OFFICE OF COMMUNICATIONS

Review of the cross-promotion rules

Statement

Statement

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Contents

Section 1

Summary

Introduction

1.1 Ofcom has reviewed the cross-promotion rules that currently regulate the cross-promotional activities of all television Broadcasting Act licensees. Ofcom inherited these rules from the Independent Television Commission ('ITC')[1] and Ofcom had a duty to review them in order to ensure that they remained relevant and appropriate.

1.2 Ofcom has sought to reduce the rules to the minimum required to clarify what is, and what is not, advertising; and the measures needed to ensure an appropriate competitive environment in the run up to digital switch-over.

1.3 Television, and advertising, is changing rapidly. In television, channels aimed at large audiences are complemented by niche channels aimed at smaller audiences with specific editorial interests. The same programmes appear on a variety of different channels, and there is an increasing desire by TV broadcasters to be able to promote their own services, but without using up valuable advertising time. Meanwhile, advertisers are also complementing their mass audience approaches by finding ways of addressing audiences in narrower, more specialist ways, using new forms of advertising and different ways of aligning commercial messages with editorial product.

1.4 The EU directive[2] that requires television programmes and advertising to be kept distinct needs to be reviewed against those changes; and in this context, the rules around cross-promotion are of added significance. The same EU directive constrains the amount of advertising any television channel can show. Whilst a review of the EU Directive is underway[3], and it appears that there is likely to be some liberalisation of these constraints, it will nevertheless retain a degree of control over the amount of advertising television broadcasters can sell. Any promotion can only be excluded from the calculation of advertising minutage if it is not advertising.

1.5 This statement sets out Ofcom's conclusions for the regulation of cross-promotional activities going forward and includes the new Cross-promotion Code.

Cross-promotion by television broadcasters

1.6 Promotional airtime on television arises as a result of both the advertising rules that limit the amount of advertising that can be shown and programme lengths. Broadcasters are often left with remaining airtime between advertising and

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[1] The current rules, which are replaced by Ofcom's *'Cross Promotion Code',* are available at: http://www.ofcom.org.uk/tv/ifi/guidance/rules_promo_prog/

[2] The EU Directive on Television Broadcasting 89/552/EEC, 3 October 1989 (as amended by Directive 97/36/EC, 19 June 1997), and the 1989 Council of Europe Convention on Transfrontier Television ('Television Without Frontiers Directive').

[3] Further details on the European Commission's review of the Television Without Frontiers Directive is available at: http://europa.eu.int/pol/av/overview_en.htm

programmes, which they use for self-promotion (promotions for programmes on the same channel) and cross-promotion[4].

1.7 Cross-promotion by television broadcasters is the promotion on one television channel of another channel or service, such as ITV1 promoting programmes on ITV3 or Channel 4 promoting E4 or E4's availability on cable, satellite and Freeview.

The current cross-promotion rules

1.8 In January 2002, the ITC issued rules regulating the promotion of programmes, channels and related services on commercial television ('the current rules')[5]. The current rules were adopted by Ofcom on 29 December 2003[6]. The current rules address both competition and content issues, such as the potential impact of excessive cross-promotion on competition between channels and digital retail TV services[7] and also on the viewer in terms of 'clutter' (excessive quantity of logos, on-screen graphics and other messages).

The December consultation

1.9 Ofcom consulted on 6 December 2005 on proposals for a new, deregulatory Cross-promotion Code. The consultation closed on 24 February 2006. There were 18 responses to the consultation and the majority of respondents were supportive of Ofcom's proposals[8]. Ofcom has considered the responses carefully and taken them into account in publishing this statement and the new Cross-promotion Code.

Conclusions

1.10 The conclusions of Ofcom's analysis are that, with the exception of two specific areas, it is appropriate to de-regulate and remove the current rules.

1.11 The new Cross-promotion Code contains the following two rules that apply to promotions outside programmes only, i.e. not within programmes:

- **a requirement on all television broadcasting licensees and S4C[9] to limit the subject of cross-promotions to broadcasting-related services**
  This is necessary in order to protect consumers from promotions that provide no benefit to their viewing experience and to ensure the separation of television programmes from advertising; and

[4] In the absence of advertising minutage rules, it is likely that TV broadcasters would still self- and cross-promote, although there may be a reduction in quantity and promotions may appear at a different place in the schedule.
[5] The current rules which are replaced by Ofcom's *'Cross Promotion Code'* can be found at: http://www.ofcom.org.uk/tv/ifi/guidance/rules_promo_prog/
[6] For further information please see: The Office of Communications Act 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003, S.I. 2003/3142.
[7] Digital retail TV services include free-to-view multi-channel TV (such as Freeview on DTT and Sky Freesat on digital satellite) and pay-TV services (such as Sky subscription services on satellite, ntl and Telewest subscription services on cable, Top-Up TV on DTT and Homechoice over DSL).
[8] Copies of the non-confidential responses to the consultation are available at: http://www.ofcom.org.uk/consult/condocs/promotion/responses/
[9] Although S4C is not licensed by Ofcom, the Communications Act 2003 places a duty on the Welsh Authority, which is responsible for S4C, to comply with any code put in place by Ofcom pursuant to Section 319 of the Communications Act 2003. For further information please see paragraph 12 of Schedule 12 of the Communications Act 2003.

- **a requirement on Channels 3, 4 and 5 to maintain neutrality between digital retail TV services and digital platforms**
  Discrimination by the commercial terrestrial broadcasters in favour of one particular digital retail TV service or digital platform has the potential to have a material impact on competition between digital retail TV services. This is of particular importance as analogue-only homes must make choices about digital TV services in the run up to digital switchover and consumers should have the ability to make informed choices. It is therefore appropriate, in these particular circumstances, for Ofcom to put in place this precautionary measure.

1.12 In addition, Ofcom will remove the strict 30% shareholding requirement and replace it with non-binding guidance which is based on presumptions created by 30% shareholding or voting power relationships. This non-binding guidance is set out in the new code and will be reviewed from time to time in light of individual cases considered by Ofcom.

1.13 Ofcom will provide separate guidance on Rules 10.3 and 10.4 of the Broadcasting Code[10] to make it clear that these rules are not intended to prohibit or constrain a licensee from self-promoting or cross-promoting in breaks between programmes.

1.14 Within programmes, Ofcom has decided that references to broadcasting-related services do not need separate rules. Instead, they will be subject to the provisions of Section 10 of the Broadcasting Code, which deals with commercial references in programmes, in the same way as references to any other services or products. This is reflected in the Cross-promotion Code.

1.15 In addition, Ofcom has decided that, in certain circumstances, a broadcaster may be able, by means of the Broadcasting Code (more specifically, the ability to promote 'programme-related material'), to inform viewers that a programme it is showing is also available on another, unrelated channel.

1.16 Ofcom considers that it is unnecessary to retain the rule that promotions in centre breaks must not exceed 20 seconds, which is currently contained in the Rules on Amount and Distribution of Advertising ('RADA') [11], and therefore this will be removed.

Digital Switchover communications obligations

1.17 Ofcom is currently discussing with the commercial terrestrial broadcasters how they will fulfil the Digital Switchover ('DSO') communications obligations which are set out in their Digital Replacement Licences ('DRLs'). Nothing in this Statement on the Cross-promotion code should be read as limiting the DSO communications obligations placed on the commercial terrestrial broadcasters under the provisions of the DRLs, or the associated platform neutrality requirements.

[10] The Broadcasting Code came into effect on 25 July 2005 and is available at: http://www.ofcom.org.uk/tv/ifi/codes/bcode/. The Broadcasting Code replaced the Programme Code which was produced by the ITC and inherited by Ofcom.
[11] http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/?a=87101

Cross-promotion by the BBC

1.18 Ofcom has no powers to regulate the BBC's cross-promotional activities and therefore this review does not include proposals in respect of the BBC. The Government's White Paper published on 14 March 2006 stated the following:

> *"Ofcom has identified a potential area of concern in the case of cross promotion between digital platforms. This is an example of where we expect the Trust, in consultation with Ofcom, to formulate an ex ante code to ensure that effective regulation might be extended across the whole broadcasting sector."*

1.19 Ofcom considers that the analysis and proposals for regulation set out in this document have equal relevance to the BBC as to the commercial terrestrial broadcasters. Therefore, in line with the Government's White Paper, Ofcom considers that it is important that an *ex ante* code based on similar principles is formulated for the BBC.

Cross-promotion by radio broadcasters

1.20 There are no rules that currently apply to cross-promotion by radio broadcasters. Crucially, and in contrast with television, there are no advertising minutage restrictions for radio and radio contains 'programming', rather than clearly delineated 'programmes'. Therefore, issues that arise with promotional airtime on television do not arise in radio broadcasting in the same way.

Timing of the new cross-promotion code

1.21 The new Cross-promotion Code will come into effect on 10 July 2006. Ofcom intends to issue amended guidance on the Broadcasting Code and to remove the 20 second rule from RADA on the same date.

Section 2

Background and introduction

Introduction

2.1 Ofcom has reviewed the cross-promotion rules that currently regulate the cross-promotional activities of all television Broadcasting Act licensees. Ofcom inherited these rules from the Independent Television Commission ('ITC')[12] and Ofcom had a duty to review them in order to ensure that they remained relevant and appropriate.

2.2 Ofcom has sought to reduce the rules to the minimum required to clarify what is, and what is not, advertising; and the measures needed to ensure an appropriate competitive environment in the run up to digital switch-over.

2.3 Television, and advertising, is changing rapidly. In television, channels aimed at large audiences are complemented by niche channels aimed at smaller audiences with specific editorial interests. The same programmes appear on a variety of different channels, and there is an increasing desire by TV broadcasters to be able to promote their own services, but without using up valuable advertising time. Meanwhile, advertisers are also complementing their mass audience approaches by finding ways of addressing audiences in narrower, more specialist ways, using new forms of advertising and different ways of aligning commercial messages with editorial product.

2.4 The EU directive[13] that requires television programmes and advertising to be kept distinct needs to be reviewed against those changes; and in this context, the rules around cross-promotion are of added significance. The same EU directive constrains the amount of advertising any television channel can show. Whilst a review of the EU Directive is underway[14], and it appears that there is likely to be some liberalisation of these constraints, it will nevertheless retain a degree of control over the amount of advertising television broadcasters can sell. Any promotion can only be excluded from the calculation of advertising minutage if it is not advertising.

2.5 This statement sets out Ofcom's conclusions for the regulation of cross-promotional activities going forward and includes the new Cross-promotion Code.

2.6 Ofcom's approach to cross-promotion on radio is explained in paragraph 2.20 below.

Cross-promotion by television broadcasters

2.7 Cross-promotion by television broadcasters is the promotion on one television channel of another channel or service[15], such as ITV1 promoting programmes on ITV3 or Channel 4 promoting E4 or E4's availability on cable, satellite and Freeview.

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[12] The current rules, which are replaced by Ofcom's *'Cross Promotion Code',* are available at: http://www.ofcom.org.uk/tv/ifi/guidance/rules_promo_prog/

[13] The EU Directive on Television Broadcasting 89/552/EEC, 3 October 1989 (as amended by Directive 97/36/EC, 19 June 1997), and the 1989 Council of Europe Convention on Transfrontier Television ('Television Without Frontiers Directive').

[14] Further details on the European Commission's review of the Television Without Frontiers Directive is available at: http://europa.eu.int/pol/av/overview_en.htm

[15] Section 3 of this Statement discusses the criteria for establishing whether an appropriate cross-promotion relationship exists between the broadcasters of the promoting and promoted channels.

2.8 Promotional airtime on television arises as a result of both the advertising rules that limit the amount of advertising that can be shown, and programme lengths. Broadcasters are often left with remaining airtime between advertising and programmes, which they use for self-promotion (promotions for programmes on the same channel) and cross-promotion. In the absence of advertising minutage rules, it is likely that broadcasters would still self- and cross-promote, although there may be a reduction in quantity and promotions may appear at a different place in the schedule.

The advertising rules

2.9 The amount of television advertising is restricted by RADA, which gives effect to requirements laid down in the EU Directive on Television Broadcasting 89/552/EEC, 3 October 1989 (as amended by Directive 97/36/EC, 19 June 1997), and the 1989 Council of Europe Convention on Transfrontier Television ('Television Without Frontiers Directive' or 'TWF')[16]. RADA imposes a maximum on the amount of advertising that can be shown in a given hour and over any one day.

Programme lengths

2.10 Actual programme length will vary depending on the type of programme and when in the day it is shown. For commissioned programmes, producers are typically asked to deliver a programme of a specified length but there will be a tolerance of, for example, 30 seconds either side of the specified length. Programmes which are imported are usually of a length suited to the maximum advertising requirements of the country in which they were made. For example, the USA allows more advertising than the UK and therefore programmes imported from the USA are generally of shorter length. Similarly, programmes which are made anticipating export or expected to be shown on secondary channels showing advertising will also be shaped to accommodate the appropriate regulations applying abroad or on the secondary channels. The result for traded or tradable programmes is that typical programme length combined with the maximum advertising minutes allowed in the UK does not fill up a given hour of airtime. To illustrate, advertising minutage per hour on Channels 3 to 5 is capped at 7 minutes per hour (on average over the day) but up to a maximum of 12 minutes in any one clock hour is permitted and a maximum of 40 minutes between the hours of 6pm and 11pm. At the same time, the amount of programme time per hour would generally be in the order of 48-50 minutes (to allow for increased advertising minutage at peak times). The total amount of minutes taken up by paid-for advertising and programmes is therefore in the order of 58-59 minutes per hour. This would tend to leave 'surplus' airtime of perhaps 1-2 minutes per hour.

Promotional airtime

2.11 Television broadcasters are left with remaining airtime between advertising and programmes which they use for promotions. Broadcasters could adjust programme lengths to fill this airtime. However, it is generally too complicated and impractical for them to do so.

[16] The Television Without Frontiers Directive is currently being reviewed by the European Commission. Further details are available at: http://europa.eu.int/pol/av/overview_en.htm

The current cross-promotion rules

2.12 In January 2002, the ITC issued the current rules regulating the promotion of programmes, channels and related services on commercial television. The current rules address both competition and content issues, such as the potential impact of excessive cross-promotion on competition between channels and digital retail TV services[17] and also on the viewer in terms of 'clutter' (excessive quantity of logos, on-screen graphics and other messages) and on the editorial integrity of programmes.

Competition rules

2.13 In terms of competition concerns, the current rules were introduced to address issues that arose primarily from the cross-promotion of ITV Digital by ITV. The ITC was concerned that ITV's unique ability to cross-promote a specific digital retail TV service could have an impact on competition in the retail pay-TV market, i.e. the market where Sky, cable and ITV Digital were competing for subscribers. The current rules require Channel 3 licensees, Channel 4 and Five to ensure that promotional references to digital retail TV services and platforms are either generic, for example, *"available on digital satellite, cable and digital terrestrial"* or comprehensive, for example, *"available on Sky, ntl, Telewest and Freeview"*. The other competition rules that apply to Channel 3 licensees, Channel 4 and Five require that no excessive airtime is given to a particular channel or service and that pricing information is excluded.

Content rules

2.14 The content aspects of the current rules apply to all television Broadcasting Act licensees. They focus on what happens within programmes and are intended to ensure the separation of advertising from programme content as required under the TWF, which is discussed further in Section 7, and also to minimise viewer irritation. The current rules say that the primary place for cross-promotions and other promotions is within promotional airtime and not within programmes. Mentions in a programme of other programmes or services must provide information likely to be of value to the viewers of that programme and must not constitute advertising. Material allowed for under the current rules is not deemed to be in breach of the prohibition on undue prominence in the legacy Programme Code[18].

2.15 In addition, the current rules limit cross-promotion to where the promoting channel has a 30% shareholding in the promoted channel or service and limit the subject of cross-promotion to channels or related services, such as a website.

Ofcom's duties to review the current cross-promotion rules

2.16 Under section 6 of the Communications Act 2003 ('the Communications Act'), Ofcom has a general duty to review its regulatory burdens to ensure that they do not include rules which are no longer necessary. More specifically, under section 318, Ofcom has a duty to review the competition aspects of codes made or approved by them for the purposes of a broadcasting provision.

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[17] Digital retail TV services include free-to-view multi-channel TV (such as Freeview on DTT and Sky Freesat on digital satellite) and pay-TV services (such as Sky subscription services on satellite, ntl and Telewest subscription services on cable, Top-Up TV on DTT and Homechoice over DSL).
[18] The Programme Code, which was produced by the ITC and inherited by Ofcom, has now been replaced by the Broadcasting Code.

2.17 There have been a number of significant developments in the sector since the current rules were introduced by the ITC, such as the emergence of Freeview. In addition, Ofcom has now replaced a number of other legacy codes dealing with broadcasting content with the new Broadcasting Code, which came into force on 25 July 2005. Given these developments, it was particularly appropriate for Ofcom to conduct a review of these rules.

The December consultation

2.18 Ofcom consulted on proposals for a new Cross-promotion Code on 6 December 2005. The consultation closed on 24 February 2006. There were 18 responses to the consultation and the majority of respondents were supportive of Ofcom's proposals[19]. Ofcom has considered the responses carefully and taken them into account in publishing this statement and the new Cross-promotion Code.

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Cross-promotion by radio broadcasters

2.20 There are no specific rules that currently apply to cross-promotion by radio broadcasters. Crucially, and in contrast with television, there are no advertising minutage restrictions for radio. Moreover, radio contains 'programming', rather than clearly delineated 'programmes'; anything that is not advertising is programming. Therefore, issues that arise with promotional airtime on television do not arise in radio broadcasting in the same way.

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[19] Copies of the non-confidential responses to the consultation are available at: http://www.ofcom.org.uk/consult/condocs/promotion/responses/

Structure of this statement

2.23 The rest of this statement is set out as follows:

- Section 3 sets out the relationships that need to exist for cross-promotion to fall outside the definition of advertising;
- Section 4 explains the requirement to limit the subject matter of cross-promotion to broadcasting-related services and what this means;
- Section 5 sets out Ofcom's competition analysis;
- Section 6 sets out the platform neutrality requirement;
- Section 7 explains how the content of cross-promotional activity within programmes will be regulated; and
- Section 8 summarises Ofcom's conclusions.

Research

2.24 At the same time as publishing the consultation document Ofcom also published two research reports: a report titled *'Television promotions – what the viewers think a report of the key findings of a qualitative and quantitative study'*[20] and a report titled *'Analysis of current promotional activity on television, a report of the key findings of a content analysis study'*[21]*.* The two reports were undertaken for the purposes of this review and are referred to in relevant parts of this Statement.

[20] http://www.ofcom.org.uk/research/tv/reports/promotion/viewers/
[21] http://www.ofcom.org.uk/research/tv/reports/promotion/activity/

Section 3

Regulating cross-promotion relationships

Introduction

3.1 This section sets out Ofcom's final conclusions on regulating cross-promotion relationships.

3.2 The section explains these conclusions and Ofcom's consideration of the comments received in response to the December consultation.

3.3 There are no advertising minutage rules for radio and therefore cross-promotions on radio are not necessarily differentiated from radio advertising. In theory, there could be unlimited advertising on the radio, although in fact this is self limiting as listeners are likely to become irritated with excessive advertising and switch radio stations. There are no consequences for radio cross-promotions being considered advertising and therefore there is no reason to regulate radio cross-promotion relationships.

The current 30% shareholding rule

3.4 The current rules limit permissible cross-promotional activities on television to where the promoting channel has a shareholding of at least 30% in the promoted channel or service.

3.5 Specifically, the current rules permit broadcasting licensees to promote channels or related services that they provide:

> *"ITC licensees may, outside advertising time, and subject to the following rules, promote programmes, events and strands being shown by that licensee, and make reference to any other channel or related service (such as a website) that they provide."*

3.6 The current rules define a provider of another channel or service in the following way:

> *"To be considered as 'provider' of another channel or service, a promoting channel must hold or be beneficially entitled to at least 30 per cent of the shares in the promoted channel or service, or possess 30 per cent or more of the voting power in the promoted channel or service."*

When are promotions advertising?

3.7 RADA provides that:

> *"For the purposes of calculating advertising time the following are deemed to be advertising items:*
>
> *(a) all items of publicity broadcast on behalf of someone other than the licensee in breaks in or between programmes, apart from public service announcements, charity appeals broadcast free of charge, announcements required by the BSC and information to viewers broadcast in accordance with an ITC requirement;*

> *(b) publicity by the licensees themselves except information to viewers about or in connection with programmes."*

3.8 The TWF defines television advertising as any form of announcement broadcast whether in return for payment or for similar consideration[22] or broadcast for self promotional purposes. However, it specifically carves out self-promotion (and the promotion of ancillary products) from the advertising minutage rules while also noting that cross-promotion is a relatively new and unknown phenomenon.

The December consultation

3.9 The consultation document discussed the options for regulating cross-promotion relationships going forward and set out Ofcom's proposed approach. The following four options were considered:

- Regulate cross-promotion on the basis of minimum ownership;
- Do not regulate cross-promotion and provide no guidance;
- Do not regulate cross-promotion but provide guidance; and
- Allow cross-promotion where there are relationships based on joint programming or licensing rights.

3.10 Ofcom proposed that deregulating and providing guidance was the most appropriate approach.

Conclusions

3.11 Following careful consideration of the responses to the consultation, Ofcom has concluded that it is appropriate to deregulate and remove the current 30% shareholding rule. Ofcom considers it appropriate to set out in guidance the relationships that are likely to be necessary for cross-promotion to fall outside the definition of advertising and be excluded from the advertising minutage limits set out by RADA. These relationships are based around a 30% ownership.

3.12 The rationale for an approach based on minimum ownership is that, where a certain percentage ownership exists, there are likely to be sufficient incentives for the promoting channel to provide another channel or service with free airtime. However, rigid rules based on a fixed shareholding percentage, applied inflexibly, may lead to unfair results which do not necessarily reflect the nature of the relationship between the parties. It is also the case that ownership is not an exact basis for determining whether sufficient incentives to cross-promote may exist, and there are difficulties in ensuring that a correct shareholding figure is chosen[23].

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[22] The legal interpretation of 'consideration' concentrates on the requirement that 'something of value' must be given. Under the doctrine of consideration, a promise has no contractual force unless some value has been given for it. As a general rule, it does not matter whether 'adequate' value has been given or whether the agreement is harsh or one-sided. Even acts of very small value can be consideration, although they must be real and of some estimation in the eyes of the law.

[23] This is because it may allow certain cross-promotions when they should not be, i.e. the promoting company has a 30% shareholding in the promoted channel or service but does not have sufficient incentives to provide it with free airtime, in which case it would not promote it unless it was paid. In addition, it could also work the opposite way and not allow promotions which may be legitimate and rational; for example, sufficient incentives may exist but the minimum percentage shareholding is not

3.13 The introduction of guidance will minimise uncertainty for broadcasters. Broadcasters will have clarity on when Ofcom is likely to take a complaint seriously and investigate. This is likely to have a deterrent effect and mean that in general cross-promotion activity only takes place where there are significant ownership relationships. In addition, it is likely to mean fewer and more focussed complaints than would arise in the absence of any guidance. It also ensures that broadcasters who have arranged their organisational structure by reference to the 30% shareholding rule will not need to revisit those legal and commercial arrangements.

3.14 Therefore, Ofcom's guidance will provide flexibility but also give some certainty to broadcasters as to Ofcom's general approach.

The guidance

3.15 Certain shareholding or voting power relationships between broadcasters create a rebuttable presumption that there are sufficient incentives for the promoting channel to provide another channel or service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not normally, in the absence of evidence to the contrary, consider these promotions to be advertising. However, if there are payments or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules and may be treated as advertising minutage.

3.16 The ownership relationships that create this presumption of sufficient incentives are as follows:

- the licence holder for the promoting channel has a shareholding of 30% or more (or voting power of 30% or more) in the licence holder for the promoted channel;
- the licence holder for the promoted channel has a shareholding of 30% or more (or voting power of 30% or more) in the licence holder for the promoting channel;
- the licence holder for the promoted channel and promoting channel are the same.

3.17 The definition of 'licence holder' (for the purposes of the first and second bullet points) includes the company or legal entity which actually holds the licence and other companies or legal entities that have a 30% or more shareholding (or voting power of 30% or more) in that company or legal entity. This definition will allow channels within more complex corporate group structures to cross-promote. Although the guidance is now drafted more widely, broadcasters must still ensure that no payment or consideration passes between parties in return for a cross-promotion taking place. Ofcom is likely to scrutinise whether consideration has passed between parties; for instance, in circumstances where there appear to be remote corporate relationships between the licence holder for the promoted channel and the licence holder for the promoting channel. In considering the relationship between the parties, Ofcom may also consider the overall shareholding (or voting power) actually linking the two broadcasters and the way in which the two broadcasters are run.

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satisfied because a broadcaster only has a 28% or 29% shareholding. It also overlooks the issue of the materiality of the interest, where a 20% stake in a large company is worth more than a 50% stake in a small company.

3.18 In response to the comments received from respondents to the consultation, which are set out in more detail below, this guidance contains the following amendments from the version consulted on in December:

- it now refers to voting power as well as shareholdings to take account of the fact that voting power is a similar means of control as shareholdings;

- the reference in the current rules to 'channels' having shareholdings gave rise to confusion because channels are not legal entities. Therefore, the drafting has been amended to make clear that it is the broadcasting licence holder for the promoting channel or promoted channel that must hold the 30% shareholding or voting power; and

- a new third bullet point has been inserted to make clear that the presumption will be satisfied where the licence holder for both the promoted and promoting channel are the same company or legal entity. This is intended to address a possible anomaly whereby a licence holder could be treated as not having any shareholding in another licence holder because they are the same company or legal entity.

3.19 If there is less than a 30% shareholding (or less than 30% voting power), there may be insufficient incentives for the licence holder of a promoting channel to provide the licence holder of another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that cross-promotion is justified on the basis of other incentives.

3.20 This guidance would not apply to information to viewers broadcast in accordance with an Ofcom requirement, as RADA specifically excludes this from the definition of paid for advertising. The licences of the commercial terrestrial broadcasters require them to ensure that viewers are informed about digital switchover and therefore the guidance proposed above would not apply to these information broadcasts.

3.21 The non-binding guidance is set out in the code at Annex 1.

Ability to promote 'shared' programming

3.22 A number of the respondents suggested that, where two (or more) unrelated broadcasters share content, for example where they co-produce or jointly license a programme, each should be able to tell viewers that the programme is also available on the other broadcaster's channel. That information is clearly relevant and useful to the viewer. This type of scenario would have particular benefits for smaller broadcasters who do not have a sister channel that they can cross-promote. For example, Five and Discovery might jointly commission a documentary series, on the understanding that the first broadcast would take place on the former with a 'catch-up' viewing slot later in the week on the latter.

3.23 However, it will often be the case that consideration has passed between the parties; for example, an agreement that Channel A will promote the availability of the programme on Channel B in return for Channel B doing the same for Channel A is likely to comprise consideration. Where consideration passes, the promotion is advertising and should therefore count towards advertising minutage.

3.24 Ofcom recognises, however, that it may be beneficial for viewers of a programme to be informed that another, albeit unrelated, channel is showing that same programme, or a different series of that programme. Where a broadcaster is unable to establish that consideration has not passed, we believe that 'programme-related material' offers an alternative route by which it may promote the availability of the programme on that other channel. The key issue here is that the promotion must be about a specific programme.

3.25 Section 10 of the Broadcasting Code contains rules intended to ensure that programmes are not distorted for commercial purposes and that the advertising and programme elements of a service are clearly separated. Rule 10.3 of the Broadcasting Code provides that products and services must not be promoted in programmes. However, an exception is made for 'programme-related material'. This is defined as *"products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme."*

3.26 There are a number of benefits to this approach:

- Unlike cross-promotion, programme-related material does not involve an ownership requirement.
- It would not be necessary for the programme to have been co-commissioned or jointly licensed, although in practice a broadcaster is more likely to wish to tell its viewers that the programme is available on another channel where it has some sort of arrangement regarding that programme with the other broadcaster.
- The issue of whether consideration has passed is not relevant to the promotion of programme related material.
- Channel A can already say after a programme *"This programme is available on DVD via our website and other retailers".* Therefore, it seems entirely consistent that it should be able to say *"This programme is also being shown on Channel B"*, even though it does not have any relationship with Channel B.
- Promotion of the programme's availability on the other channel would be limited to around the programme itself, not elsewhere in the schedule; this is important to ensure that information is provided to viewers only where it is relevant.
- The promotion of programme-related material is subject to the rules relating to undue prominence.

3.27 We recognise that this is an extension of the way in which programme-related material has been interpreted and that this approach will allow broadcasters more flexibility in this area than has been permitted to date. However, we consider that this deregulatory move has clear benefits for viewers and that there are sufficient safeguards in both the Cross-promotion Code and the Broadcasting Code to ensure that this new interpretation of programme-related material is not abused. In addition, we will clarify the position in guidance on Section 10 of the Broadcasting Code.

Responses to the consultation

3.28 Out of the eighteen responses received in total, twelve respondents commented on this part of Ofcom's consultation. Eleven of the twelve respondents supported Ofcom's proposal to remove the current shareholding rule and rely on guidance based on similar principles. Only the Campaign For Press and Broadcasting Freedom was opposed to removing the rule.

ITV's licensing structure

3.29 One respondent asked for the guidance to take into account the federal licensing structure of Channel 3 licence holders.

3.30 There are currently 16 different ITV companies which hold the Channel 3 licence; 15 licensees for different regions of the United Kingdom, and 1 licensee which provides the national breakfast-time service[24].

3.31 As was previously acknowledged by the ITC:

> *"The intention behind this [exception] is that viewers be provided with a uniformity of promotional information in areas where a particular service is available. The structure of the ITV network means that, without this [exception], 'ITV services' cannot be cross-promoted on ITV in some areas where they are available, whereas they can in others…"*[25]

3.32 Ofcom considers that it is appropriate for the guidance to continue to provide an exception for Channel 3 licensees.

Additional guidance on consideration and joint programming or licensing relationships

3.33 A number of respondents requested additional guidance on what constitutes consideration aside from payment. They suggested that cross-promotions based on joint programming or licensing relationships should be permitted and Ofcom should provide further guidance on when this is allowed. Related to this, a number of respondents also suggested that Ofcom should focus on whether viewers benefit from cross-promotions, rather than on consideration.

3.34 While Ofcom does not consider it appropriate to provide further clarification on the meaning of consideration, Ofcom will clarify in guidance that, even where a broadcaster cannot establish that no consideration has passed, Ofcom may consider that information about the availability of a programme on another channel constitutes 'programme-related material'. This is explained in more detail above.

3.35 It is necessary for Ofcom to focus the guidance on the Cross-promotion Code on consideration, as opposed to other incentives for cross-promotion, as this is the basis on which cross-promotions would fall outside the advertising minutage rules under both RADA and the TWF.

Corporate Ownership

3.36 A few respondents asked for greater clarity on the application of the guidance to different corporate structures.

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[24] Further information on the Channel 3 licensees is available at:
http://www.ofcom.org.uk/tv/ifi/tvlicensing/c3/

[25] See the current rules '*New ITC rules on the promotion of programmes, channels and related services on commercial television*', January 2001, paragraph 15. The current rules which are replaced by Ofcom's *'Cross Promotion Code'* are available at:
http://www.ofcom.org.uk/tv/ifi/guidance/rules_promo_prog/

3.37 Ofcom has addressed the issues raised by respondents as set out above.

Amending RADA

3.38 One respondent, who supported the removal of the rule, considered that Ofcom should amend RADA in order to properly give effect to the cross-promotion guidance. The respondent requested that RADA be amended to more closely reflect the drafting contained in the TWF Directive, by defining advertising in a way which refers to *"payment or similar consideration".*

3.39 While Ofcom accepts that some further clarity could be provided by amending the RADA rules, Ofcom does not consider that it is necessary to make any amendments at this time.

3.40 Whilst the guidance is intended to provide some degree of certainty, this cannot be absolute because it relates to a presumption only, which can be rebutted. It is for this reason that the guidance also makes clear that:

> *"…if there is payment or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules".*

Section 4

Broadcasting-related services

Introduction

4.1 Only broadcasting-related services may be cross-promoted in promotional airtime (as opposed to paid-for advertising) outside programmes, subject of course to satisfying the rebuttable presumption arising from a 30% ownership share. Therefore, a broadcaster is not able to promote non broadcasting-related products and services, such as newspapers or supermarkets, in promotional airtime simply because it owns them. This is a common-sense approach. Permitting non broadcasting-related services to be promoted outside of paid-for advertising time would not be consistent with the requirements of the TWF regarding transparency, separation and advertising minutage.

4.2 The current rules refer to the promotion of programmes, channels and 'related services'. In the consultation paper, Ofcom proposed using the term 'broadcasting-related services'. Having considered the responses, Ofcom has decided that this is indeed the appropriate term. It is flexible enough to reflect the current dynamic media environment in which new services are constantly emerging

4.3 The consultation paper proposed the following definition:

> *"Broadcasting-related Services" include all broadcasting activities licensed by Ofcom, for example television and radio services. They may also include other services which are of clear relevance to viewers, for example, a channel's own website.*

4.4 As set out above, this rule only applies to promotions that occur outside programmes. Within programmes, with effect from 10 July 2006, there will be no separate content rules for broadcasting-related services; the rules in Section 10 of the Broadcasting Code will apply in the normal way. This is discussed in more detail in Section 7 of this statement.

What is a broadcasting-related service?

4.5 In deciding whether something is a broadcasting-related service and may therefore be cross-promoted, the focus should normally be on its relation to the channel itself, rather than individual programmes. A broadcasting-related service will either be a service licensed by Ofcom or some other service which, although not licensable under the Communications Act, comprises some kind of broadcasting-type content, for example content delivered via video on demand, mobile phone and broadband.

4.6 Ofcom recognises that there is an exception to this conceptual approach: a television channel may cross promote a website providing deeper, richer content with a very clear and direct relationship to the overarching broadcasting service (as discussed in paragraph 4.5). This is likely to be the website for the channel itself. Other websites, even where the 30% ownership presumption is met, are unlikely to be considered a 'broadcasting-related service', but Ofcom would need to consider each case on the individual facts. However, if a website that is not broadcasting-related satisfies the definition of 'programme-related material', it could of course be promoted around the relevant programme.

4.7 Importantly, the term ‘broadcasting-related services’ does not extend to specific products and must be distinguished from ‘programme-related material’. This is explained further below.

4.8 Programme-related material is defined in the Broadcasting Code as *“products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme.”* This would include, for example, a DVD of a series, a telephone service providing further information on issues discussed in a programme, or a download of clips from a programme.

4.9 These individual products are unlikely to be considered a broadcasting-related service.

4.10 Ofcom considers that it is unnecessary to retain the rule that promotions in centre breaks must not exceed 20 seconds, which is currently contained in the Rules on Amount and Distribution of Advertising (‘RADA’) [26], and therefore this will be removed.

4.11 Under the Broadcasting Code, programme-related material can only be promoted around the relevant programme (or within it, where editorially justified to do so), not elsewhere in the broadcaster’s schedule, for example, a DVD of Friends could not be promoted around Hollyoaks. However, a broadcasting-related service is not tied to any one programme and can therefore be promoted more flexibly within the broadcaster’s schedule.

4.12 The distinction between broadcasting-related services and programme-related material is summarised below:

A broadcasting-related service:

- relates to a licensee’s overarching broadcasting service, rather than to an individual programme
- has a ‘broadcasting feel’, i.e. delivers content similar to that delivered on a television or radio service (the service may or may not itself be licensable by Ofcom)
- also includes a website that provides content clearly and directly related to a broadcasting-related service, e.g. a channel’s own website
- may be promoted outside programmes anywhere in the broadcaster’s schedule (within programmes, the Broadcasting Code applies)
- it is necessary to consider whether there is a cross-promotion relationship, e.g. a 30% shareholding
- possible examples include: a television channel; a radio station; video-on-demand; content delivered over a mobile or broadband platform.

[26] http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/?a=87101

Programme-related material:

- must be both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme
- may only be promoted within the programme itself (subject to editorial justification) or around it
- it is not relevant to consider whether there is a cross-promotion relationship but the licensee must ensure that it is indeed a programme-related service
- possible examples include: a book or DVD of a series; a live event derived from a programme; downloads of outtakes from a programme; a telephone service providing further information about issues discussed in a programme; the programme itself if available on another channel.

Responses to the consultation

4.13 Most of the respondents wanted further clarification of what is intended to be captured by 'broadcasting-related service'. They were keen that the cross-promotion of content on new and emerging distribution platforms, such as video on demand, mobile and broadband, should be permitted. This has now been clarified above.

4.14 Some of the respondents suggested that they should be able to cross-promote specific products related to programmes, such as downloads. This appears to have resulted from some confusion regarding the distinction between 'broadcasting-related services' and 'programme-related material'. This has now been clarified above.

4.15 The consultation paper cited a broadcaster's own website as an example of a broadcasting-related service. However, one respondent argued that cross-promotion should not be limited to channel-branded websites and, that if a website passing the ownership test is particularly relevant to the content of a programme, it makes more sense for viewers to be directly referred to that site, rather than via another site. In response to this, Ofcom confirms that it would need to consider the nature of such a website on its individual merits; if it turned out not to be a broadcasting-related service, it might nevertheless satisfy the definition of programme-related material.

4.16 Some of the respondents requested clarification regarding events, and whether these could be cross-promoted. One respondent pointed out that the current rules say the licensee may *"promote programmes, events and strands being shown by that licensee"*.

4.17 Another respondent, Paramount, suggested that a broadcaster should be able to cross-promote events closely related to its programmes and of interest to the viewer, e.g. the Brighton Comedy Festival.

4.18 By way of clarification, Ofcom confirms that, if a broadcaster is providing broadcast coverage of an event, it is able to promote that coverage under the Cross-promotion Code if it is clear that what is being promoted is the programme rather than the event.

4.19 A broadcaster may only promote the event itself, for example by providing details of the venue and ticket prices, where the event satisfies the definition of programme-related material, in which case the broadcaster is limited to promoting the event around or within the programme itself, not elsewhere in its schedule. An event such as the Brighton Comedy Festival would not be considered to be programme-related material; whilst there is a generic relationship with a comedy programme, it is not directly derived from the programme. However, there are other ways in which the broadcaster may let its viewers know about the event, for example by referring viewers to its own website which in turn contains useful information about the event.

Section 5

Competition regulation

Introduction

5.1 The following section sets out Ofcom's approach to addressing the potential competition issues that arise in relation to promotional activity by television broadcasters. It begins by setting out the structure of broadcasting markets, the role of promotional activity and the competition concerns that have been raised by various stakeholders. The section then sets out Ofcom's analytical approach to considering these concerns; discusses the potential impact of promotional activity on competition, and also summarises the various competition matters raised during the consultation together with Ofcom's response to those issues. Finally, the regulatory approach going forward is set out.

5.2 The analytical framework, i.e. the discussion of market definition analysis and the assessment of the impact on competition, is set out in more detail in Annexes 2 and 3.

The structure of broadcasting markets

5.3 The structure of broadcasting markets can be thought of as operating at a number of different levels, such as the transmission level, the retail TV services level (e.g. competition between platform providers for subscribers) and the channel level. Given the nature of the competition concerns set out below, Ofcom's analysis focuses on competition at the retail TV services level and at the channel level.

The retail TV service level

5.4 For the purposes of this analysis, there are three broad types of retail TV services:

- analogue-only (no additional cost beyond TV set, aerial and annual licence fee);
- free-to-view multi-channel TV, such as Freeview on DTT and Sky Freesat on digital satellite (the viewer must purchase the reception equipment but there are no on-going subscriptions); and
- pay-TV services, e.g. Sky subscription services on satellite, ntl/Telewest subscription services on cable and Top-Up TV on DTT[27] (the viewer must purchase or rent the reception equipment and pay a monthly subscription).

The channel level

5.5 There are four broad categories of channels:

- free-to-view PSB channels, such as BBC1, BBC2, ITV1, Channel 4 and Five;
- free-to-view digital channels, such as BBC3, BBC4, tele-shopping channels and news channels;

[27] Increasingly there are IPTV based pay-TV services (e.g. Homechoice) that are being developed and rolled out. It is also possible for television channels to be delivered over mobile networks. However, the number of subscribers to these services is still relatively low.

- basic subscription channels packaged into different 'bundles'; and
- premium subscription channels for which a specific additional subscription is required.

The role of promotional activity influencing consumer choice

5.6 Qualitative and quantitative research undertaken by Ofcom[28] indicates that viewers derive a benefit from the promotional activity carried out by broadcasters; for example, viewers use promotions extensively to help plan and shape their viewing choices and promotions stimulate choice between channels and programmes.

5.7 The research also indicates that promotional activity has a role to play in influencing decisions to convert to a digital TV service, although it is only one of a range of factors which viewers list as influencing their decision. This evidence suggests that promotional activity by broadcasters has a role to play in terms of raising awareness of digital TV among those viewers who have not yet switched to digital TV[29].

5.8 Given that cross-promotional activity could influence the choice between different television channels and the decision to take up digital TV, it has the potential to have an impact on competition between broadcasters for viewers and also on competition between different digital retail TV services.

The timing of digital switchover

5.9 Over 70% of UK households have already switched to digital television but that still leaves a significant minority that have still to make a decision. Furthermore, the current proposals are that the UK should be fully switched over to digital television by 2012, with the digital switchover process beginning in 2008. This means that those households which have yet to switch to digital TV will need to make a decision on the choice of digital retail TV services over the next few years in order to continue to receive television services. Households will also need to make decisions about converting second and third television sets. This limited window for digital switchover represents a unique period in the development of the UK broadcasting sector.

5.10 The particular timing of the decision window has an important bearing on Ofcom's consideration of the potential competition issues around the promotional activity carried out by the terrestrial broadcasters.

Competition concerns

5.11 There are three main competition concerns in relation to promotional activities[30]:

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[28] See 'Television promotions - what the viewers think, a report of the key findings of a qualitative and quantitative study', 6 December 2005.

[29] In addition in the context of the promotional activity of the BBC, the DCMS has also specifically recognised the impact of promotional activity on digital take-up, e.g. *"BBC promotion has also played an important role in driving the take-up of digital TV and radio."* (*'A public service for all: the BBC in the digital age',* BBC White Paper March 2006).

[30] A further concern is in relation to the ability of ITV plc to use cross-promotions to drive the cross-selling of advertising, i.e. to bundle advertising airtime across ITV1-4. Under the terms of the Contract Rights Renewal Remedy (CRR) ITV is not permitted to make the sale of airtime on ITV1 conditional on an advertiser also taking airtime on the other ITV plc owned channels. However, ITV plc is permitted to sell a package of airtime if an advertiser chooses to purchase airtime across some or all

- competition between digital retail TV services;
- competition between digital channels; and
- competition in other broadcasting markets.

5.12 In essence, all three concerns relate to the use of promotions to affect leverage within or between markets.

5.13 In relation to competition between digital retail TV services, the concern relates to the use of promotions to affect leverage into the digital retail TV services market(s) from the channel markets where the main terrestrial channels have high audience reach and share, stemming from a historic position of being granted privileged access to analogue spectrum. The argument is that, in the absence of regulation, the main terrestrial channels, BBC1, BBC2, ITV1, Channel 4 and Five, would have incentives to promote the availability of their services specifically on Freeview/the DTT platform and would therefore move away from the current requirement for neutrality in promoting digital TV. These incentives arise because the viewing shares of the main terrestrial channels are consistently higher in Freeview households[31] compared to other multi-channel households. This in turn means they retain more commercial impacts and thus greater advertising revenues. In addition, the BBC as part of the Freeview consortium and as a multiplex operator for two of the six DTT multiplexes, has an interest in promoting Freeview/the DTT platform over other digital retail TV services and platforms. Therefore a key element is that the incentives of all the main terrestrial broadcasters are aligned to act in this way. In addition, there is a time dimension as households which have yet to switch to digital TV must do so in the next few years as the UK switches to digital transmission. It is this particular combination of circumstances that could lead to a potential material distortion of competition between digital retail TV services.

5.14 In relation to competition between digital channels, the concern is that the main terrestrial broadcasters again have an unfair advantage over other digital broadcasters in terms of cross-promoting their suite of channels, as a result of their higher audience reach and share. The five main terrestrial channels have higher viewing shares than other channels. For instance, ITV1's viewing share across all homes was just under 22% in 2005, although in itself this varies from around 29% in analogue-only homes to less than 20% in multi-channel homes. Similarly in 2005, Channel 4's viewing share across all homes was just under 10% and Five's just over 6%. In contrast none of the digital channels had a viewing share of over 3%.

5.15 The issue is that the main terrestrial broadcasters can use this advantage in relation to audiences to cross-promote their own digital services for 'free' whereas it would be prohibitively expensive for a rival digital broadcaster to have to pay to advertise its own services to an equivalent audience (in terms of absolute size or demographic or both).

of the ITV plc owned channels. Since these issues primarily relate to CRR, we do not propose to address this issue in this context.

[31] One respondent has disputed this point, arguing that viewing shares in Freesat homes are in fact higher than those in Freeview homes. However, that respondent produced only a limited dataset to support this argument. Furthermore, Ofcom understands that BARB has not issued any guidance about viewing analysis for Freesat homes and so Ofcom has been unable to verify this assertion.

5.16 The third competition concern is that, in the absence of regulation, broadcasters would promote services on other media altogether in a way that could distort competition in other markets, such as radio broadcasting markets.

5.17 In order to assess the validity of the concerns about the impact of promotional activity on competition and its ability to impact adversely the operation of competition, there is the need to consider the relevant markets in which broadcasters operate; the markets in which competition could be affected; and the likely impact of promotional activity on competition in the relevant markets.

Market definition

5.18 The discussion of the market definition analysis is set out in full in Annex 2.

5.19 The standard approach to defining relevant markets involves considering the question of what would happen if a hypothetical monopolist of a product tried to impose a small but significant, non-transitory increase in price (the so-called SSNIP test). This approach is used to identify which products are sufficiently close demand- or supply-side substitutes to impose a competitive constraint on the pricing of the product in question and therefore form part of the same relevant market. However, the application of this test to broadcasting services is not straightforward because, in most cases, television services are not directly charged for. That is, for the majority of television services today, viewers are not charged specifically for what they watch on either a per-programme or even a per channel basis. For instance, viewers of terrestrial channels do not pay directly for the product they consume and this means that for the viewer, television is free at the point of consumption. In the case of subscription TV, the consumer will typically pay a monthly charge for access to bundles of channels but the viewing of individual channels within that bundle is still free at the point of consumption.

5.20 The absence of information on the prices of specific broadcasting services means that, in order to make use of the hypothetical monopolist test, there is a need to take into account other data on consumer behaviour, such as consumer switching between different retail TV services, data on audience share and audience reach, programme budgets, attitudes to multi-channel television etc. This data provides important insights into determining what products or services might be sufficiently close demand-side substitutes so as to exert a competitive constraint but it does not allow Ofcom to reach definitive conclusions on the definitions of the relevant markets in which channels compete for viewers or in which retail TV services compete for subscribers. In order to inform its future market definition work, Ofcom is putting in place an extensive programme of consumer research. In the meantime, and for the purposes of this analysis, Ofcom has considered different potential candidate markets but has not reached any definitive conclusions on market definition.

Responses to the consultation

5.21 In its response to the consultation the BBC stated that it did not necessarily agree with Ofcom's preliminary market definition analysis. However, it did not provide any specific arguments or information in this respect. It is therefore not possible for Ofcom to respond to this comment. None of the other responses commented on Ofcom's overall approach to market definition.

Digital retail TV services market(s)

5.22 In relation to digital retail TV services, Ofcom has considered a number of potential candidate markets. Taking into account data on a range of factors such as the way in which services are bundled and priced; what influences a consumer's decision to subscribe to different services; data on switching etc, it might be possible to construct a chain of substitution argument that links together the various digital retail TV services into one market. For instance, it is clear that Freeview and Sky Freesat are in competition with one another to attract viewers wanting to access a range of free-to-view channels in digital. In this case, the competition concern would tend to focus on discrimination in favour of one retail TV service over another within a narrowly defined free-to-view digital retail TV services market. However, it is also the case that there is a degree of overlap between the services available via Freeview and Sky Freesat and the services available with the entry-level subscription packages offered by pay-TV service providers. Thus, although these different services do not compete head-on across the board, there could be sufficient overlaps across different groups of customers for them to be considered to be part of the same (albeit differentiated) product market through a chain of substitution argument. In this case, there could, however, still be competition concerns about discrimination in favour of one digital retail TV service within a broader market for digital retail TV services.

5.23 However, there may be breaks in the chain of substitution and it might be possible to define more narrow markets, such as between free-to-view services on the one hand and digital pay-TV services on the other. Ofcom notes that the sector is in a state of flux as the penetration of digital television increases and that market definitions are likely to evolve over time.

5.24 For the purposes of assessing the likely impact of promotional activity on competition in relation to digital retail TV services, Ofcom has not reached any definite conclusions about the definition of the relevant product markets.

Responses to the consultation

5.25 In its response to the consultation, Channel 4 set out two markets which combined aspects of both platform and channel markets, namely:

- a market based on converting current analogue households to digital (this market accounted for approximately one third of all homes); and,
- a market based on competing for penetration and revenue among households that had already adopted digital television (this market accounted for around two-thirds of homes).

5.26 Channel 4 did not present any systematic analysis to support these particular market definitions and therefore Ofcom is unable to consider the proposed market definitions further. However, it is the case that one of the main competition concerns relates to the impact of cross-promotional activity on analogue homes, i.e. those homes that have yet to make a decision about which digital television platform to choose. The distinction made by Channel 4 thus appears to be in line with the focus of Ofcom's analysis of the potential competition concerns.

Channel markets

5.27 In relation to the relevant markets in which broadcasters compete for viewers, the key issues for market definition purposes centre on the extent to which the existing terrestrial channels face a significant competitive constraint from other digital channels, i.e. channels operating in a wholly digital environment[32]. The available data, such as viewing share, audience reach, programme budgets and programme quality, suggest that it may be possible to maintain a distinction between competition between the existing terrestrial channels (i.e. BBC1, BBC2, ITV1, Channel 4 and Five) and competition between other channels. However, Ofcom again notes that the data indicates that the position of the digital channels is in a state of flux as the penetration of digital television increases and that this position is likely to change over time.

5.28 For the purposes of assessing the likely impact of promotional activity on competition, it does not appear that the definition of the relevant market is a key factor because the conclusions on the impact of promotional activities on channel markets are the same in the case of a wide or narrow market definition. Therefore, it is not necessary for Ofcom to reach any definite conclusions about the relevant markets in which channels compete for viewers.

Legal framework – options for addressing competition issues

The Competition Act 1998

5.29 Ofcom has considered using the Competition Act 1998 ('the Competition Act') to address any potential competition issues but does not believe that it is appropriate to address the competition concerns set out above. Ofcom considers the following to be relevant:

- the Competition Act is concerned with agreements between undertakings that may prevent, restrict or distort competition or the conduct of one or more undertakings which amounts to the abuse of a dominant position. In terms of the ability to take action, if Ofcom were to rely on the use of its concurrent competition law powers, this would involve an *ex post* enforcement approach, i.e. Ofcom would respond to complaints or launch an own initiative investigation into whether particular courses of conduct infringe the Competition Act[33];

- at present competition concerns around promotional activity are addressed by the current rules, which ensure that cross-promotions do not prejudice fair and effective competition. As set out above, there is a specific timing issue about the transition to digital switchover which focuses particular attention on the decisions that consumers will have to make about choice of digital retail TV service. This could mean that moving away from the current *ex ante* approach and moving instead to an *ex post* enforcement approach would be less effective because of the difficulty in reversing any possible negative impact on competition if firms in the market did in fact act in an anti-competitive way; and

- the overall framework for promoting fair and effective competition in relation to competition in broadcasting markets needs to take into account digital switchover and public policy to encourage the adoption of digital television in the UK.

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[32] Ofcom recognises that there may also be narrower channel markets, such as for unique premium content. However, it is unnecessary to consider these distinctions for the purposes of this analysis.

[33] There is, of course, an expectation that the sanctions available to Ofcom under the Competition Act would act as a deterrent to anti-competitive conduct.

Sector specific competition powers

5.30 Ofcom is able to use its powers under the Broadcasting Act and rely on the *ex post* enforcement of the fair and effective competition condition contained in all Broadcasting Act licences. In addition, Ofcom is able to act in anticipation that an agreement, conduct or type of conduct could be prejudicial to fair and effective competition and set a code or provide guidance. The appropriateness of relying on the *ex post* enforcement of the condition or alternatively setting a code and/or guidance is discussed in relation to each competition concern below.

5.31 The fair and effective licence condition and relevant legislation are set out in Annex 5.

Prejudicial to fair and effective competition

5.32 In order to assess the impact of cross-promotion on competition in the relevant product markets, it is necessary for Ofcom to set out the way in which it is proposing to apply the 'fair and effective' competition test in this context.

5.33 The assessment of whether a course of conduct is likely to be prejudicial to fair and effective competition needs to be tempered by the notion of materiality. Competition involves rivalry between firms and actions taken by one firm will have an impact on other firms in the same market. A key issue in considering whether conduct might be prejudicial to fair and effective competition is whether the conduct is having, or might be expected to have, a *material* impact on the competitive process.

5.34 The fact that there are current rules on cross-promotion in operation means that it is difficult to point to specific evidence to support or reject an assessment about the potential anti-competitive effect of any particular course of behaviour. If the existing code has been successful, then it will have restricted certain types of behaviour. In order to deal with this problem, Ofcom considers that it would be appropriate to examine other indicators in order to assess the extent to which firms might act in a way which could have a material impact on competition. The main indicators that Ofcom is proposing to consider are the incentives on broadcasters and the specific time window in relation to digital switchover, i.e. to abstract from the current situation and to consider what might happen in the absence of the current rules and how the behaviour of market participants might change.

5.35 If there is the potential for behaviour to have a material impact on competition, Ofcom considers that it should adopt a precautionary principle and put in place *ex ante* rules to prevent such behaviour from emerging. However, any such rules should be a proportionate response to the potential competition issue that has been identified.

Impact on competition and regulatory approach

5.36 In assessing the impact of promotional activity on competition and the role of *ex ante* competition rules, Ofcom has considered the incentives on the terrestrial broadcasters and issues around materiality.

5.37 Ofcom's detailed assessment of the impact on competition is set out in Annex 3.

Competition between digital retail TV services

5.38 In relation to competition between digital retail TV services, the incentives on the terrestrial commercial broadcasters are aligned in such a way that they have financial incentives to promote the Freeview service and the DTT platform over other digital retail TV services and platforms providing access to digital television. Audience share data indicates that the viewing shares of ITV1, Channel 4 and Five are higher in Freeview homes than in the homes of other digital retail TV services[34]. The fact that audience share is higher in Freeview homes has important financial implications in terms of enabling the commercial terrestrial broadcasters to continue to deliver commercial impacts and thus generate advertising revenue. Therefore, absent the current rules regarding digital retail TV services/platform neutrality, the commercial terrestrial broadcasters would have a financial incentive to promote Freeview and the DTT platform. In addition, Channel 4 and ITV are partners in Digital 3&4 (which operates a DTT multiplex) and have recently joined the Freeview consortium, which further reinforces this incentive.

5.39 Furthermore, the BBC, as a shareholder in the Freeview consortium and as a multiplex operator for two of the six DTT multiplexes, has an incentive to promote Freeview and DTT over other digital retail TV services and platforms in order to maintain high viewing shares and therefore continued support for the licence fee.

5.40 Cross-promotional activity on the part of an individual terrestrial broadcaster in its own right might not give rise to particular competition issues but where the conduct of all the terrestrial broadcasters (both commercial and licence-fee funded) is aligned in a particular way then there could be a potential distortion to competition in the affected markets[35]. Furthermore, it is recognised that there do not need to be agreements or understandings between firms for there to be an effect on competition[36].

5.41 As well as this alignment of incentives, there is also a specific time dimension occasioned by digital switchover in the UK. It is the combination of the alignment of incentives on the part of all the terrestrial broadcasters, combined with the specific time dimension of digital switchover, that gives rise to the concern that there is the potential for a material adverse impact on competition in the absence of regulation.

5.42 The potential for such promotional activity to have an adverse impact on competition is present whether there are narrow product markets, such as a digital retail free-to-view TV services market and a digital retail pay-TV services market, or a broader market, such as a single digital retail TV services market. In light of the nature of the competition concerns which have been identified, Ofcom considers that it is appropriate to adopt a precautionary approach, which for the purposes of assessing leverage in this context means consideration of the impact on competition in the broad market, i.e. a product market in which the all digital retail TV services are in competition with one another.

Responses to the consultation

5.43 In its response, the BBC argued that its motivations in the area of cross-promotions were more complex than those of the commercial terrestrial broadcasters. The BBC

[34] For instance, the Chief Executive of ITV plc in talking about the take up of Freeview has said that: *"It's great news for ITV too because our channels perform better on Freeview than any other digital platform."* (Evening Standard, 28 March 2006).
[35] This principle is already well established, e.g. the OFT guidelines 'Market investigation references' (OFT 511, April 2006) state that "…forms of [firms'] conduct are often pro-competitive but they may have effects, that, especially when combined with other market features blunt the competitive process, for example by adding to entry barriers." (paragraph 6.5).
[36] OFT guidelines 'Market Investigation references' (OFT 511, April 2006): "Competition can be muted in oligopolistic markets without any coordination of firms' decisions." (paragraph 6.8).

argued that its case for engaging in cross-promotion activity other than to inform its audience about digital platforms was driven by public service and licence fee payer interests and was thus linked to getting best value for licence fee. The driver for the BBC's support for digital platforms, particularly Freeview, has been the delivery of its public purposes, not the commercial imperatives that Ofcom suggests.

5.44 Ofcom recognises that the BBC's motivations are different from those of the commercial terrestrial broadcasters: the BBC is obviously required to fulfil a specified public service remit. However, given the investment the BBC in the Freeview service in terms of marketing and also its role as a multiplex operator, it is still the case that, in the absence of regulation, the incentives on the BBC would be to promote the DTT platform and the Freeview service compared to other digital platforms/services. Thus although the BBC might cross-promote DTT and Freeview for reasons which differ from those of the commercial terrestrial broadcasters, there would be the same net effect.

5.45 Another respondent disagreed with Ofcom's analysis about the potential impact on competition and made the following points:

- Ofcom has failed to establish that promotions on ITV1, Channel 4 and Five are the single biggest or even a significant factor influencing decisions to take digital TV;

- if one channel promoted the availability of its channels on the DTT platform, as opposed to on other digital platforms, that would not represent leverage from one market into another. Instead it would be an example of the channel seeking to ensure that its channels maximise their audience share and advertising revenues. Analogue broadcasters have an advantage from the fact that their channels are universally available and they should be able to use this advantage to promote the availability of their services;

- Ofcom has failed to establish that the incentives of the analogue terrestrial broadcasters are aligned and even if they are aligned that would not distort competition but rather that would be a feature of the competitive process;

- even if the incentives on the analogue terrestrial broadcasters are aligned in such a way as to have a material impact on competition, Ofcom has not established that such an impact would be inconsistent with fair and effective competition. The respondent argued that Ofcom seemed to assume that a material impact on competition would not be consistent with fair and effective competition. The respondent argues that the alignment of incentives of particular participants within a market and the mere fact that through promotional or other activity they could have a material impact on competition does not necessarily mean that such conduct amounts to unfair competition.

5.46 As set out above in paragraph 5.7, the research carried out by Ofcom established that promotional messages do have a role to play in influencing the decision households make about switching to digital TV but, as Ofcom recognised, they were one of a number of relevant factors. Again, as set out above, the incentives of the terrestrial broadcasters are clearly aligned to promote the DTT platform and the Freeview service even if the motivations for this might differ between the BBC and the commercial terrestrial broadcasters. Audience shares for the PSBs hold up significantly better in Freeview homes than on other digital platforms. The DTT platform is thus important to the commercial terrestrial broadcasters because it enables them to deliver commercial impacts and it is important to the BBC because it helps them to deliver on their public service remit. In fact, during 2005, the viewing shares of the portfolio of channels operated by the terrestrial broadcasters (including the BBC channels) accounted for just under 85% of all viewing in Freeview homes.

5.47 In addition, the PSBs also own and operate four of the six DTT multiplexes[37]. The main PSB broadcasters therefore also have a direct interest in the success of the DTT platform. When ITV acquired SDN, the multiplex operator for Multiplex A, in 2005, one of the reasons given by ITV was that it would give them greater control over DTT capacity going forward. Channel 4 have also argued[38] that PSBs should be granted additional DTT capacity in the future.

5.48 These factors help to establish that in the absence of regulation the terrestrial broadcasters would be likely to promote a particular platform and service over other digital television platforms and services. Ofcom considers that the respondent has failed to acknowledge the specific concern identified by Ofcom in relation to cross-promotional activity by the terrestrial broadcasters in the run-up to digital switchover. As set out above, Ofcom accepts that cross-promotional activity is not *per se* anti-competitive and that not all impacts on competition are anti-competitive. However, it is the combination of the alignment of incentives together with the run up to switchover that could give rise to an adverse impact on competition and suggests to Ofcom that an *ex ante* requirement to maintain platform neutrality is appropriate. Ofcom is not prohibiting cross-promotional activity by the commercial terrestrial broadcasters. Rather it is signalling that it needs to take place within certain constraints. This position can then be reviewed once digital switchover has occurred.

Ex post enforcement

5.49 As set out above Ofcom does not consider that the Competition Act is appropriate to address competition concerns arising from promotional activity. However, Ofcom could rely on the *ex post* enforcement of the fair and effective competition condition in broadcasting licences to address any distortion of competition between digital retail TV services. Given the concerns set out above that there is potentially an important timing issue in relation to consumers having to choose between digital retail TV services in the run up to digital switchover, Ofcom considers that there would be a risk relying on the *ex post* enforcement of this condition. In particular, there would be a risk that, by the time evidence emerged of a significant detriment to competition between digital retail TV services, the damage to the competitive process would have already taken place and it would be difficult for the regulator to remedy that detriment.

Ex ante rule

5.50 The alternative approach is to put in place a code that requires the commercial terrestrial broadcasters, ITV1, Channel 4 and Five, to maintain neutrality in respect of promoting digital retail TV services and platforms to analogue households[39]. This would ensure that they are unable to promote Freeview or DTT to the detriment of competition between digital retail TV services for analogue homes that have yet to make a decision about which digital television platform to switch to.

[37] It is also the case that Five acquired a stake in Top Up TV during 2005.
[38] Key note speech by Andy Duncan, Chief Executive, Channel 4, Oxford Media Convention (January 2006).
[39] Ofcom notes that Freeview is often used interchangeably with the DTT platform. In order to be clear about the issue of neutrality between services, it is necessary to refer to neutrality between digital retail TV services and platforms.

5.51 In terms of considering how the proposed rules should be implemented, it is necessary to consider (a) whether the rules should be applied to all commercial terrestrial broadcasters and (b) whether the rules should be extended to include digital channels or groups of digital channels. A key factor in this assessment is a consideration of proportionality.

5.52 In terms of whether the rules should be applied to all commercial terrestrial broadcasters, consideration has been given to whether Five should be included. Five does not have any secondary digital channels (although there has been speculation that they are considering implementing a multi-channel strategy) and does not operate a digital retail TV service. However, Five has the same incentive as the other terrestrial channels to promote Freeview and DTT. Potentially, it too has an important role in influencing the choice of digital retail TV service for the remainder of the population that has not yet switched to digital TV. On this basis, Ofcom considers that it is proportionate and appropriate for Five to be subject to a requirement to maintain neutrality between digital retail TV services and platforms.

5.53 In the case of considering whether it might be justified to extend the scope of the neutrality requirement to digital channels, Sky is used as an example of a provider of a range of digital channels. By definition, Sky channels are only available in homes that have already connected at least one television set to a digital multi-channel platform, be it satellite, cable or indeed to a more limited extent DTT. Promotions by Sky could thus influence choices about connecting subsequent TV sets but the household has already been exposed to multi-channel television and is thus more likely to be aware of the range of services available. Therefore, it is unlikely that promotions by Sky would be sufficient to trigger a materiality concern. On that basis, Ofcom considers that promotional activity by Sky or other providers of digital channels would have less ability to distort competition between different digital retail TV services.

Responses to the consultation

5.54 In their responses Channel 4 and Five accepted that there could be a need for an *ex ante* rule on cross-promotional activity by the terrestrial broadcasters. For instance, Five accepted that for the next few years, households that have yet to go digital should be presented with information that is platform neutral when digital channels or their programmes are promoted on the main terrestrial channels.

5.55 In its response, Channel 4 concluded that the continuation of an analogue market (see above) did suggest that *ex ante* rules governing platform neutrality should be retained but argued that the platform neutrality obligations should be extended to all broadcasters with significant platform interests e.g. Sky and Flextech/Telewest.

5.56 As set out above, Ofcom does not consider that the promotion of digital platforms/services gives rise to the same materiality issues in households which have already switched to digital TV compared to analogue homes which have yet to make that decision. On that basis, it would not seem appropriate to extend the scope of the *ex ante* rules to include Sky and by extension other digital channels such as UKTV, Viacom etc.

5.57 In their responses, a number of the PSBs argued that the application of any platform neutrality requirement should be limited to the principal digital television platforms (i.e. DTT, digital cable and digital satellite), and that they should be able to promote their services on new, emerging digital TV platforms e.g. IPTV services, mobile platforms etc without any requirements to maintain platform be neutrality.

5.58 In the competition analysis set out in the consultation document Ofcom did not take into account the role of alternative television distribution platforms (e.g. mobile and broadband) because such distribution platforms are in their infancy. That said, Ofcom accepts that their role will undoubtedly grow and develop over time. Ofcom considers that, in order to avoid foreclosure of smaller players, it will be important for broadcasters to consider how to achieve platform neutrality in respect of alternative television distribution platforms. At the same time, Ofcom recognises that there is a corresponding need to avoid viewer confusion if too many different platforms are mentioned, e.g. so that broadcasters do not refer to television distribution platforms that are not widely available. In order to balance these factors, Ofcom considers that, for the purposes of the platform neutrality requirement, there should be some sort of threshold which alternative distribution platforms need to reach before they must be mentioned by broadcasters[40]. Ofcom's approach to this is set out in section 6.

Competition between channels

5.59 In relation to competition in channel markets, the incentives of the main terrestrial broadcasters are not aligned. Broadcasters clearly have an incentive to promote their own services in order to attract or retain viewers. Research indicates that viewers undoubtedly derive a benefit from promotional activity carried out by broadcasters. Without the same alignment of incentives across the commercial terrestrial broadcasters as is the case in relation to digital retail TV services and without the window created by digital switchover, the issue of a material impact on competition does not arise.

Ex post enforcement

5.60 As set out above Ofcom does not consider that the Competition Act is appropriate to address cross-promotion competition concerns. However, Ofcom has the option of relying on the *ex post* enforcement of the fair and effective competition condition in broadcasting licences to address any distortion of competition between channels. Ofcom considers that this is the more appropriate basis on which to address competition concerns in relation to the promotion of channels.

Ex ante rule

5.61 The alternative approach is to impose an *ex ante* rule. However, in the case of competition in channel markets, the evidence suggests that there are not the same issues of materiality and timing as there are in relation to competition between digital retail TV services.

Responses to the consultation

5.62 A number of the responses from other digital channel providers expressed concern about the move away from the current *ex ante* rules to a reliance on an *ex post* system of enforcement, given the powerful position of the terrestrial broadcasters as a result of their current and historical public service privileges. One of the respondents considered that the most effective way to promote plurality and choice of channels would be *ex ante* regulation which limited the extent to which the

[40] However, for the avoidance of doubt, the platform neutrality requirement would still need to be complied with if a broadcaster chooses to refer to the availability of their channels on specific digital platforms and retail TV services which do not satisfy the threshold. This issue is discussed in more detail in paragraph 6.6 below.

terrestrial incumbents could promote their portfolio of digital channels but accepted that there would be difficulty in justifying this in relation to standard competition tests. The same respondent urged Ofcom to monitor the impact of their cross-promotional activities in the event of de-regulation, taking into account not just the volume of cross-promotion but also its value, given audience sizes. A number of other responses re-iterated this request to Ofcom to ensure that it had processes in place that would enable it to react quickly to enforce this licence condition in the event of complaints about this activity.

5.63 As set out in more detail below, the fact that Ofcom is withdrawing the existing cross-promotion rules does not mean that Ofcom is not prepared to take forward complaints about the anti-competitive impact of promotional activity. Ofcom does have in place the processes to investigate complaints of this nature.

Competition in other markets

5.64 The issues in relation to competition in other markets, such as radio broadcasting markets, are largely the same as that for competition between channels. Again, it is unclear that the impact on competition would be sufficiently material.

Ex post enforcement

5.65 As set out above Ofcom does not consider that the Competition Act is appropriate to address cross-promotion competition concerns. However, Ofcom has the option of relying on the *ex post* enforcement of the fair and effective competition condition in broadcasting licences to address any distortion of competition in other broadcasting markets.

Ex ante rule

5.66 The alternative approach is to impose an *ex ante* rule. However, as in the case of competition in channel markets, Ofcom does not consider that there is the same issue of timing as there is in relation to competition in platform markets. In addition, there is no clear evidence at the present time that the promotional activity of the terrestrial broadcasters is having a material adverse effect on competition in other broadcasting markets.

Conclusions on addressing competition issues between digital retail TV services

5.67 Ofcom considers that it is appropriate to impose an *ex ante* rule that requires Channel 3 licensees, Channel 4 and Channel 5 to maintain neutrality in respect of references to digital retail TV services and digital TV platforms that are aimed at analogue households[41]. Ofcom considers that an *ex ante* neutrality rule is a proportionate response to the potential competition issue that has been identified. In particular, Ofcom considers such a rule to be a precautionary measure that will not impose an onerous burden on the terrestrial commercial broadcasters, as the requirement will only restrict the cross-promotional activities of these broadcasters where they want to promote one particular digital retail TV service or platform over another.

[41] The digital replacement licences require the PSBs to ensure that the services on analogue and DTT are exactly the same and therefore, in practice, promotions on DTT will also have to be platform neutral.

5.68 This requirement is only applied to promotions outside programmes. Ofcom considers that in particular circumstances, such as an editorial feature on Freeview boxes, the mention of a particular platform or digital retail TV service within a programme may be justified. However, the content rules as discussed in Section 7 below would apply within programmes as usual, including those relating to undue prominence.

5.69 Ofcom notes that as part of the debate about the digital switchover process, the government has been keen to maintain a position of platform neutrality. Ofcom therefore considers that its approach is aligned with other public interest issues. In addition, this rule should not affect any information announcements about digital switchover, which by their nature should be neutral in respect of digital retail TV services and platforms.

Responses to the consultation

5.70 In their responses, Channel 4 and Five both argued that given the pace of change in digital television, Ofcom should review the situation in 2, rather than 3 years time.

5.71 Ofcom accepts that the pace of change in digital television can be rapid. However, given the specific link between the *ex ante* competition concerns and the digital switchover process, Ofcom considers that a review of the *ex ante* platform/service neutrality requirements should be linked to the process of digital switchover. Once the process of digital switchover has begun, Ofcom will be better placed to make a more informed assessment as to whether the *ex ante* platform/service neutrality requirement is still required. On that basis, Ofcom intends to review this rule as the process of digital switchover gets underway to ensure that it remains an appropriate requirement.

Conclusions on addressing competition issues between channels

5.72 Ofcom considers that relying on the *ex post* enforcement of the fair and effective competition condition is a more appropriate basis on which to address any competition concerns that may arise in relation to the promotion of channels.

5.73 In the absence of clear evidence that promotional activity has an adverse effect on the competition between channels for viewers and given the fact that viewers undoubtedly derive a benefit from the promotional activity carried out by broadcasters, Ofcom has decided to remove the existing *ex ante* competition rules on promotional activity as it relates to the promotion of channels.

5.74 The fact that Ofcom is withdrawing the current rules as they relate to the cross-promotion of channels does not mean that Ofcom will refuse to investigate complaints that particular promotional activity is having an anti-competitive effect on competition between channels. As with other competition complaints, Ofcom will consider each complaint on its merit.

Conclusions on addressing competition issues in other broadcasting markets

5.75 In the absence of clear evidence that promotional activity would have an adverse effect on competition in other broadcasting markets, and given the fact that viewers could derive a benefit from the promotional activity carried out by broadcasters, Ofcom has decided to remove the existing *ex ante* competition rules on promotional activity as it relates to the promotion of services in other broadcasting markets. Again, however, Ofcom will consider any complaint that is made on its merit.

Section 6

Interpreting the platform and retail TV service neutrality requirement

6.1 This section provides further clarity on the platform and retail TV service neutrality requirement (‘the neutrality requirement’) that is imposed on the analogue services of the Channel 3 licensees, Channel 4 and Five (‘the main commercial terrestrial broadcasters’) as set out in the previous section.

Branding and pricing

6.2 The neutrality requirement obliges the main commercial terrestrial broadcasters to deal with references to digital retail TV services and platforms in their analogue services on an equivalent basis whether in respect of branding, pricing information or other promotional messages. This will need to be considered on a case by case basis. However, one acceptable formulation for referring to prices for branded services might be:

> *“With Freeview you will need to buy a set top box, and prices start at around £50. With Sky Freesat you need to buy a set top box and install some equipment, which costs £150. With both services there are no ongoing subscription charges. Subscription charges apply to ntl, Telewest and other Sky pay-TV services”.*

Which platforms?

6.3 The main commercial terrestrial broadcasters need to mention only the platforms on which their services are available. Ofcom considers that in deciding which platforms should be mentioned, a common sense approach is appropriate. For example, for all intents and purposes, a Sky pay-TV subscriber considers that the ITV suite of channels is available as part of the Sky pay TV package since the ITV channels are all accessed via the Sky EPG, whether or not this may actually be the case. A common sense approach best fulfils Ofcom’s objectives of ensuring that consumers have sufficient information provided to them about the alternative platforms available in the run up to digital switchover.

6.4 For reasons of practicality and relevance, Ofcom considers that it is appropriate to limit the number of platforms and retail TV services that are required to be mentioned by the main commercial terrestrial broadcasters. It would not be practical for the main commercial terrestrial broadcasters, and it may be potentially confusing or misleading for viewers, if too many different retail TV services are mentioned, especially if the retail TV services mentioned are largely unavailable to a significant proportion of the population. Therefore, it is appropriate to apply a materiality threshold to decide whether a digital platform or retail TV service is required to be mentioned, such as 500,000 customers. While a threshold based on customer numbers involves the use of a fairly arbitrary figure, 500,000 represents a significant number of customers and captures the major digital platforms and retail TV services which have wide ranging availability throughout the UK.

6.5 Notwithstanding the materiality threshold, Ofcom considers that it is appropriate for the main commercial terrestrial broadcasters to mention that digital television services are available via the broadband platform. In paragraphs 6.6 and 6.8 below, Ofcom recommends suitable phrases for referring to broadband and other smaller platforms.

6.6 In order to avoid foreclosure of smaller players and to ensure that viewers are aware that services may be available via other digital retail TV services, a phrase should be used that captures the other digital retail TV services that are not mentioned. A suitable phrase might be *"also available on other digital platforms"*.

6.7 The materiality threshold is not intended to prohibit the main commercial terrestrial broadcasters from mentioning specific digital platforms and/or branded retail TV services which have less than 500,000 customers. The main commercial terrestrial broadcasters are free to mention any digital platforms and/or branded retail TV services on which their services are available, but if they do so, then they must still comply with the neutrality requirement even if the digital platform or retail TV services which are to be mentioned have less than 500,000 customers. For example, if the main commercial terrestrial broadcasters refer to the availability of their services via a named broadband provider, they must refer to all the other broadband providers on which their services are available within the relevant reception area, even if any of the broadband providers have less than 500,000 customers. On this basis, the materiality threshold operates in a way which gives the main commercial terrestrial broadcasters a choice of either using a generic phrase for referring to smaller digital platforms and retail TV services or making reference to all of the specific smaller digital platforms and retail TV services on which their services are available within the relevant reception area.

6.8 To provide further clarity on the neutrality requirement, Ofcom would recommend that the main commercial terrestrial broadcasters use the following two phrases when referring to appropriate digital platforms or retail TV services:

- If the broadcaster only wishes to mention platforms:

"available on satellite, cable, digital TV through your aerial or over broadband"

- If the broadcaster wishes to mention retail TV service brands:

"available on Sky, NTL/Telewest, Freeview or other digital platforms[42]

Responses to the consultation

6.9 One respondent considers that the platform neutrality requirement should only require neutrality in respect of free digital retail TV services, given that the terrestrial channels are not available on a number of pay TV retail TV services. In addition, Ofcom should note the material difference between payments for reception equipment and subscription charges. On the other hand, Sky considered that, in order to avoid misleading consumers that both free and pay TV retail services on the same platform are mentioned.

6.10 Channel 4 and Five requested clarity on the particular platforms that they are required to mention.

[42] This phrase is intended to reflect the current branding of the retail TV services which satisfy the materiality threshold. The main commercial terrestrial broadcasters who are subject to the platform neutrality requirement will need to amend such a phrase to reflect any branding changes made to the retail TV services.

6.11 These issues have now been addressed above.

Section 7

Content regulation

Introduction

7.1 This section confirms how Ofcom will address the issues surrounding the content of self and cross-promotions. With effect from 10 July 2006, self- and cross-promotions within television programmes will be subject to Section 10 (Commercial References) of the Broadcasting Code. Promotions outside programmes will be addressed by means of the new Cross-promotion Code, as well as new guidance on Section 10 of the Broadcasting Code. In addition, RADA will be amended on 10 July 2006 to remove the rule limiting programme promotion in centre breaks to 20 seconds ('the 20 second rule').

7.2 This section also summarises the responses received to the consultation and sets out Ofcom's comments on those responses.

7.3 Promotions within programmes and promotions outside programmes raise different issues, including the application of the undue prominence prohibition set out in the Broadcasting Code and the treatment of misleading content. Therefore, promotions within programmes and outside programmes are addressed separately in this section.

The Broadcasting Code

7.4 Ofcom has been charged by Parliament with the task of setting standards for the content of television and radio broadcasting. Most households now have digital multi-channel television and access to digital radio. Access to audio-visual content through the internet – a medium unregulated by Ofcom – is on the increase. These technological developments and changing patterns of use lead to changing audience expectations. Under the Communications Act, Ofcom must take these expectations into account in setting standards for broadcasting. Audiences expect challenging and creative content, while also wanting those standards to be maintained.

7.5 Ofcom is required by the Communications Act and also by the Broadcasting Act 1996 to draw up a code for television and radio, covering standards in programmes, sponsorship and fairness and privacy.

7.6 Ofcom therefore published the Broadcasting Code on 25 May 2005. This came into effect on 25 July 2005, replacing a number of codes that Ofcom inherited from the legacy broadcasting regulators, that is, the Broadcasting Standards Commission, the ITC and the Radio Authority. The Broadcasting Code was developed at a time of rapid change in the distribution of audio-visual content and an expansion in choice in television and radio for most households. It was the product of extensive consultation with broadcasters, viewers and listeners and other interested parties.

7.7 Broadcasting is a creative and evolving medium where choice, innovation and experimentation serve the interest of both citizens and consumers. The main purpose of the Broadcasting Code is to set standards which will protect viewers and listeners whilst still enabling broadcasters to be creative and to express a full range of views. Section 10 of the Broadcasting Code is headed 'Commercial References and Other Matters' and, as explained later in this section, contains rules to ensure that two key principles are upheld:

- the independence of editorial control over programme content is maintained and programmes are not distorted for commercial purposes; and
- the advertising and programme elements of a service are clearly separated.

7.8 The new Cross-promotion Code replaces the current cross-promotion content rules and must be read in conjunction with Section 10 of the Broadcasting Code and the guidance on that section.

The content legal framework

7.9 Section 319 of the Communications Act requires Ofcom to set a code (or codes) containing standards to ensure fulfilment of a number of specified objectives. These standards objectives include the following:

- *"in setting standards, Ofcom must have regard, amongst other things, to the desirability of maintaining the independence of editorial control over programme content"* - Section 319(4)(f); and
- *"that the international obligations of the United Kingdom with respect to advertising included in television and radio services are complied with"* - Section 319(2)(i).

7.10 The international obligations referred to in Section 319(2)(i) include the requirements of the TWF.

7.11 The TWF coordinates, at Community level, national legislation in areas such as:

- determination of the law applicable to broadcasters;
- promotion of production and distribution of European works;
- public access to events of major importance;
- television advertising, teleshopping and sponsorship;
- protection of minors; and
- the right of reply.

7.12 Article 10 of the TWF requires television advertising to be *"readily recognisable as such and kept quite separate from other parts of the programme service by optical and/or acoustic means"*. It also prohibits surreptitious advertising. This is defined as:

> *"the representation in words or pictures of goods, services, the name, the trade mark or the activities of a producer of goods or a provider of services in programmes when such representation is intended by the broadcaster to serve advertising and might mislead the public as to its nature. Such representation is considered to be intentional in particular if it is done in return for payment or for similar consideration."*

7.13 Ofcom's rules regarding the promotion of products and services within programmes, undue prominence and product placement are derived from these provisions in the TWF and Ofcom's duties under the Communications Act. These rules appear in Section 10 ('Commercial References') of the Broadcasting Code.

7.14 There are two rules in the Broadcasting Code of particular relevance to self- and cross-promotions:

- Rule 10.3: Products and services must not be promoted in programmes. This rule does not apply to programme-related material.

- Rule 10.4: No undue prominence may be given in any programme to a product or service.

7.15 These rules are considered in further detail below.

7.16 It should be noted that Section 10 of the Broadcasting Code does not apply to BBC services funded by the licence fee or grant in aid, which are regulated on these matters by the BBC Governors.

Undue Prominence

7.17 As discussed above, the TWF requires advertising to be readily identifiable and separate from the rest of the programme service and prohibits surreptitious advertising. Clarification of surreptitious advertising is provided in the European Commission's 2004 '*Interpretative communication on certain aspects of the provisions on televised advertising in the "Television Without Frontiers" Directive'* ('the Communication'). The Communication says:

> *"…the Commission considers it appropriate to apply the criterion of the 'undue prominence' of the good, service, brand or company name. The undue nature may result from the recurring presence of the brand, good or service in question or from the manner in which it is presented and appears."*

7.18 Ofcom considered the Communication carefully in drafting the rule in the Broadcasting Code prohibiting undue prominence. Rule 10.4 explains that undue prominence may result from:

- the presence of, or reference to, a product or service in a programme where there is no editorial justification; or

- the manner in which a product or service appears or is referred to in a programme.

7.19 The question of whether a reference is unduly prominent will depend on the particular circumstances. Editorial justification will not always be required; for example, where a product appears briefly and incidentally in a programme, Ofcom may consider that its appearance is not unduly prominent, even in the absence of editorial justification. It should also be noted that editorial justification may not always be sufficient to avoid a breach of the prohibition, for example, if a product is featured in a particularly prominent manner.

Promotion of products and services in programmes

7.20 Rule 10.3 of the Broadcasting Code says:

> *"Products and services must not be promoted[43] in programmes. This rule does not apply to programme-related material."*

7.21 This rule is intended to prohibit selling messages within programmes, for example where information about price and availability is provided. In guidance on the Broadcasting Code, Ofcom has clarified that a favourable reference to a product or service will not necessarily be considered in breach of this rule (although it may need to be examined under the undue prominence prohibition).

7.22 In the context of cross-promotion, application of this rule means, for example, that price information about a retail TV service could not be provided within a programme, unless it is an editorial feature comparing products available to consumers.

7.23 If, however, a product or a service is considered to be 'programme-related material' as defined in the Broadcasting Code, then it may be promoted both within the programme and around it.

Programme-related material

7.24 Rule 10.6 of the Broadcasting Code allows programme-related material to be promoted (in the sense of a 'sell') within programmes provided that there is editorial justification. Broadcasters are also permitted to promote programme-related material around the programme in question; this does not count towards their advertising minutage. The distinction between broadcasting-related services and programme-related material is discussed in Section 4.

7.25 Programme-related material is defined as *"products or services that are both directly derived from a specific programme and intended to allow listeners or viewers to benefit fully from, or to interact with, that programme."*

7.26 Such material might include, for example, a DVD about the making of the programme or a telephone helpline providing advice on issues addressed in the programme.

Misleading claims in promotions outside programmes

7.27 Ofcom tends to consider promotions as programmes, as did the ITC, and therefore addresses complaints about most types of content (for example, offensive language in programme trailers) under the Broadcasting Code. However, where the complaint concerns the factual accuracy of a claim made in a promotion, Ofcom applies the BCAP[44] Television Advertising Standards Code; for example, where a promotion provides misleading information about the availability or price of a television service. In practice, few such cases arise.

7.28 The Advertising Standards Code contains rules designed to ensure, amongst other things, that advertising does not misrepresent the nature, benefits and limitations of advertised offers. These rules address misleading claims and price information.

Audience research

7.29 Ofcom commissioned primary research, qualitative and quantitative, to understand audience views on promotional activity during end credits, commercial breaks and within programmes.

[43] In the sense of a selling message.
[44] Broadcast Committee of Advertising Practice

7.30 The qualitative research consisted of a series of detailed group discussions in February 2005 across the UK, with separate groups for viewers from multi-channel homes and from analogue terrestrial only homes. In addition, approximately 1100 people were interviewed in a telephone omnibus survey in March 2005. Full details of the research methodology and findings have been published in the document entitled '*Television promotions - what the viewers think', a report of the key findings of a qualitative and quantitative study*, 6 December 2005.

7.31 Overall, the research suggests promotional activity has far reaching benefits for viewers that outweigh some minor irritations.

7.32 Some of the key findings of the research are listed below:

- Promotions were not top-of-mind like programmes and advertising.
- Respondents used promotions extensively to help plan and shape their viewing choices. Programme-specific promotions for programmes up to seven days ahead were seen as most useful.
- Many respondents said that promotions helped them to discover programmes and to watch programmes they would not have otherwise watched.
- Promotions stimulated choice between channels and programmes.
- Most respondents did not recall having seen in-programme promotions.
- Most respondents were comfortable with promotions in breaks between programmes and over end credits. They were less comfortable with promotions in centre breaks.
- Whilst most respondents were comfortable with the current volume of on-air promotions, they did not want more.
- Respondents tended to notice BBC promotions more than other promotions, mostly for understandable or positive reasons, e.g. there is no advertising on the BBC.
- Most respondents considered promotions for websites, books, DVDs and magazines acceptable.

7.33 These preferences and reservations were considered together with responses to the consultation in deciding how the content of self- and cross-promotions should be regulated.

Self- and cross-promotions within programmes

Rely on the Broadcasting Code, i.e. no separate content rules for cross-promotion

7.34 Ofcom has concluded that separate content rules for cross-promotion and self-promotion within programmes are not required. The Broadcasting Code, in particular Section 10 which contains rules relating to undue prominence and promotion of products and services within programmes, will apply in the normal way and the 30% shareholding presumption is not relevant. This was Option A3 in the consultation document.

7.35 Rule 10.4 of the Broadcasting Code prohibits undue prominence of products and services in programmes. Undue prominence may arise *either* where there is no editorial justification for the reference *or* from the manner in which the reference is made. If a reference is not editorially justified, it will not necessarily be considered unduly prominent: Ofcom would also consider the manner in which the reference was made.

7.36 For example, if a programme presenter were to make a passing but seemingly random reference to a future programme on the same or another channel, i.e. the reference could not be editorially justified, this would be unlikely to raise any regulatory concerns.

7.37 More deliberate references, e.g. a feature about a new series or repeated references to another programme, would be likely to require editorial justification. One means of satisfying this requirement would be to show that the promoted material was likely to be of interest to the viewer of that particular programme, for example, a reference in a nature programme to another nature programme.

7.38 As a more general point, the test of ‘editorial justification’ for self-promotions may well be relatively straightforward to establish, bearing in mind that editorial integrity is unlikely to be compromised where the same broadcaster is involved. For example, a ‘coming up later tonight’-type reference would probably not be problematic if it were just a single mention within the programme; it is also probable that such information would be considered editorially justified.

7.39 Rule 10.3 of the Broadcasting Code, which prohibits promotion of products and services within programmes (in the sense of a ‘sell’), will ensure that price information about channels, platforms and other services is not provided in programmes unless the particular context indicates that such information is not intended as a ‘selling’ message, e.g. in a product review programme. There is the usual exception for ‘programme-related material’. This allows references to relevant websites and information about prices and availability of factsheets, DVDs and other ‘programme-related material’ (subject to the other provisions of Section 10 of the Code). The distinction between programme-related material and broadcasting-related services is discussed in Section 4 of this statement.

7.40 Rule 10.5 of the Broadcasting Code, which prohibits product placement, applies as normal; for example, a channel must not pay for an in-programme reference within a programme on another channel.

7.41 This approach reduces the regulatory burden of compliance upon broadcasters in that they only need refer to the Broadcasting Code for references to programmes, channels and other broadcasting-related services within programmes. No amendment to the Broadcasting Code is required.

Responses to the consultation

7.42 Most of the respondents to the consultation agreed that this was the most appropriate approach.

7.43 However, the Campaign for Press and Broadcasting Freedom (‘CPBF’) said that there should continue to be specific rules governing self- and cross-promotion in addition to rules on commercial references in programmes, and that it was right to limit the opportunity and restrict the incentives for commercial promotions. Ofcom remains of the view that the Broadcasting Code provides sufficient safeguards. There is no compelling reason why references within programmes to broadcasting-related services should be subject to different rules to references within programmes to other services.

7.44 One respondent asked Ofcom to note that references within programmes to other programmes on the same channel may extend beyond single references into excerpts or features within programmes, which represent entertaining programme content in their own right. Ofcom considers that such references are likely to be editorially justified, for example because they clearly benefit viewers.

7.45 Another respondent suggested that Ofcom should make it clear in guidance that in-programme promotions do not require any relationship between the promoting and the promoted channel. At this time, Ofcom does not consider such guidance necessary – it has already clearly stated its intention to rely on the Broadcasting Code and not to have separate content rules for self- and cross-promotions within programmes.

7.46 The respondent also wanted clarification that statements about the availability of a product or service in an in-programme promotion will not in themselves cause the statement to fall foul of Rule 10.3 of the Broadcasting Code (i.e. products and services must not be promoted within a programme). Ofcom confirms that in deciding whether an in-programme promotion was in breach of Rule 10.3, it would need to take into account the context.

Self- and cross-promotions outside programmes

No content regulation for the subject of the promotion

7.47 Ofcom proposed in the consultation that the content aspects of the current cross-promotion rules would be discontinued outside programmes, and that Ofcom would provide guidance making clear that Rules 10.3 and 10.4 of the Broadcasting Code would not be interpreted by Ofcom as prohibiting or constraining a licensee from self-promoting or cross-promoting in breaks. However, all the rules in Section 10 would apply in the normal way to references to other products or services within the promotional item and the other sections of the Code would apply as appropriate, for example, the provisions regarding harmful or offensive content. This was Option B2 in the consultation document.

7.48 Ofcom remains of the view that this is the correct approach. However, having considered the responses to the consultation, Ofcom believes that further clarification of the circumstances in which Rules 10.3 and 10.4 would *not* apply would be helpful.

7.49 For regulatory purposes, promotions, e.g. trailers, have always been regarded as programmes. By its very nature, the way in which a promotion refers to a broadcasting-related service would almost always appear to fall foul of Rules 10.3 and 10.4. That is the basis upon which Ofcom proposed in the consultation paper that self- and cross-promotions in breaks should not be subject to these rules.

7.50 Therefore, promotions outside programmes would not be prevented by the Broadcasting Code from providing information about price and availability (as discussed below, this will tend to involve reference to a platform or a retail service package but such reference must not be unduly prominent) or otherwise promoting (in the sense of a ‘sell’) programmes, channels and other broadcasting–related services.

7.51 However, a promotion may also refer to the platform or other service carrying that broadcasting-related service, e.g. a satellite channel might refer by brand name to a platform upon which its sister channel is available. Ofcom has allowed this to date, subject to:

- Channel 3 licensees, Channel 4 and Five being platform neutral (this is for competition reasons and will continue under the new rules); and
- other broadcasters avoiding undue prominence.

7.52 Whilst this was not specifically discussed in the consultation paper, Ofcom believes it is sensible to continue with this undue prominence approach. The primary purpose of the promotion should be to promote the broadcasting-related service itself, often a channel; any *additional* reference regarding how to get that channel, i.e. the platform or retail service, including price information, should not be unduly prominent in the context of the promotion. If it were, that would tend to suggest that consideration has passed, i.e. the promotion is in fact an advert for that third party.

7.53 For example, if a non-terrrestrial channel, Channel A, were to run a promotion trailing one of its programmes, and also saying, *"Channel A is available on Platform X - the UK's favourite cable company"*, Ofcom would be likely to consider the reference to Platform X unduly prominent.

7.54 To take another example, if Channel A were available on both Platform X and Platform Y but promotions for it referred only to its availability on Platform X then, in the absence of editorial justification, this would appear to be unduly prominent. If, however, Channel A had only recently become available on Platform X, then there might well be justification for running a promotion, for a limited period of time, letting viewers know this without also mentioning its availability on Platform Y.

7.55 Ofcom will clarify the position in its guidance on Section 10 of the Broadcasting Code, although of course it is not possible to anticipate and address every eventuality.

Responses to the consultation

7.56 Most of the respondents welcomed the approach proposed by Ofcom in the consultation paper. However, two respondents pointed out that guidance would be needed to clarify the position. Another respondent went further and suggested that, as guidance is not binding, the Broadcasting Code itself should be amended.

7.57 Ofcom understands the need for clarity in this area and remains of the view that this should be provided by means of guidance on Rules 10.3 and 10.4. This guidance, whilst not binding on broadcasters, will set out in general terms and for the benefit of broadcasters how Ofcom intends to interpret the rules. Undue prominence is a flexible concept, turning upon the particular circumstances of each case, and guidance therefore appears entirely appropriate.

7.58 In addition, the preamble to Section 10 of the Broadcasting Code was drafted with the cross-promotion review in mind and clearly states:

> *"The rules in this section are subject to, and supplemented by, any Ofcom rules or guidance on cross-promotion."*

7.59 However, before the next reprint of the Broadcasting Code, Ofcom may consider again whether the Broadcasting Code itself should be revised in this respect.

7.60 CPBF alone disagreed with Ofcom's preferred option, expressing concern about removing content regulation altogether in this area. However, this appears to be a misunderstanding as such a move is not what Ofcom intends. It is only Rules 10.3 and 10.4 that will not apply to the broadcasting-related service in the context of the specific promotion. Promotions outside programmes will still be subject to the Broadcasting Code, for example in terms of harmful or offensive content. Any misleading claims in promotions outside programmes will continue to be considered under the Advertising Standards Authority's relevant rules (but by Ofcom, rather than by the ASA).

The 20 second rule

7.61 Ofcom has decided to remove the rule set out in Section 5.6 (A)(b) of RADA, which applies to internal breaks on Channels 3, 4 and 5. This states:

> *"The maximum duration of any break within a programme is three minutes fifty seconds, of which no more than three and a half minutes may be advertising and no more than 20 seconds may be programme promotion."* ('the 20 second rule')

7.62 The 20 second rule is also referred to in the current rules, in the special restrictions for Channel 3 licensees, Channel 4 and Channel 5. It applies to centre breaks only, and there is no such restriction on other licensees.

7.63 Ofcom has decided that there is no longer a need for *ex ante* rules regarding the volume of cross-promotion in breaks (whether centre or end), for the purposes of promoting fair and effective competition or protecting consumers. It is therefore proportionate and consistent that the new Cross-promotion Code should not contain the 20 second rule and that RADA should be appropriately amended. Channel 3 licensees, Channel 4 and Five will now be able to increase the time in centre breaks dedicated to self- and cross-promotion as appropriate, subject to the other requirements of RADA. They will not however be able to have more than three and a half minutes of advertising in centre breaks and the maximum length of centre breaks would remain unaltered at three minutes and fifty seconds.

7.64 While RADA was not the subject of the December consultation, it would not have been logical to remove the 20 second rule from any cross-promotion rules without also amending the specific and discrete reference in RADA.

7.65 Section 5.6 (A)(b) of RADA will be amended to read:

> *"The maximum duration of any break within a programme is three minutes fifty seconds, of which no more than three and a half minutes may be advertising."*

Responses to the consultation

7.66 Respondents who commented on Ofcom's proposal to remove the 20 second rule had mixed views. Those who agreed with it include Channel 4, Five and Paramount.

7.67 One respondent suggested that Ofcom should go further and amend other aspects of RADA with a read-across into cross-promotion. Whilst Ofcom understands the need for consistency, it does not believe that the review of cross-promotion is the appropriate vehicle for further revisions of RADA; in any case, such amendments would need to be consulted upon. However, Ofcom will ensure that, where relevant, RADA is interpreted in a manner consistent with the new Cross-promotion Code.

7.68 CPBF agreed with the removal of the 20 second rule, but only subject to a limit on total promotions, e.g. 90 seconds per hour. Ofcom notes the suggestion but does not believe that there are grounds for such an overall limit nor that it would be consistent with Ofcom's deregulatory objectives.

7.69 Other respondents did not agree and felt the 20 second rule should be retained to facilitate fair competition. One respondent suggested that Ofcom should keep the level of promotional activity by the commercial analogue broadcasters under close review, particularly in view of the proposal to remove the 20 second rule. Ofcom's reasons for not including in the new Cross-promotion Code *ex ante* regulation on the volume of promotions are set out in Section 5. In any event, this is self-limiting as ITV, Channel 4 and Five would need to forego paid-for advertising minutage if they wished to run more than 20 seconds of self- and cross-promotions in a centre break. In addition, viewers may find extensive promotions unattractive.

Radio

7.70 Taking into account the differences between radio and television, Ofcom has concluded that there is no need to change the current approach to promotional activity on radio. The Broadcasting Code, and in particular the undue prominence prohibition, will therefore continue to apply in the normal way and there does not appear to be a need for any additional regulation.

7.71 The current cross-promotion rules applied to promotional activities on television only, not on radio. For radio, there have been no specific rules for self and cross-promotion; such issues have simply been considered in the context of undue prominence. Crucially, in contrast with television, there are no advertising minutage restrictions for radio. Moreover, radio contains 'programming', rather than clearly delineated 'programmes'; anything that is not advertising is programming. It is therefore neither necessary nor logical to distinguish between self- and cross-promotion in programming and outside programming for radio.

Responses to the consultation

7.72 Most of the respondents did not comment on this issue. Of those that did, Channel 4, Paramount, SMG and one other respondent agreed that there was no need for cross-promotions on radio to be regulated by specific rules. CPBF disagreed and said that radio should have rules on cross-promotion of broadcasting-related services and non-broadcasting-related services. However, Ofcom believes that this distinction is neither necessary nor appropriate in the absence of constraints on advertising minutage for radio.

Section 8

Summary of conclusions and impact assessment

Summary of conclusions

Deregulation

8.1 Ofcom intends to remove the current rules that regulate the promotion of programmes, channels and related services on commercial television on 10 July 2006. The following competition and content rules will be removed:

- promotions must not give an excessive amount of airtime to a particular channel, service, or suite of channels/services;
- promotions may not include any information on prices of products or services;
- promotions in centre breaks must not exceed 20 seconds per break;
- in-programme promotions should not compromise the editorial integrity of the programmes within which they are placed or lead to advertising substituting for programme content;
- in-programme promotions must provide information likely to be of value to the viewer;
- in-programme promotions must not constitute a call to make a specific purchase;
- digital channels which can be shown to have market power must provide a feed clean of interactive icons, if the interactive service is not available on the platform concerned[45].

8.2 Ofcom will rely on the Broadcasting Code, and in particular Section 10 (Commercial references in programmes), to regulate promotions within programmes. Section 10 includes rules prohibiting undue prominence and the promotion of products and services within programmes. In relation to outside programme promotions, Ofcom will amend its guidance on the Broadcasting Code to explain that these rules will not be interpreted as constraining a licensee from self- or cross-promoting in between programmes. This revised guidance will be published on 10 July 2006.

8.3 Ofcom considers that it is unnecessary to retain the 20 second rule contained in RADA and therefore will also remove this rule on 10 July 2006.

[45] This guidance duplicates the existing BskyB undertaking to the Office of Fair Trading, which can be found at: http://www.oft.gov.uk/nr/rdonlyres/0abc3684-84c9-49d3-a4be-d5ab4ecedd09/0/bskybundertakings.pdf. Ofcom does not consider it necessary or appropriate for this guidance to be repeated in its future cross-promotion code.

The new Cross-promotion Code

8.4 As self- and cross-promotional activity within programmes will be subject to the Broadcasting Code only, the rules in the new Cross-promotion Code apply only to promotions outside programmes. The Cross-promotion Code requires the following:

- all licensees and S4C to ensure that only services that are broadcasting-related are cross-promoted; and

- Channel 3, Channel 4 and Channel 5 to maintain neutrality in their analogue services in respect of digital retail TV services and platforms.

8.5 The Cross-promotion Code will also contain guidance to the following effect:

- Certain shareholdings or voting power relationships between broadcasters create a rebuttable presumption that there are sufficient incentives for the promoting channel to provide another channel or service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not normally, in the absence of evidence to the contrary, consider these promotions to be advertising. However, if there are payments or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules.

- The ownership relationships that create this presumption of sufficient incentives are as follows:

  - o the licence holder for the promoting channel has a shareholding of 30% or more (or voting power of 30% or more) in the licence holder for the a promoted channel;

  - o the licence holder for the promoted channel has a shareholding of 30% or more (or voting power of 30% or more) in the licence holder for the promoting channel;

  - o the licence holder for the promoted channel and promoting channel are the same.

- For the purposes of cross-promotion, the definition of 'licence holder' (for the first and second bullet points above) includes the company or legal entity which actually holds the licence and other companies or legal entities that have a 30% interest in that company or legal entity. This definition will allow more complex corporate group structures to cross-promote. Although the guidance is now drafted slightly more widely than set out in the consultation, broadcasters must still ensure that no payment or consideration passes between parties. Ofcom is likely to scrutinise whether consideration has passed between parties in circumstances where there appear to be remote corporate relationships between the licence holder for the promoted channel and the licence holder for the promoting channel. Ofcom will also consider the overall shareholding (or voting power) actually linking the two broadcasters and the way in which the two broadcasters are run.

- If there is less than a 30% shareholding (or less than 30% voting power), there may be insufficient incentives for the licence holder of a promoting channel to provide the licence holder of another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that cross-promotion is justified on the basis of other incentives.

8.6 The new Cross-promotion Code is set out at Annex 1.

Impact assessment

8.7 The analysis presented in this statement and the December consultation document, along with the summary set out below, represents an impact assessment, as defined by section 7 of the Communications Act. The following is in accordance with Ofcom's impact assessment guidelines[46]:

i) Stage 1 – The competition issues are set out in Section 5 and the content issues are set out in Section 7.

ii) Stage 2 - The objective of reviewing the current rules regarding cross-promotion is to ensure that regulation remains appropriate, deregulating where necessary, to further the interests of consumers in broadcasting markets by ensuring fair and effective competition and protecting the interests of consumers.

iii) Stage 3 – In relation to competition issues, Ofcom considered the option of setting or not setting a code and relying on the *ex post* enforcement of the Competition Act or the fair and effective competition condition in Broadcasting Act licences. These options were set out in Section 4 of the consultation document. In relation to content issues, Ofcom considered relying on the Broadcasting Code, retaining the current cross-promotion content rules or applying no content regulation at all. These options for both inside-programme and outside-programme cross-promotions were set out in Section 5 of the consultation document.

iv) Stage 4 – There are potential impacts on citizens and consumers, television channel providers, digital retail TV services providers, platform providers and providers of services in other broadcasting markets.

v) Stage 5 – Ofcom considers that there is likely to be a detriment to competition if a neutrality requirement in respect of digital retail TV services and platforms is not imposed. This is discussed further in Section 5 and Annex 3.

vi) Stage 6 – Ofcom has assessed the costs and benefits of each of the options and considers that the proposed approach is proportionate and deregulatory.

[46] *'Better Policy Making',* 21 July 2005, which can be found at: http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf

Annex 1

Ofcom Cross-promotion Code

Introduction

There are limits upon the amount of advertising, that is any form of promotional announcement broadcast in return for payment or similar consideration that may be broadcast on a television channel. These limits are set out in the Rules on Amount and Distribution of Advertising ('RADA'), available at http://www.ofcom.org.uk/tv/ifi/codes/advertising/?a=87101

However, subject to this Cross-promotion Code ('the Code'), television broadcasters are able to promote programmes, channels and other broadcasting-related services without such promotions being considered advertising and included in the calculation of advertising minutage.

The Code replaces the rules regulating the promotion of programmes, channels and related services on commercial television issued by the ITC in January 2002 and takes effect from 10 July 2006.

The Code applies to television services regulated by Ofcom. However, it does not apply to BBC services funded by the licence fee or grant in aid. All references to 'licensees' should be interpreted accordingly.

The Code applies to promotions outside programmes only.

Within programmes, references to all products and services, including broadcasting-related services, are subject to the rules in Section 10 (Commercial References) of the Broadcasting Code.

The Ofcom Broadcasting Code applies in the usual way to the content of promotions outside programmes, unless otherwise stated in the guidance on Section 10 of the Broadcasting Code.

Legislative background to the Code

Under Ofcom's powers to issue broadcasting licences under the Broadcasting Acts 1990 and 1996, broadcasting licences may contain such conditions as Ofcom considers appropriate having regard to the duties imposed on Ofcom under the Broadcasting Acts and Communications Act 2003. Under the Communications Act 2003 Ofcom also has the power to approve codes for the purposes of a provision contained in a licence.

Under section 316 of the Communications Act 2003 Ofcom has the power to include conditions which Ofcom consider appropriate for ensuring fair and effective competition. All television broadcasting licences currently contain a fair and effective competition licence condition. This condition requires licensees to comply with any code or guidance approved by Ofcom for the purpose of ensuring fair and effective competition.

Section 319 of the Communications Act 2003 imposes a duty on Ofcom to set standards to secure, amongst other things, that the international obligations of the United Kingdom with respect to advertising in television services are complied with. These international obligations include those contained in the Television without Frontiers Directive, EC Directive 89/552/EEC, as amended by EC Directive 97/36/EC.

Broadcasters should bear in mind the legislative background that has informed the rules, the principles that apply to each section, the meanings given by Ofcom and the guidance issued by Ofcom, in this Code and in the Broadcasting Code, all of which may be relevant in interpreting and applying the Code.

Principles

To ensure that cross-promotions on television are distinct from advertising and inform viewers of services that are likely to be of interest to them as viewers.

To ensure that promotions on television outside programmes do not prejudice fair and effective competition. In particular, the rules are intended to ensure that, as television broadcasting in the United Kingdom switches from analogue to digital transmission, consumers are made aware of the various platforms and digital retail TV services through which they can receive broadcasting services and that this is done in such a way that will avoid the distortion of fair and effective competition.

Rules

Meanings

'Broadcasting-related Services' include all broadcasting activities licensable by Ofcom, for example television and radio services. They also include other services with a 'broadcasting feel', that is, services which deliver content similar to that delivered on a television or radio service. In addition, a website that provides content clearly and directly related to a Broadcasting-related Service may itself be a Broadcasting-related Service.

'Cross-promotions' are promotions, on a channel, of programmes and Broadcasting-related Services, that are not Self-promotions.

'Licensees' are the companies and legal entities which hold a broadcasting licence granted by Ofcom pursuant to the Broadcasting Act 1990 (as amended by the Broadcasting Act 1996 and the Communications Act 2003).

'Promotions' are Self-promotions and Cross-promotions.

'Self-promotions' are promotions on a channel for that same channel and/or for programmes broadcast on that channel.

Broadcasting-related services

1.1 All licensees and S4C shall ensure that Cross-promotions are limited to Broadcasting-related Services.

Platform and retail TV service neutrality

2.1 The following rule shall apply to the analogue services of Channel 3, Channel 4 and Channel 5 licensees ('the Main Commercial Terrestrial Broadcasters').

2.2 The Main Commercial Terrestrial Broadcasters shall ensure that Promotions to analogue households for Broadcasting-related Services that mention a digital retail television service and/or digital television broadcasting platform treat all major digital retail television services and/or digital platforms in an equal and impartial manner. In particular:

> (a) promotions that refer to a digital retail television service, such as Freeview or Sky, must also name all other digital retail television services on which the Broadcasting-related Service is available;
>
> (b) promotions that refer to a particular digital platform, such as digital terrestrial television ('DTT') or cable, must refer to all other digital platforms on which the Broadcasting-related Service is available. Generic promotions for digital television are permitted if they do not specifically mention any particular platform; and
>
> (c) promotions must treat digital retail television services and/or digital platforms equally in respect of all aspects mentioned, such as pricing, brand names, availability and packages.

Guidance

This guidance is non-binding and will be reviewed from time to time to reflect Ofcom's experiences with individual cases. It is provided to assist licensees in interpreting and applying the Code. Every complaint or case will be dealt with on a case by case basis according to the individual facts of the case.

Broadcasting-related services

Ofcom does not wish to be prescriptive in defining the term 'Broadcasting-related Services'. Depending on the individual facts, it may include a service whereby audiovisual content is delivered over a mobile or broadband platform, and video-on-demand. It is distinct from 'programme-related material', which is defined in Section 10 of the Broadcasting Code.

Cross-promotion relationships

Certain relationships between broadcasters (which are based on shareholdings or voting power) create a rebuttable presumption that there are sufficient incentives for the promoting channel to provide another channel or broadcasting-related service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not, in the absence of evidence to the contrary, consider these Cross-promotions to be advertising. However, if Ofcom believes that payment or some other consideration has passed or is passing between the parties, these types of arrangements could be investigated under the advertising minutage rules and may be counted as advertising minutage.

The relevant relationships that create this presumption of sufficient incentives are as follows:

(i) the Licence Holder for the promoting channel has a shareholding of 30% or more (or voting power of 30% or more) in the Licence Holder for the promoted channel;

(ii) the Licence Holder for the promoted channel has a shareholding of 30% or more (or voting power of 30% or more) in the Licence Holder for the promoting channel;

(iii) the Actual Licence Holder for the promoted channel and promoting channel are the same.

'Actual Licence Holder' means: the legal entity or company which holds the broadcasting licence granted by Ofcom pursuant to the Broadcasting Act 1990 (as amended by the Broadcasting Act 1996 and the Communications Act 2003).

'Licence holder' means: the Actual Licence Holder <u>or</u> any legal entity or company which has a 30% or more shareholding (or 30% or more voting power) in the Actual Licence Holder.

If there is less than a 30% shareholding (or less than 30% voting power), there may be insufficient incentives for a broadcaster to provide another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that Cross-promotion is justified on the basis of other incentives.

In the case of Cross-promotions between Channel 3 licence holders, there will be a rebuttable presumption that no consideration has passed.

These presumptions do not apply to public service announcements, charity appeals broadcast free of charge, announcements required by Ofcom and information to viewers broadcast in accordance with an Ofcom requirement, which are already excluded from paid for advertising by RADA. In particular, information to viewers broadcast in accordance with requirements to inform viewers about digital switchover is excluded.

Platform and retail TV service neutrality

This guidance relates to the platform and retail TV service neutrality requirements that are imposed on Channel 3 licensees, Channel 4 and Five ('the Main Commercial Terrestrial Broadcasters').

For reasons of practicality and also relevance to viewers, Ofcom considers that it is reasonable to limit the number of platform and retail TV services that need to be mentioned by the Main Commercial Terrestrial Broadcasters. Ofcom considers that a 500,000 customer base ('the materiality threshold') represents an appropriate threshold for these purposes as this captures the major platforms and retail TV services which have wide ranging availability throughout the UK.

At the time of drafting, Ofcom considers that the retail TV services which are likely to satisfy the materiality threshold are as follows:

- the digital satellite retail TV services operated by Sky
- the digital cable retail TV services operated by NTL/Telewest
- the digital terrestrial retail TV services provided by Freeview

The Main Commercial Terrestrial Broadcasters will need to review which platform and retail TV services meet the materiality threshold from time to time. Ofcom considers that data provided in Ofcom's '*Digital Television Update*' publications would be one appropriate source of information on customer numbers for these purposes.

Whilst the materiality threshold does not appear to be met for any particular retail TV services available via the broadband platform, Ofcom still considers that it will be appropriate for the Main Commercial Terrestrial Broadcasters to refer to broadband.

For the avoidance of doubt, the Main Commercial Terrestrial Broadcasters must still comply with the neutrality requirement if, instead of making a generic reference to smaller digital platforms, they refer to the availability of their channels on a specific digital platform or retail TV service which does not satisfy the materiality threshold (e.g. by mentioning a particular brand name). Therefore, the materiality threshold operates in a way which gives the Main Commercial Terrestrial Broadcasters a choice of either referring specifically to all the smaller digital platforms and retail TV services where their channels are available within the relevant reception area or making a generic reference such as *"available on other digital platforms"*.

Ofcom would recommend that the Main Commercial Terrestrial Broadcasters use the following two phrases when referring to appropriate platforms or retail TV services:

- If the broadcaster only wishes to mention platforms:

  "available on satellite, cable, digital TV through your aerial or over broadband"

- If the broadcaster wishes to mention retail TV service brands:

"available on Sky, NTL/Telewest, Freeview or other digital platforms[47]

General guidance on the Cross-promotion code

It is the responsibility of the broadcaster to comply with the Cross-promotion code.

Ofcom can offer general guidance on the interpretation of the Cross-promotion code. However, any such advice is given on the strict understanding that it will not affect Ofcom's discretion to judge cases and complaints after transmission and will not affect the exercise of Ofcom's regulatory responsibilities. Broadcasters should seek their own legal advice on any compliance issues arising. Ofcom will not be liable for any loss or damage arising from reliance on informal guidance.

[47] This phrase is intended to reflect the current branding of the retail TV services which satisfy the materiality threshold. The main commercial terrestrial broadcasters who are subject to the platform neutrality requirement will need to amend such a phrase to reflect any branding changes made to the retail TV services.

Annex 2

Market definition analysis

Introduction

A2.1 It should be made clear that market definition is not an end in itself, it is rather a tool which enables the analysis of competition issues. By considering the definition of the relevant product markets, it is possible then to assess the impact of particular types of behaviour or courses of conduct on competition within that market. This annex starts by setting out Ofcom's basic approach to market definition issues and discusses some of the analytical issues which arise when attempting to apply this approach to the broadcasting sector.

Conceptual approach to market definition

A2.2 There are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. Ofcom's approach to market definition follows that used by other UK competition authorities[48] and is in line with that used by European and US competition authorities.

A2.3 The relevant product market is determined by identifying constraints on the price setting behaviour of potentially competing products and services. There are two main competitive constraints to consider: how far it is possible for customers to substitute other products and services for those in question if prices were to increase (demand-side substitution); and to what extent could other firms switch production to supply the relevant products or services if prices were to increase (supply-side substitution).

A2.4 The concept of the 'hypothetical monopolist test' is a useful tool to identify close demand-side and supply-side substitutes. A product (or group of products) is considered to constitute a separate market if a hypothetical monopoly supplier could impose a small but significant, non-transitory increase in price ('SSNIP') above the competitive level without losing sales to such an extent as to make this unprofitable[49]. If such a price rise would be unprofitable, because consumers would switch to other products, then the market definition should be expanded to include these substitute products. This process continues until a point is reached at which the SSNIP test becomes profitable. The initial focus of market definition is typically on examining the scope for demand-side substitution.

A2.5 Supply-side substitution possibilities are then assessed to consider whether they provide any additional constraints on the pricing behaviour of the hypothetical monopolist which have not been captured in the demand-side analysis. Supply-side substitution considers what competitive constraints might be imposed on the hypothetical monopolist from firms which are producing similar or closely related products and who would be attracted to enter the market in question in response to the hypothetical monopolist imposing a price rise. For supply-side substitution to be relevant, suppliers would need to be able to enter the market in a relatively short

[48] See OFT guideline: '*Market Definition*' (OFT 403, December 2004).
[49] The OFT guidelines suggest that a price increase is to be defined as an increase of 5-10% above the competitive level. See '*Market Definition*' (OFT 403, December 2004), paragraphs 3.3 and 3.4.

period of time and at low cost, by virtue of their existing position in the supply of other services[50].

A2.6 There might be suppliers who provide other services but who might also be materially present in the provision of demand-side substitutes to the product or service for which the hypothetical monopolist has raised its price. Such suppliers would not be relevant to supply-side substitution since they supply services already identified as demand-side substitutes. As such their entry has already been taken into account and would not provide an additional competitive constraint on the hypothetical monopolist.

A2.7 The relevant geographical scope of the market takes into account whether there are any common pricing constraints across customers, services or areas such that they should be included within the same relevant market even if demand- and supply-side substitutes are not present.

Market definition issues in broadcasting markets

A2.8 The application of the SSNIP test to broadcasting services is not straightforward because, in most cases, television services are not directly charged for. That is, for the majority of television services today, viewers are not charged specifically for what they watch on either a per-programme or even a per-channel basis. Viewers of terrestrial channels do not pay directly for the product they consume and this means that for the viewer, television is free at the point of consumption. In the case of subscription TV, the consumer will typically pay a monthly charge for access to bundles of channels but the viewing of individual channels within that bundle is still free at the point of consumption.

A2.9 In the absence of a directly observable market price, the SSNIP test becomes problematic but that does not invalidate the conceptual approach. The absence of information on the prices of specific broadcasting services means that there is a need to take into account other data on consumer behaviour, such as consumer switching between different retail TV services, data on audience share and audience reach, programme budgets, attitudes to multi-channel television, etc. This data provides important insights into determining what products or services are sufficiently close demand-side substitutes so as to exert a competitive constraint. However, at present, the data does not allow Ofcom to reach definitive conclusions on the definitions of the relevant markets. In order to inform its future market definition work, Ofcom is putting in place an extensive programme of consumer research. In the meantime, and for the purposes of this analysis, Ofcom has considered different potential candidate markets but has not reached any definitive conclusions on market definition.

A2.10 In the context of broadcasting markets there can be important linkages between markets for viewers and markets for the sale of advertising airtime. Both types of markets are inter-related in that commercial broadcasters seek to attract viewers/audiences which are then ‘sold’ to advertisers. Broadcasting markets can therefore be characterised as ‘two-sided markets’: a large number of viewers for a particular channel translates into more commercial impacts for advertisers, implying that a larger number of potential customers may be attracted to buying some of the advertised products. Viewers, on the other hand, whilst they may perceive the

[50] The OFT guidelines consider a relatively short period to be within a year. See ‘*Market Definition’* (OFT 403, December 2004), paragraph 3.15 and *‘Assessment of Market Power’* (OFT 415, December 2004) paragraph 5.31.

programme interruptions associated with adverts as the 'price' of viewing also benefit from the presence of more advertisers through higher quality programming without having to pay (more). Where relevant to the matter in hand, the implications of 'two-sided' markets for market definition and competition analysis will be discussed in more detail below. However, Ofcom does not consider that it is necessary to analyse both 'sides' of a market in all cases.

A2.11 As set out in Section 5 of the Statement, the potential competition concerns around promotional activity by broadcasters relate to the ability of broadcasters, in particular the terrestrial broadcasters, to leverage their position in respect of the audiences that they reach to affect competition in other markets, such as competition between digital retail TV services for subscribers and competition between channels for viewers (and thus advertising revenue). It is therefore appropriate to consider viewers' likely substitution patterns between different types of digital retail TV services and channels.

Digital retail TV services market(s)

A2.12 In considering issues around the definition of the relevant product market, Ofcom has relied on a number of sources of data. Ofcom has considered evidence relating to differences in functionality and price between the services in question and other potentially substitutable products; consumers' valuations of such functional differences; survey evidence relating to consumers' basis for choosing one retail TV service over another; and also some limited data on consumer switching behaviour.

Demand-side substitution

A2.13 For the purposes of this analysis, Ofcom has taken as its starting point the retailing of digital TV services by means of the DTT platform. Once a household has purchased a Freeview set-top box, it is then able to access a range of free-to-view digital channel services, including the existing terrestrial channels, i.e. BBC1, BBC2, ITV1, Channel 4 and Five and also a range of radio services, without the need to pay any on-going subscription.

A2.14 The first step in the market definition process is to consider the extent to which other digital retail TV services could impose a competitive constraint on the Freeview service, i.e. if there were to be a reduction in the quality of services available on Freeview, in terms of number of services or quality of reception, would viewers switch to another digital retail TV service. It should be noted that we have chosen to use a Freeview home as the 'focal product', i.e. the starting point of our market definition analysis. We are thus making a distinction between analogue and digital households at the outset and are assuming that once a household has made a 'participation' decision to go digital, then in the first instance, the focus of the demand-side substitution issue is on the extent to which other digital retail services could impose a competitive constraint.

Content packages

A2.15 The television services associated with the different digital retail TV services are set out in tables A4.1 to A4.6 at Annex 4. This data reflects the recent restructuring of cable packages in terms of both the composition of the entry level packages and also the pricing of those packages. Sky restructured its packages earlier in 2005.

A2.16 From the data available on channel packaging and taking into account the lack of an ongoing subscription charge, the closest offering to Freeview in terms of providing access to free-to-view services is the Sky Freesat service. With the Sky Freesat product, the user has access to a wide range of free-to-view digital channel services once they have invested in the purchase of the Sky reception equipment, i.e. the satellite dish and the digital set top box (‘STB’). The Sky Freesat service offers access to the unencrypted services, such as BBC1 and BBC2, plus services accessible through the Freesat card, such as ITV1, Channel 4 and Channel 5. Those with an existing Sky mini-dish and STB can purchase a Freesat viewing card for £20[51]. The Sky Freesat option provides access to some 120 channels in all (including shopping channels and foreign language channels) compared to the 30 plus channels available via Freeview. However, there is a clear overlap in terms of the channels accessible via Freeview and those accessible via Sky Freesat. Sky Freesat’s coverage is also around 98% of the UK[52] compared to 75-80% for Freeview (although Freeview coverage will increase closer to digital switchover).

A2.17 Towards the end of 2005 it was announced that BBC and ITV intended to launch a ‘Freesat’ proposition in the course of 2006. However, at the time of writing, it is not clear when that service might be launched and there are no specific details of the range of services that will be available via the BBC/ITV Freesat service or any indication of prices for the customer equipment. However, it is anticipated that this could provide another demand-side substitute.

A2.18 In addition to the overlap of services available via the Sky Freesat proposition, other retail TV services, such as pay-TV services, could also impose a constraint on the Freeview service. Subscribers to multi-channel services are not homogeneous and their preferences will differ considerably. Offering a range of bundled content packages to subscribers is one way in which pay-TV service providers seek to address this issue. The tables in Annex 4 indicate that the channel services available via Freeview are also typically available via various content packages offered by other digital retail TV service providers[53]. This means that there are areas of overlap in terms of the bundles of television services that are available. For example, there is a significant overlap between the entry level subscription TV packages offered by ntl, Telewest[54], Sky and Homechoice and the services available with Freeview and Sky Freesat. Further, the option of Freeview plus a Top-Up TV subscription is similar, not just in terms of channels offered but also in terms of pricing, to the entry level packages offered by the retail pay-TV service providers.

A2.19 This might suggest that there is at least a subset of the users of the Freeview platform for whom the entry level packages of pay-TV services might represent a sufficiently close demand-side substitute as to impose a competitive constraint.

A2.20 A comparison of the services available would suggest that Sky Freesat could be expected to be the closest demand-side substitute to Freeview. However, as set out above, there are also significant overlaps between the channel services on offer via Freeview/Sky Freesat and the basic entry level packages offered by ntl, Telewest, Sky and Homechoice. This would suggest that it might be possible to construct a

[51] Prior to Freesat, there were periods in which ‘Free-to-view’ cards could be purchased in order to view encrypted content such as Channel 4 and Channel 5.
[52] Sky’s Freesat website (www.freesatfromsky.co.uk) states that Sky's coverage is *“98% of the UK”*.
[53] Some retail TV service providers bundle their service with other products. For instance, the cable companies ntl and Telewest offer bundles comprising digital television, broadband Internet access and telephony services. A similar approach is adopted by operators providing services over DSL technology.
[54] ntl and Telewest completed their merger on 3rd March 2006. However, it is not yet clear how the new entity intends to standardise its TV packages going forward.

chain of substitution argument linking the different retail TV services together. For instance, it could be possible to construct an argument that the cable companies and Sky face competition from Freeview/Sky Freesat for subscribers that are currently only subscribing to the basic subscription packages. They thus face the risk that subscribers taking only a limited number of channels might switch to the Freeview service instead. The restructuring and re-pricing of their access packages by ntl, Telewest and Sky might represent a strategic reaction to this in order to retain these subscribers.

Consumer research

A2.21 Consumer research carried out for Ofcom[55] examined the reasons given by customers for choosing particular retail TV services. This data is set out in more detail in Table A4.6 at Annex 4. The research was based on interviews with individuals identified by the retail TV service subscribed to rather than by any particular service or bundle of services. Therefore, care needs to be taken to ensure that the data is interpreted correctly in the context of considering options for substitution for customers wishing to alter their supplier of TV services.

A2.22 This data indicates that consumers' choices are shaped by a range of factors and the fact that the single largest response *"don't know"* perhaps reflects the fact that different factors are at play. That said, it is the case that consumers did appear to be aware of price; the *"cheapest method"* was the most commonly cited reason for cable, Freeview and DSL subscribers choosing a particular service. For BSkyB subscribers, this reason came second behind a *"better quality than cable"* reason. In relation to Freeview and Sky, *"additional channels"* was also an important reason for choosing their respective platforms, although given the range and nature of channels available via each, it is unlikely that these subscribers would regard one as a close demand-side substitute for the other across the board. For both cable and DSL subscribers the fact that TV services were bundled with telephony and Internet services was an important factor in their choice.

A2.23 The fact that different reasons are important to subscribers of different digital retail TV services could suggest that the availability of other digital retail TV services might only be a weak competitive constraint on Freeview.

Evidence on switching behaviour

A2.24 The evidence on switching between digital retail TV services is limited. However, research carried out for Ofcom indicates that the levels of switching are typically very low. In the most recent survey data, the majority (88%) of multi-channel TV customers had never used another digital retail TV service provider while living at the same address. Of those that had switched to Sky, around 80% had switched from analogue or digital cable (although this result should be viewed only as indicative because the sample size involved was small) and the remainder had switched from Freeview.

A2.25 Ofcom's The Communications Market: Digital Progress Report, Digital TV Q4 2005 sets out the available data on customer 'churn', i.e. customers giving up their subscription to a particular digital retail TV service. A churn rate of 10.6% for pay digital satellite (Sky) against a subscriber base of 7.7m homes implies that just over

[55] ICM Research, September 2005.

812,000 households churn off the pay-TV service each year[56]. Similarly, churn rates of 19.2% for ntl and 14.4% for Telewest would indicate that around 373,000 and 197,000 customers are ceasing their subscriptions respectively. Not all of these subscribers would necessarily be switching to another service and some of the churn might result from subscribers moving house to properties where reception is not possible or simply ceasing to subscribe to digital television altogether. However, such high rates of churn, over non-trivial numbers of consumers, suggests that even if switching costs are non-trivial, they do not represent a sufficient barrier to switching to prevent it from occurring at significant levels.

Supply-side substitution

A2.26 In terms of considering the scope for supply-side substitution, it is necessary to consider the scope for other broadcasters to switch the use of their existing assets to enter the market and offer a competing digital retail TV service. The main question to consider is whether, in response to a rise in prices from the competitive price (or reduction in quality), any such supply-side switching would occur within a short timescale.

A2.27 The scope for supply-side substitution might include the following;

- the provision of a free-to-view service over a satellite platform; and
- the provision of a digital retail TV service using British Telecom's ('BT') network infrastructure.

A2.28 Sky does not control the Astra satellite platform on which it operates which means that, in the absence of capacity constraints, other broadcasters could acquire capacity to transmit programming into the UK via digital satellite. However, the key contribution of Sky is the provision of technical platform services such as regionalisation and EPG listing, via its conditional access technology (particularly the STB and the smart card). This means that another broadcaster would either have to establish their own distribution network of STBs or seek access to Sky's distribution network. In 2005, ITV announced that it will be looking to work with the BBC in developing an alternative 'Freesat' proposition to that offered by Sky but at the time of writing no further details are available. As set out above, Sky already offers both free to view and subscription services and therefore this constraint has already been taken into account in considering demand-side substitution.

A2.29 As regards the provision of a TV platform over BT digital subscriber line ('DSL') services, BT Retail announced[57] from late summer/autumn 2006 it will offer a TV over broadband service called BT Vision using IPTV. BT Vision will offer access to a range of television services including digital terrestrial television services. The acquisition of the broadband Internet provider Easynet by BSkyB could also signal that BSkyB might be interested in exploring the delivery of TV services over broadband.

[56] It is estimated that of those who have churned off Sky pay-TV services, 450,000 still use their STBs to receive all of the free to view public service channels (Ofcom – '*The Communications Market: Digital Progress Report, Digital TV Q4 2005'*.)

[57] BT Press Release: '*BT takes another major step towards next generation TV'*, (October 26th 2005). In March 2006, BT announced that the new service would be called *'BT Vision'* – BT Press Release (March 20th 2006).

A2.30 The recent announcements would suggest that any scope for supply-side substitution is already being exploited. In particular, both free-to-view and subscription services can be provided over digital satellite and DSL.

Geographic market

A2.31 Although the digital satellite platform is available to around 98% of the population, there are a number of geographic constraints on the availability of the other digital TV platforms. At present, coverage of DTT is around 73% of UK households although this is projected to rise to above 98.5% at the time of digital switchover.

A2.32 Cable television passes around 51% of all homes. ntl operates in London and South-East England, East Anglia, the East Midlands, North-West England, North-East England, the Glasgow area and Northern Ireland. Telewest has eight franchises: London & South East region, North East, Scotland, North West, Yorkshire, Birmingham & Midlands, South West and Eurobell SW. Other platforms are currently more limited in terms of geographic availability, e.g. HomeChoice is only available in parts of London[58].

A2.33 In practical terms, it seems highly unlikely that consumers would switch house in order to have access to a particular digital retail TV service, and very few would be influenced by this factor even at the time of moving house. Therefore, it would appear that cable or other platforms (e.g. broadband) do not offer any significant direct competitive constraint on Sky for households that they are not currently able to supply.

A2.34 However, this narrow geographic approach to market definition could fail to capture adequately the competitive constraints operating on supply in a particular geographic area. Specifically, the above approach does not take into account the geographic pricing constraints faced by specific firms. Where firms choose, in practice, to adopt uniform pricing across a number of local areas, then specific local competitive pressures will have an impact only to the extent that they can influence the uniform price. Furthermore, to the extent that local factors do influence that price, the effect will be ‘transmitted’ across all the areas where the uniform price is in operation.

A2.35 Sky has chosen to set a single national price for its service, i.e. it does not price discriminate between cable and non-cabled areas. For this reason, we cannot, at this stage, rule out that the geographic market would be national in scope[59].

A2.36 In the case of the report into the ntl/CWC merger in 2000[60], the Competition Commission concluded that: *“the main characteristics of the market are national… Despite operating within separate local franchises the cable companies operate a*

[58] The consultation document also referred to Kingston Interactive Television (KiT) as a service provider but in March 2006 Kingston Communications announced that KiT would be closed down from April 2006.

[59] For example, this was the conclusion drawn in European Commission Case No IV/36.539 (*OJ L 312, 06.12.1999, p. 1-37*) — British Interactive Broadcasting (BiB), 4.13.iii: *“It is true that all UK TV households do not have access to cable, whereas virtually all households can receive satellite. However, this does not provide a justification for distinguishing between cable and satellite markets, or drawing a distinction between different geographic markets. BSkyB sets a single national price for its satellite retail pay-TV service, and in practice could not discriminate between cabled and non-cabled areas as avoidance by consumers would be easy. “*

[60] Competition Commission: ‘ntl Incorporated and Cable & Wireless Communications plc – a report on the proposed acquisition’, March 2000 – the ‘ntl/CWC Report’.

uniform pricing policy and the bulk of programmes they make available are also ones of a national rather than local interest".

A2.37 Furthermore, in the OFT's Competition Act 1998 investigation into BSkyB in 2002[61], it was concluded that

> *"The narrowest potential market definition is a region of the UK. Although the coverage of UK distributors varies, any gaps are not large or predictable enough to yield localised pricing opportunities for individual platform operators. The national pricing strategies of cable companies indicate that they regard the relevant market as being broader than individual franchise areas, while both BSkyB and ITV Digital (prior to insolvency) also pursued national pricing policies".*

A2.38 Taking these factors into consideration, Ofcom considers that the geographic market is likely to be national in scope, albeit it with local characteristics. It is possible that this too could change over time but the issue of the geographical scope of the relevant market does not appear to be germane to the competition analysis in this instance.

Initial position on the relevant digital retail TV services market(s)

A2.39 Based on the consideration of the characteristics of the different digital retail TV services, the way in which channels are bundled together and the (absence of) pricing structures, it would seem that the Freeview and Sky Freesat offerings would be likely to be sufficiently close demand-side substitutes to form part of the same product market.

A2.40 Further, taking into account data on the way in which services are bundled and priced and data on switching etc, it might be possible to construct a chain of substitution argument that links together Sky and cable with Freeview and Sky Freesat into a single market for digital retail TV services. Although these different services do not compete head-on across the board, there could be sufficient overlaps across different groups of customers for them to be considered to be part of the same (albeit differentiated) product market. This is particularly the case with the entry-level subscription packages offered by the pay-TV service providers.

A2.41 Furthermore, on the supply-side, the announcements by BT and BBC/ITV indicate that there is scope for supply-side substitution over the different distribution platforms. In particular both free-to-view and pay services can be provided over digital satellite and DSL technology.

A2.42 On the other hand, it is possible that once further data is available it may demonstrate that there are breaks in the chain of substitution and it might be possible to define more narrow markets, such as digital retail free-to-view services and digital retail pay-TV services. Ofcom also recognises that the broadcasting sector is in a state of transition and market definitions are likely to evolve over time.

A2.43 Further, the evidence of consumer switching behaviour and consumer views on the characteristics of the different retail TV services suggests that the extent of switching behaviour might be more limited (even though switching costs may not be a barrier to switching) and thus the relevant markets could be narrower in scope.

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[61] Decision of the Director General of Fair Trading: 'BSkyB Investigation: alleged infringement of the Chapter II prohibition' (17 December 2002).

A2.44 At this stage, Ofcom does not believe it is in a position to define the relevant market(s) for the provision of digital retail TV services but potential candidate markets are considered in its assessment of the impact on competition set out in Annex 3.

Channel markets

Demand-side substitution

A2.45 As detailed above, in the standard scheduled[62] television environment, with the exception of premium services, a viewer does not typically pay for content on a per programme or per channel basis and therefore there is no price as such. Therefore, there is a need to consider other product attributes which a hypothetical monopolist could manipulate. In these circumstances, one approach would be to consider the effect of a reduction in programme quality by a small but significant increment as a proxy for an increase in price. It can be argued that on commercial television advertisements represent a 'cost' to the viewer of watching television. Thus, an alternative formulation would be to consider how viewers might react if the number of adverts increased on a particular channel.

A2.46 In terms of considering the competitive constraints on different broadcasters, it is possible to start at the level of individual programmes and consider the extent to which different types of programming are substitutable. Given that the main terrestrial channels are general entertainment channels providing a broad range of programming, this would quickly lead to a multi-dimensional analysis in which different channels could be in competition with the main terrestrial channels at different times of the day[63]. However, given that programmes are arranged into channels and that the main metrics of aggregate viewer behaviour (share of audience, audience reach etc) are generally presented at a channel level, Ofcom is proposing to start its analysis by using the channel level as the focal product and to consider the competitive constraints on different channels rather than to sub-divide the analysis. More importantly, such distinctions would appear to be unnecessary in order to assess the competition concerns that have been raised.

A2.47 In order to consider the role of promotional activity, this analysis takes as its starting point competition between channels for viewers and starts by considering the competitive constraints on the main terrestrial channels, i.e. BBC1, BBC2, ITV1, Channel 4 and Five. It may be that the competitive incentives between channels differ. Given the BBC's public service broadcasting remit, its rationale for competing for viewers may differ from the commercial rationale faced by ITV plc, but that should not change the analysis of the scope for demand-side substitution[64].

[62] A distinction is made between scheduled television where the viewer is constrained to watching what is being broadcast at a point in time and 'on-demand' television where the viewer selects the programming that they want to watch.

[63] For instance, the main terrestrial broadcasters all provide sports programming in their schedules. This would tend to suggest that at certain times, and depending on the type of sports programming, they could be in competition with programming provided by specialist sports channels, if the audiences for sports channels tended to be comprised of sports fans in general rather than fans of specific sports.

[64] It should be noted that in order for two channels to be in competition with each other it is not necessary that 100% of viewers would switch between the two, only that a sufficient proportion of viewers would switch and render an attempt to reduce quality unprofitable.

A2.48 In order to assess the particular competition concerns that have been raised in relation to channels, there appear to be two main types of candidate markets to consider:

- narrow channel markets, such as terrestrial channels versus other digital channels or different genres of channels; or
- a single broad market in which all channels compete with each other for viewers.

Competition between terrestrial channels

A2.49 Given that a number of concerns that have been expressed about cross-promotion relate to the position of ITV1, we start by considering the competitive constraints on a terrestrial general entertainment channel, such as ITV1, in terms of competition for viewers. In order to assess how consumers make choices between different channels, we consider a range of measures, such as audience share (at an aggregate level and also in different types of TV homes), audience reach etc.

A2.50 Once a household has a television set then the cost of switching between the main terrestrial channels is negligible. The only issue then is one of availability, for example, not all households can receive the analogue signal for Five.

A2.51 Table A2.1 sets out data on audience share measured across all homes over the period 1998-2005. It should be made clear that the way in which the audience share data is presented is intended to provide an indication of what audiences are watching rather than pre-judging the definition of the relevant market. The ‘consumption’ of television programming is not like other products where consumption of one product would tend to preclude consumption of a competing product. In the context of television services, viewers can and do watch programmes across a range of channels within a normal week’s viewing.

Table A2.1: Channel audience share – all homes: 1998-2005

	1998	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
BBC1	29.5%	28.4%	27.2%	26.9%	26.2%	25.6%	24.7%	23.3%
BBC2	11.3%	10.8%	10.8%	11.1%	11.4%	11.0%	10.0%	9.4%
ITV1	31.7%	31.2%	29.3%	26.7%	24.1%	23.7%	22.8%	21.5%
C4	10.3%	10.3%	10.5%	10.0%	10.0%	9.6%	9.8%	9.7%
Five	4.3%	5.4%	5.7%	5.8%	6.3%	6.5%	6.6%	6.4%
Other	12.9%	14.0%	16.6%	19.6%	22.1%	23.6%	26.2%	29.6%

Source: BARB/The Communications Market 2005, Ofcom

A2.52 The data clearly shows the general increase in viewing of multi-channel television over time as the penetration of digital retail TV services has increased. This general trend has had an impact on all the terrestrial channels apart from Five.

A2.53 Given that viewers do not tend to confine their viewing to a single channel, this aggregate audience share data would tend to suggest that ITV1’s closest competitor for viewers is BBC1, followed by BBC2 and Channel 4. It should be noted that the data for Five would be affected by the fact that Five does not have universal coverage in analogue. The hypothesis that BBC1 is likely to be the main competitor to ITV1 for viewers is confirmed if we consider audience share by platform. Table A2.2 below indicates that even in digital homes the closest competitor to ITV1 would still appear to be BBC1.

Table A2.2: Channel share of audience by platform, 2005

	BBC1	**BBC2**	**ITV1**	**Channel4**	**Five**	**Other**
Terrestrial Only	32.7	15.3%	28.9%	14.0%	8.8%	0.3%
Digital Terrestrial only	24.9%	10.3%	21.7%	10.7%	7.8%	24.6%
Digital satellite only	16.6%	5.0%	16.5%	6.4%	3.8%	51.6%

Source: BARB/The Communications Market 2005, Ofcom

Note: Platform figures are based on individuals with access to the specified platform only. This excludes viewing by individuals with multi-platform access

A2.54 Table A2.2 clearly shows that, in 2005 the viewing shares achieved by the terrestrial broadcasters in DTT-only homes were consistently higher than in digital satellite-only home, and in some cases were up to as twice as high.

A2.55 Another measure of audience behaviour is audience reach data. This data sets out the proportion of the viewing population who watch at least fifteen minutes of each channel in an average week. It therefore gives an indication of the mix of viewing, i.e. whether channels achieve a relatively wide audience or whether they are restricted to a more narrow range of viewers.

Table A2.3: 15-minute weekly channel reach, all homes 1998-2005

	1998	**1999**	**2000**	**2001**	**2002**	**2003**	**2004**	**2005**
BBC1	88.4%	87.4%	85.9%	84.4%	81.9%	83.8%	82.3%	80.3%
BBC2	72.1%	70.3%	68.8%	67.5%	66.3%	67.4%	62.7%	59.6%
ITV1	86.9%	85.6%	83.0%	79.4%	77.7%	79.1%	76.8%	73.7%
C4	68.9%	68.2%	67.4%	62.7%	61.2%	62.0%	61.4%	62.5%
Five	33.0%	36.5%	38.3%	39.2%	40.5%	42.5%	43.6%	43.8%

Source: BARB/The Communications Market 2005, Ofcom

A2.56 The audience reach data would tend to confirm the idea that many viewers do take advantage of a range of different television channels over the course of a week – it is not the case that viewing is limited to one channel. Furthermore, it suggests that a sizeable majority of viewers will watch four of the five main terrestrial channels over the course of a single week.

A2.57 The audience share data on its own could be taken to indicate that the closest competitor to ITV1 was BBC1. It is the case that the overall structure of their schedules is broadly similar, i.e. in terms of being mass market, general entertainment services. However, if we were to consider a hypothetical monopolist for ITV1 and BBC1 together, the audience reach data would also indicate that viewers do not limit their viewing just to these two channels. For instance, 60% of viewers also watch BBC2 and C4 for at least 15 minutes each week. This would tend to suggest that, if a hypothetical monopolist attempted to reduce programme quality by a small but significant amount, then viewers could switch more of their viewing to BBC2 and Channel 4. In the first instance, this could be could be taken as an indication that the relevant market is broader than just ITV1 and BBC1 together, i.e. the availability of programming on BBC2 and Channel 4 could impose a competitive constraint on ITV1 and BBC1. Again, because of Five's limited coverage it is not clear the extent to which Five might be a close demand-side substitute for ITV1 and BBC1 but it might offer a close demand-side substitute for programming on BBC2 and Channel 4, forming a chain of substitution. If that were the case it is possible that all the terrestrial channels could be regarded as being part of the same market. This conclusion is independent of whether they are broadcast in analogue or digital.

Competition from other digital channels

A2.58 If we consider the situation in which there is a hypothetical monopolist of all the main terrestrial television channels, the relevant consideration is the extent to which the availability of other digital channels imposes a competitive constraint on the hypothetical monopolist, if the monopolist were to reduce the quality of programming on the main terrestrial channels. Given that not all homes are subscribers to multi-channel television, this means that there is a potential issue in terms of the extent to which the less than universal availability of other digital channels would exercise a competitive constraint on the viewing of the main terrestrial services.

A2.59 In terms of the data available on viewer behaviour, data on audience shares across all homes indicates that although there has been a decline in the viewing share for the main terrestrial channels, they still account for the majority of viewing. Table A2.1 above indicates that, together, the five main terrestrial channels account for just over 70% of all viewing in 2005.

A2.60 However, audience share data for all homes will be influenced by the fact that around 30% of households do not yet take a digital TV service. Therefore, there is a need to consider viewing shares according to platform. Table A2.2 set out audience share data by the different types of platforms. Even in homes which have access to digital satellite television (and therefore the greatest range of television channels), the combined viewing share of the main terrestrial channels still accounted for just under 50% of viewing in 2005. Table A2.2 above indicated that in 2005 the combined viewing share of the five main terrestrial channels is 75.4% in DTT homes and 49.5% in digital satellite homes.

A2.61 The pattern of audience share data would tend to suggest that there has been some shift away from the main terrestrial channels to other digital channels over time. This would in turn tend to suggest that other digital channels offer an alternative to the main terrestrial channels. This trend also might be expected to increase over time as digital penetration increases. However, what is not clear is the extent to which other digital channels are a sufficiently close demand-side substitute to exercise a competitive constraint, if there were to be a decrease in quality in the programming available on the main terrestrial channels.

A2.62 At the level of individual channels, the audience share data indicates that there remains a significant gap between the viewing shares of the five main channels and other digital channels. Table A2.4 below sets out audience share data for the top ten channels in multi-channel homes.

Table A2.4: Channel's audience share in all multi-channel homes, Oct-Dec. 2005 (those Channels with audience share >1.0%)

ITV1	19.51%}	
BBC 1	19.51%}	
BBC 2	6.74%}	
Channel 4	6.74%}	
Five	5.09%}	Total terrestrial = 57.6%
Sky Sports (Total – 6 channels)	3.39%}	
Sky Movies (Total – 13 channels)	2.57%}	
Sky One	1.85%}	Total Sky = 7.81%
ITV2	2.04%	
UKTV Gold (Total – 2 channels)	1.64%	
CBeebies	1.28%	
Living (Total – 2 channels)	1.13%	
E4	1.02%	
TOTAL:	72.50%	

Source: BARB/The Communications Market 2005, Ofcom

A2.63 The data would tend to suggest that in spite of the increasing significance of non-terrestrial channels in viewers' watching habits, very few individual non-terrestrial channels have broken through to account for a significant viewing share. Between October-December 2005, ITV2 was the only single channel other than the five main channels to achieve more than a 2% audience share in a multi-channel home.

A2.64 With the audience share data indicating that the five main terrestrial channels on their own still account for around 50% of audience share even in homes with digital satellite and with so many other digital channels having very low audience shares, it is not possible to conclude that there is a continuous chain of substitution between the terrestrial channels and other digital channels. Therefore, it is necessary to consider other sources of information about viewer preference/viewer behaviour.

Audience reach

A2.65 In terms of considering the average reach across a portfolio of channels, Table A2.5 below sets out a comparison of the average weekly and monthly reach data for the first six months of 2005.

Table A2.5: 15-minute average reach, (all individuals, Jan-June 2005 in multi-channel homes)

Channels	Average Weekly Reach (%)	Average Monthly Reach (%)
All BBC Channels	83.7%	95.5%
All ITV Channels	75.3%	91.9%
All Channel 4 Channels	61.6%	85.9%
All BSkyB Channels	45.8%	66.2%
Five	43.5%	72.1%
All UKTV Channels	31.1%	53.3%
All Discovery Channels	19.4%	35.1%
All Flextech Channels	24.7%	44.4%

Source: BARB

A2.66 Again this data tends to indicate the fact that over the course of a month there is a significant difference between the viewing of the main terrestrial broadcast channels and groups of other digital channels even in multi-channel homes. The other digital channels do not obtain the same reach as terrestrial channels.

Advertising markets

A2.67 In the context of the merger between Carlton Communications plc and Granada plc[65], the Competition Commission concluded that, for the purposes of the merger, there was a single market for television advertising. This would imply that the commercially funded terrestrial channels were in competition with the other digital channels for advertising revenue which could in turn suggest that these channels were also in competition for commercial impacts/viewers. As mentioned earlier television broadcasting markets can be characterised as 'two-sided' markets but here the focus is on the viewer side of the market.

A2.68 If we consider the position of the main terrestrial broadcasters in terms of television net advertising revenue ('NAR'), the leading position of the main terrestrial broadcasters compared to multi-channel services is also a useful indicator. A measure of the overall premium a channel can command for its advertising airtime is the extent to which its share of advertising revenue exceeds its share of commercial impacts.

[65] Competition Commission 'Carlton Communications Plc/Granada plc: a report on the proposed merger' (2003).

A2.69 In 2005, ITV accounted for just over 48% of all TV NAR with Channel 4 accounting for just over 21% and Five for just over 8%. Other digital channels together accounted for just under 22% of total TV NAR, with Sky channels accounting for just over half of this[66]. For the other digital channels, this represented an increase in share of NAR of around 11% over 2004, which would indicate that advertising on multi-channel television is becoming more significant. However, ITV1's share of commercial impacts was just over 40% and Channel 4's was just over 16% for 2004.

A2.70 The difference between the share of NAR and the share of impacts indicates that ITV1 and Channel 4 are still able to command a premium within the market for television advertising although the other data on advertising markets would tend to suggest that advertisers increasingly regard advertising on the other digital channels as a substitute for advertising on the commercial terrestrial channels.

Programming budgets

A2.71 Audience research consistently shows that viewers value UK-originated programming more highly than imported materials and repeats[67]. Digital channels provided more hours of original first-run programming than the five main channels in aggregate in 2004, although their proportion of total originations is significantly smaller than their proportion of total programming. The digital channels (excluding movies, music, shopping and games services) broadcast just under 80,000 hours of originations in 2004. Over the same period, the five main terrestrial channels broadcast around 21,000 hours of original network programming, the BBC digital channels accounted for a further 14,000 hours of programming and programmes for the nations and regions accounted for a further 15,000 hours[68].

A2.72 The main terrestrial channels tend to offer a broader range of programming than the other digital channels and even the general entertainment digital channels will tend to focus on a more limited range of programming than that offered by the main terrestrial channels.

A2.73 Despite broadcasting more original programming than the five main channels, the digital sector spends significantly less on its output. Total programme costs for UK broadcasters (excluding regional programming) reached £4.816bn in 2004. Of that total, the digital channels (excluding the BBC) accounted for £1.862bn (39% of the entire industry spend). However, two-thirds of that figure was spent by sports and film channels, reflecting the high cost of rights to those channels. Other digital channels spent significantly less in total (£658m) than either BBC1 (£858m) or ITV1 and GMTV1 (£842m), although this represents an increase in programme spend of 17% of digital channels' programme costs in 2003.

A2.74 This data indicates that the budgets for programming originated by the main terrestrial channels are significantly higher than that for other digital channels. This is likely to have implications for programme quality in terms of range, diversity of original content as well as possibly production values. The other digital channels tend to rely more heavily on acquired material and repeats compared to the main terrestrial channels. In addition, the main terrestrial broadcasters typically have specific regulatory requirements in terms of original production.

[66] Source: 'The Communications Market 2005'.
[67] Section 4.3.4, 'The Communications Market 2005'.
[68] Figure 4.17, 'The Communications Market 2005'.

A2.75 To the extent to which there is a general correlation between programme budgets and the quality of programming on screen, the difference in programme budgets could be taken to indicate that the main terrestrial channels could be regarded as offering higher quality programming compared to other digital channels which in turn would tend to suggest that other digital channels may not be sufficiently close demand-side substitutes to exercise a significant competitive constraint on the main terrestrial channels.

Supply–side substitution

A2.76 In terms of considering the scope for supply-side substitution, the relevant consideration is whether a broadcaster in a nearby market would be prompted to enter the market in relation to a decrease in programme quality in order to compete for viewers (and therefore advertising revenue).

A2.77 In relation to the main terrestrial channels, spectrum scarcity imposes an absolute barrier to entry; a digital channel could not reposition itself as an analogue terrestrial broadcaster because there is no analogue spectrum available. In a digital environment there may be more scope in terms of obtaining access to spectrum, such as satellite capacity.

A2.78 As discussed briefly above, although other digital channels such as Sky One or UK Gold offer general entertainment services, their programme budgets are significantly less than those of the main terrestrial broadcasters and their schedules make greater use of acquired material and repeats.

A2.79 If a broadcaster were to move away from a programme schedule which was based heavily on acquired material and repeats to one which was based around UK-originated material, there would inevitably be a certain lag between commissioning new material and that material being ready for transmission, although the extent of the lag would vary from genre to genre. For instance, in the case of factual documentaries it could well be possible for other broadcasters to acquire this type of programming or to commission original programming to be broadcast relatively quickly. However, it would be more complex to commission original drama. In general there would be a need to acquire the staff with the relevant expertise in commissioning across a range of different genres. In addition, there would be the need to adjust the way in which advertising was sold on the channel. It would be easier to orchestrate such a move over several years which is outside the time horizon usually adopted for a consideration of supply-side substitution.

Geographic market

A2.80 Ofcom considers that the relevant market is likely to be national in scope.

Initial position on channel market(s)

A2.81 Channels compete for viewers in the context of the different retail TV services being used to access channels. That is, other digital channels can only compete for viewers where a viewer is accessing multi-channel television by means of a digital retail TV service. The data set out above indicates that the viewing shares of the main terrestrial channels have been declining over time and that as the penetration of digital television increases, this decline is likely to continue.

A2.82 The data available does suggest that where viewers have a choice of a range of channels, they are increasingly choosing to view programming on channels other than the main terrestrial channels. However, very few individual digital channels account for a significant share of viewing, with the result that even in multi-channel homes the five main terrestrial channels still account for around half of all viewing. Comparing programme budgets also indicates that the quality of programming available on the terrestrial channels is likely to be higher than that on other digital services in terms of having a greater proportion of original UK commissions, fewer repeats and less imported programming.

A2.83 Taking into account the data on both audience share and audience reach and the fact that the proportion of households with access to digital TV is around 70%, it is not clear as to the extent to which multi-channel services exercise a significant competitive constraint on the main terrestrial channels in terms of competition for viewers. The data does suggest that there may still be an important distinction between the main terrestrial channels and other digital channels. It is possible that there could be chains of substitution in place, which would mean that other digital channels exercise a sufficient constraint on terrestrial channels, but it is not clear from the available data whether any such chains of substitution are continuous or whether they might break down at any point. Although the increasing fragmentation of television audiences would tend to suggest that terrestrial channels are in competition with other digital channels, other relevant indicators do not necessarily point in the same direction and this prevents us from concluding definitively that all channels are in competition in the same market for viewers on the basis of the evidence currently available. It is also the case that not all the different types of digital channels are likely to be substitutes for each other, for example, shopping channels and news channels etc.

A2.84 It should be noted that the data does indicate that the position of the terrestrial channels is in a state of flux as the penetration of digital television increases. It is therefore possible to speculate that if Ofcom were to adopt a more forward-looking approach and consider the market in 3-4 years time once the transition to digital switchover had begun, it might be possible to define broader channel markets in which a range of channel types might be in competition for viewers.

A2.85 For the purposes of assessing the likely impact of promotional activity on competition, it does not appear that the definition of the relevant market is a key factor because the conclusions of Ofcom’s assessment of the impact of promotional activities are the same in the case of both wide and narrow market definitions. Therefore, it is not necessary for Ofcom to reach definitive conclusions about the relevant channel markets.

Annex 3

Assessment of the impact on competition

A3.1 In considering the appropriate form of competition regulation, it is necessary to build on the market definition analysis developed in Annex 2 and examine competition in the relevant markets. This includes consideration of the role of promotional activity in the way in which channels compete with one another for viewers and also the effect on the way in which viewers make decisions about different digital retail TV services. The analysis considers the economic characteristics of promotional activity before moving on to consider the evidence from market research available to Ofcom. Finally, the extent to which promotional activity by the terrestrial broadcasters might have an adverse effect on fair and effective competition is then examined against a backdrop in which there are significant entry barriers in the supply of analogue terrestrial television.

The economic characteristics of promotional activity

A3.2 Where broadcasters are financed wholly or in part through advertising, they rely on attracting an audience and/or, in some cases, particular types of audience. Even where financed by other funding mechanisms, broadcasters ‘trail’ their programmes to potential audiences in an attempt to provide them with information about upcoming programmes so that viewers are better placed to make a judgement about whether a programme would be of interest to them. Similarly, broadcasters also provide information in terms of listings information and the ‘now and next’ facility on Electronic Programme Guides (‘EPGs’).

A3.3 Research carried out by Ofcom indicates that viewers value certain promotional activity in respect of programmes and derive a benefit from it. For example, they use promotions to plan their viewing or as a prompt to go deeper into programme subjects. This is set out in more detail below.

Use of promotional airtime

A3.4 For a broadcaster, the relevant cost of airtime is the opportunity cost of using airtime for one purpose instead of another. In the absence of regulation, the opportunity cost of airtime used for promotions would in theory be the foregone use of this airtime for programmes or advertising (both of which are sources of revenue; advertising directly through advertising revenues, and programmes indirectly via the generation of audiences).

A3.5 However, the actual cost of using airtime needs to be understood in the context of current restrictions governing the use of airtime. As set out in Section 2, RADA impose a maximum on the amount of advertising that can be shown in a given hour, and over the day[69]. In general, programme lengths combined with maximum advertising minutage typically do not fill an hour of airtime.

A3.6 Airtime used for promotions is generally not able to be used for anything else. Rather, promotional airtime is better seen as a flexible ‘buffer’ which essentially

[69] The two-sided nature of the advertising market would also tend to impose some natural constraints on the amount of advertising, whereby any amount over and above this would be ‘commercially excessive’, i.e. it could alienate viewers - reducing the size of audiences and with it advertising revenue. Whether this exactly coincides with the regulatory constraint is an empirical question.

amounts to the best use of 'dead' airtime. However, Ofcom is not suggesting that promotional airtime is without any benefit to broadcasters. The important point to note is that such airtime would not generally be used in place of higher yielding advertising, and that programme length is not adjusted with promotions in mind. Therefore, promotions can be seen as effectively having negligible opportunity cost; that is, the implicit price, is very low[70].

Promotions as a 'tool' of competition

A3.7 The role of promotional activity does differ across different broadcasters but in general terms promotions are one way in which broadcasters seek to compete with one another. They are a means by which broadcasters seek to inform their viewers of programming that might be of interest to them (on the same channel or on other channel(s) operated by the broadcaster); to provide inheritance from one programme to the next; and, in the case of the commercial broadcasters, to seek to attract or retain viewers within a 'space' controlled by the broadcaster to secure an audience which can be sold to advertisers.

A3.8 The incentives on the BBC might differ from those of the commercial broadcasters in that they do not sell advertising airtime, but the BBC describes promotional activity as: building awareness of BBC services; guiding users through the complex world of media services; and driving the impact of BBC services[71]. There is general agreement that as part of its role as a publicly funded broadcaster, it needs to retain scale and viewer impact. One way in which it can do this is by the promotion of the range of services that it offers[72].

A3.9 Against this background, it is perhaps more appropriate to describe promotions as a tool that broadcasters use. Given that they carry a very low opportunity cost with respect to advertising airtime and programming airtime for broadcasters, promotions are better analysed in terms of being an activity within a market rather than a market in their own right.

Evidence from market research

A3.10 Qualitative and quantitative research work carried out for Ofcom has indicated that promotional activity can have benefits for viewers[73]. Broadly speaking the research found that:

- Viewers use promotions extensively to help plan and shape their viewing choices
- Promotions stimulate choice between channels and programmes.
- Programme specific promotions, for programmes up to seven days ahead were seen as the most useful.

[70] Cross-promotions do, however, carry a direct cost in that the promotions need to be produced in the first place.
[71] BBC response to 'Review of the BBC's Royal Charter: A strong BBC, independent of government'.
[72] With reference to the BBC, the DCMS have stated "The Government believes that it is important that the BBC should continue to promote its services on-air so that the licence fee payers are aware of specific programmes and the breadth of the BBC's overall offering." ('A public service for all: the BBC in the digital age', BBC White Paper, March 2006).
[73] 'Television promotions – what the viewers think, a report of the key finding of a qualitative and quantative study' (6 December 2005).

- Cross-promotions between channels provoked mixed emotions. Multi-channel focus group respondents were particularly positive towards cross channel promotions.
- Digital-only content promotions led to frustration among analogue viewers.
- Nevertheless, there was evidence that this kind of promotion was encouraging digital switchover.

A3.11 In the qualitative research, everyone in the focus groups claimed that they had at some point changed channel (or wanted to) led by a promotion. Many viewers also described how promotions worked in tandem with listings to reinforce and illustrate earmarked viewing. The quantitative research also reinforced this finding as 61% of all viewers claimed that they often or sometimes used promotions to help them decide what to watch on television. The quantitative research also found that promotions were more likely to influence viewing choices in digital homes, where use of weekly listings guides is lower.

A3.12 The qualitative research found that there was an expectation now that major new prime-time programmes would be heavily trailed and the research showed evidence that promotions were helping to increase the diversity of viewing habits by leading viewers to programmes that they might otherwise have missed or passed over, both within and across channels.

A3.13 In terms of usefulness, same or next-day promotions were almost universally seen as useful practical reminders and post-programmes ‘same-time-next-week’ trailers were generally liked as reinforcement of content and time slots. 57% of respondents either agreed or strongly agreed with the statement that: *“I don’t find promotions or trailers for programmes that are more than a week away useful”.*

A3.14 In terms of cross-promotions, cross-channel promotions were broadly welcomed by the multi-channel focus group respondents in particular. Themed links to related programming were most appreciated (such as from one history programme to another). However, in analogue-only groups digital programming promotions (such as BBC4 programmes trailed on BBC1/2) were felt to be painful reminders to those who were frustrated by lack of access to digital television or knowledge about digital television. This finding was confirmed in the quantitative research where 55% of respondents either agreed or strongly agreed with the statement *“I’m irritated by promotions and trailers for programmes on digital channels that I cannot receive, for example E4, BBC3, ITV2 and Sky Sports.”*

A3.15 In spite of the negativity towards these promotions amongst many analogue only viewers, some of the participants in the qualitative research had been influenced sufficiently to consider switching to digital. This was confirmed in the quantitative research, where more than a third of digital viewers interviewed claimed that promotions for new channels had played a part in persuading them to switch.

The current level of promotional activity

A3.16 A separate piece of research was commissioned to:

- quantify the amount of promotional activity currently taking place across a selection of television channels;
- understand the split between self and cross-promotional activity; and

- understand in detail the type of self and cross-promotion taking place[74].

A3.17 The analysis showed that, over the sample period:

- The PSB channels aired fewer promotional spots than Sky One and Discovery. Within the PSB channels, BBC1 and BBC2 transmitted fewer spots than ITV1 and Channel 4.

- Promotional activity across all the channels in the sample accounted for an average of 3.7% of total output, with the terrestrial channels ranging from 2.2% (BBC2) to 3.2% (ITV1).

- 63% of all spots analysed were self-promotional sports and a third were cross-promotional. Within this total there were some stark differences. BBC, Sky and Discovery all aired more cross-promotional spots than ITV and Channel 4.

- Around a third of promotions on BBC1, BBC2, Sky One and Discovery were cross-promotional compared with 5% on ITV1 and 11% on Channel 4. In the case of ITV1, 90% of its promotional activity in the period analysed consisted of self-promotions.

A3.18 The analysis did recognise that the scale of cross-promotional activity could be related to the number of channels in a broadcaster's portfolio: the greater the number of channels the more likely that the broadcaster would make use of promotional airtime to promote its other services.

Markets affected by promotions

A3.19 In order to determine whether or not promotional activity could give rise to competition issues, it is necessary to consider the impact on competition in the relevant markets. As set out earlier, this involves consideration of the impact on competition to attract subscribers to digital retail TV services, the impact on competition between channels for viewers and the impact on competition in other markets.

Competition between digital retail TV services

A3.20 In considering the impact that promotional activity could have on competition between digital retail TV services the key issue is whether promotional activity has or could have a material adverse effect on competition.

A3.21 The qualitative research undertaken by Ofcom indicates that promotional activity does have a role to play in influencing decisions to switch to a digital retail TV service although it is only one of a range of factors which subscribers list as influencing their decisions. This would tend to suggest that promotional activity by broadcasters does have a role to play in terms of raising awareness of digital TV[75] among those viewers who have not yet switched to digital TV.

A3.22 Given that promotional activity could influence the decision to take up digital TV, it could have an impact on competition between different digital retail TV services if

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[74] 'Analysis of current promotional activity on television, a report of the key findings of a content analysis study' (6 December 2005).
[75] The BBC White Paper 2006 also states that "BBC promotion has also played an important role in driving take-up of digital TV and radio."

the terrestrial broadcasters chose to discriminate in favour of one particular digital retail TV service and targeted their promotional activity on that particular service. In order to assess the extent to which promotional activity could have an adverse impact on competition, it is relevant to consider the incentives of broadcasters when it comes to promoting different services.

A3.23 As set out above, around 70% of UK households have switched to digital television but that still leaves a significant minority that have still to make a decision. Furthermore, the current proposals are that the UK should be fully switched over to digital television by 2012, with the transition to digital switchover beginning in 2008. This means that those households which have yet to switch to digital TV will need to decide on a digital retail TV service in the next few years – this is thus a unique period in the development of the UK broadcasting sector. It also means that there is an important time dimension to considering the role of cross-promotion.

A3.24 The data on audience share of the different terrestrial channels across different digital retail TV services demonstrates that the audience share of the main terrestrial channels is higher in Freeview homes compared to other multi-channel homes. The fact that audience share is higher in Freeview homes than in other digital TV homes has important financial implications in terms of enabling the commercial terrestrial broadcasters to continue to deliver commercial impacts and thus to generate advertising revenue. That is, in the absence of rules about digital retail TV service/platform neutrality, it is expected that the commercial terrestrial broadcasters would have a financial incentive to promote Freeview/DTT over other services/platforms.

A3.25 In addition, ITV plc and Channel 4 are partners in the Digital 3&4 joint venture which is the multiplex operator for DTT Multiplex 2 which has given them an interest in the success of the DTT platform[76]. ITV plc[77] also acquired SDN, the commercial multiplex operator for Multiplex A in its own right. Given that, going forward, the value of capacity on Multiplex A, will be determined by the take-up of Freeview services, then ITV plc now has a stronger commercial incentive to discriminate in favour of Freeview services and the DTT platform, in the absence of any restrictions about digital retail TV service/platform neutrality.

A3.26 Furthermore, the BBC, in order to maintain high viewing shares, as a shareholder in the Freeview consortium and as the multiplex operator for two of the six DTT multiplexes, also has incentives to promote Freeview and DTT over other digital retail TV services and platforms. The BBC's motivations are obviously different from those of the commercial terrestrial broadcasters. It is required to fulfil a specified public service remit, but given its investment in the Freeview service it is the case that, in the absence of regulation, the BBC would have incentives to promote the DTT platform and the Freeview service compared to other platforms/services. Thus the BBC might cross-promote DTT and the Freeview service for reasons which differ from those of the commercial terrestrial broadcasters, but there would be the same net effect.

A3.27 Going forward it is also worth noting that the BBC and ITV's incentives would be aligned to promote the BBC/ITV Freesat proposition over the Sky Freesat proposition as well.

[76] It has been announced that ITV plc and Channel 4 have recently joined the Freeview consortium that is responsible for the marketing of Freeview.
[77] The acquisition of SDN by ITV plc took place on 27 April 2005.

A3.28 In these circumstances, a terrestrial broadcaster promoting the availability of Freeview or DTT rather than, for example, ntl or cable, could have an impact on competition. Furthermore, it is the case that the incentives of all the terrestrial broadcasters are aligned in respect of Freeview and DTT, i.e. BBC1, BBC2, ITV1, Channel 4 and Five all have incentives to promote Freeview and DTT.

A3.29 Cross-promotional activity on the part of an individual terrestrial broadcaster in its own right might not give rise to particular competition issues but where the conduct of all the terrestrial broadcasters (commercial and licence-fee funded) is aligned in a particular way then there could be an adverse impact on competition in the affected markets[78]. Furthermore, it is recognised that there need not be agreements or understandings between firms for there to be an effect on competition[79].

A3.30 It is this alignment of incentives on the part of all the terrestrial broadcasters, combined with the specific time dimension of digital switchover, that could give rise to a material impact on competition in the absence of regulation.

A3.31 In Annex 2, the issue of the definition of the relevant market(s) was left open. The potential for such promotional activity to have an adverse impact on competition is present whether there are narrow product markets, such as a digital retail free-to-view TV market and a digital retail pay-TV services market, or a broader market, such as a single digital retail TV services market. In light of the nature of the competition concerns which have been identified, Ofcom considers that it is appropriate to adopt a precautionary approach, which for the purposes of assessing leverage in this context means consideration of the impact on competition in the broad market, i.e. a product market in which the all digital retail TV services are in competition with one another.

Competition between channels

A3.32 In terms of competition between channels, promotional activity with a very low opportunity cost is still present as a tool of competition. However, it is more difficult to characterise promotional activity which seeks to promote upcoming programmes on the same channel or another channel as having a material effect on competition.

A3.33 When faced with a particular level of promotional activity by a rival broadcaster, competing channels could choose to respond by either doing nothing or seeking to respond to the promotional activity in some way[80]. To the extent that promotions are effective in inducing viewers to consume the promoted products at the expense of those of their rivals, then the first option is likely to result in the loss of audiences; that is, all else being equal, the rival channel might expect to lose more audience share than otherwise to the promoted channel.

A3.34 The second option for a firm faced with the promotion of a rival's product is to attempt to neutralise the adverse effect on its own business by engaging in offsetting promotional activity. All channels have the ability to promote programming on their own channel as a means of seeking to retain or attract audiences for

[78] For instance, the OFT guideline 'Market investigation references' (OFT 511, April 2006) states that "…forms of [firms'] conduct are often pro-competitive but they may have effects, that, especially when combined with other market features blunt the competitive process, for example by adding to entry barriers." (paragraph 6.5).

[79] The OFT guideline 'Market Investigation references' (OFT 511, April 2006): "Competition can be muted in oligopolistic markets without any coordination of firms' decisions." (paragraph 6.8).

[80] A key factor here is that the choice to respond or not, is endogenous to the firm, i.e. it is determined by the firm itself.

upcoming programmes. Equally channels which are part of a group of channels also have the ability to cross-promote each other's services. However, unlike the concern in relation to digital retail TV services, the incentives of the broadcasters in relation to channel promotions are not aligned. Each channel or group of channels would be focused on directing viewers to their own services and competing with each other for viewers. In this situation the issue of whether promotional activity could be expected to have a material effect on competition is more complex to determine.

A3.35 While recognising that some channels do currently enjoy an advantage in terms of higher audience share that stems from their historical position, it is difficult to discern the level of promotional activity which might be expected to have an anti-competitive effect compared to the level of promotional activity which would be considered pro-competitive.

A3.36 Channels which are part of a portfolio of channels obviously have greater opportunities to cross-promote services from within that group of channels. This applies not just to the main terrestrial broadcasters, for example, ITV1 cross-promoting ITV2 and Channel 4 cross-promoting programming on E4, but also to groups of digital channels, such as Sky One cross-promoting programming on a Sky Sports channels or promotions within the UKTV suite of channels. That is not to say that channels such as Sky One have access to an equivalent size of audience to ITV1 and so there is parity in the ability to cross-promote but not necessarily in terms of audience impact. Nevertheless, it is the case that channels which are part of families of channels are able to offset the impact of channel promotions by the main terrestrial broadcasters.

A3.37 Individual channel share is not necessarily the only, or best, way of tracking broadcasters' relative presence in the multi-channel arena. The performance of individual channels becomes less important than the share of audience achieved by a broadcaster's suite of channels or its portfolio share.

A3.38 As digital penetration increases and a much wider range of channels is provided to an increasing number of viewers, the combined share of the public service broadcasters in all homes has declined. However, their digital channels have offset some of those declines and helped them to maintain their total share at a higher level than would have been possible with only one or two channels. In total, channels operated by the BBC, ITV, Channel 4 and Five together accounted for 76.8% of viewing in 2005, down from 77.7% in 2004 and 81.8% back in 2001.

Table A3.2: Major Broadcasters' portfolio audience share in all homes (2001-2005)

	2001	**2002**	**2003**	**2004**	**2005**
BBC	38.8%	38.8%	38.3%	36.6%	35.2%
ITV	26.9%	24.8%	24.7%	24.1%	24.2%
Channel 4	10.3%	10.6%	10.1%	10.4%	11.0%
Five	5.8%	6.3%	6.5%	6.6%	6.4%

Source: BARB/The Communications Market 2005.

A3.39 Since 2002, ITV1's share has declined steadily but ITV2's share has grown and ITV3 was able to deliver 0.1% audience share in 2004 despite only launching in 2004. Overall, the combined audience share of ITV's channels has declined more gradually than that of the main channel.

A3.40 Analysis by Ofcom would tend to suggest that the initial success of ITV3 can be attributed to factors such as the strength of its schedule, based as it was on Granada Productions' back catalogue, and its presence on the Freeview platform, rather than cross-promotion from the main ITV channel. This might suggest that cross-promotion from a 'parent' terrestrial channel is not the unique factor in determining audience share and that other factors, such as branding, quality of programming and platform availability, could have at least as important a role to play in terms of attracting and retaining an audience.

A3.41 It is also the case that other digital channels are proficient at exploiting cross-promotional activities and marketing themselves. The Sky channels are the most watched of the non-terrestrial digital channels. Ofcom's analysis of the extent of current promotional activity showed that the Sky channels made considerable use of promotions with Sky One having the highest number of promotional spots of those channels surveyed and also the longest duration promotions. The Sky Sports channels in particular made considerable use of cross-promotions with 60-90% of all promotions in the sample period being classified as cross-promotional.

A3.42 As audience fragmentation continues and the audience share of the terrestrial channels declines, so the relative advantage that the main terrestrial broadcasters enjoy from being able to cross-promote their digital services from the main channel will be eroded, and going forward, as more homes switch to digital, the scale of the advantage will continue to decline further.

A3.43 In considering what might happen in the absence of regulation, one would assume that promotional activity would tend to be self-regulating in nature. Firstly, there is a cost to cross-promotion in the sense that a broadcaster could use that promotional airtime instead to self-promote. Secondly, if broadcasters engage in too great a level of promotional activity, there is a risk that viewers will get irritated by the promotions and churn away from the channels altogether, negating the primary purpose of the promotion.

A3.44 The data from Ofcom's content analysis study of promotional activity indicated that the proportion of cross-promotional activity carried out by ITV over the sample period in early 2005 was low compared to other broadcasters[81]. Although the current rules require ITV to maintain digital retail TV services/platform neutrality in respect of their promotional activity, ITV are not constrained from promoting their digital channels, except in terms of promoting their channels excessively. This would tend to indicate that the decision by ITV in respect of cross-promotional activity is one taken for commercial reasons rather than driven by regulation.

A3.45 In terms of considering the exclusionary effect of promotional activity, it is noted that with the move to digital television since 1998, there has been a proliferation of television channels. This could be taken as an indication that the ability of the main terrestrial channels to cross-promote their own digital services has not proved an absolute barrier to entry for other digital channels.

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[81] The sample period was chosen to avoid distortions caused by specific programming events such as 'I'm a Celebrity …' and 'Big Brother' in order to get a picture of the 'steady-state' level of promotional activity.

A3.46 The above discussion suggests that it is difficult to describe channel promotions as being *per se* anti-competitive, even when carried out by broadcasters which enjoy a first mover advantage in terms of access to audiences. The difference in the case of digital retail TV services, is that, while cross-promotion by a terrestrial broadcaster has the effect of raising rivals' costs, it is also combined with an alignment of incentives across all the main terrestrial broadcasters to promote one service or platform over others. It is the alignment of incentives, combined with the move to digital switchover, that creates the potential distortion of competition. This combination of factors is absent in the case of channel promotions.

Competition in other broadcasting markets

A3.47 In this context, a concern has been expressed by the commercial broadcasters in relation to cross-promotion of radio services by the BBC on its television channels.

A3.48 The Communications Act relaxed many of the media cross-ownership rules which had restricted the ability of a Channel 3 licensee to control commercial radio stations which broadcast in the areas served by that licensee. There is therefore the potential for a Channel 3 licensee to expand the range of services that it cross-promotes to include services on radio stations in which it has an ownership interest. In such a situation, the competition impact would be felt in, for example, the geographic market in which the radio station competed for listeners.

A3.49 In many respects the issue here is the same as that for competition between channels in that the central competition issue is one of leverage from one market to another. Again, a key issue is likely to be that of materiality and the absence of an alignment of incentives across all the main terrestrial broadcasters.

A3.50 As in the case of the impact of promotional activity on competition between channels, in considering what might happen in the absence of regulation, it is likely that there would be a strong element of self-regulation in respect of the amount of airtime given over to the promotion of other broadcasting-related products or services. Again, there would be the issue that this airtime could be used for self-promotion, and concerns about excessive promotion leading to viewer irritation in that excessive promotion would alienate viewers and lead to them switching away altogether.

A3.51 The above discussion suggests that it is difficult to describe promotions for services in other broadcasting markets as being *per se* anti-competitive. Again, the alignment of incentives is absent and therefore there is unlikely to be a material impact on competition from such promotions.

Annex 4

Supporting data for competition analysis

Structured Content Package Offerings[82]

Table A4.1: DTT Packages

Package	Features	Prices (per month)
Freeview	Over 30 channels including: BBC1-4, BBC News 24, BBC Parliament, Cbeebies, CBBC, ITV1-4, ITV Play, CITV, Channel 4, E4, E4+1, More 4, Five, Sky Three, UKTV History, ftn, the hits, TMF, Sky News, Sky Sports News, QVC, UKTV Bright Ideas, price-drop.tv, bid.tv, teachers' TV, Ideal World, Community Channel. Some channels only available in certain parts of the UK. Some interactive services. Digital radio.	Free
Top Up TV	UK TV Gold, TCM, UK TV Style, Discovery Channel, Discovery Real Time, UK TV Food, Cartoon Network, Boomerang, Bloomberg Television, British Eurosport, Toonami.	£7.99 (Certain premium channels can also be purchased as well)

Table A4.2: Freesat Packages

Package	Features	Prices (per month)
Sky Freesat	Over 120 channels including the main free to view services (i.e. the main channels operated by the terrestrial broadcasters, plus shopping channels plus news services). Also some content sold as pay services by subscription service providers (e.g. God Channel, B4U Music). Also 80 digital radio channels.	Free

[82] The information provided in Annex 4 on the different channel packages and prices was obtained by Ofcom during April 2006 from the websites of the relevant retail TV service providers.

Table A4.3: Basic Channel Packages offered by ntl/Telewest[83]

Package	Characteristics			£ pcm[84]
Telewest Starter	BBC NEWS 24 BBC1 BBC2 BBC THREE BBC FOUR BBC Parliament CBeebies CBBC Channel ITV1 ITV2	ITV3 Channel 4 Five UKTV Bright Ideas UKTV Gold UKTV History UKTV Style E4 Sky Sports News Sky News	Sky One CNN EuroNews LIVINGtv Challenge The Music Factory The Hits Attheraces[85]	5.50
ntl Select pack	37 Channels: Same as Telewest Starter Pack plus E4+1, Ideal World, Men and Motors, TMF, Sky One Mix, Channel ntl, Front Row. No Sky Sports News, Attheraces, UKTV Style.			5.50
Telewest Essential	75 Channels: Telewest starter + all UKTV channels, British Eurosport, British Eurosport 2, Discovery Channel, Discovery Realtime, Discovery Home & Health, Boomerang, Cartoon Network, CNBC, Nicktoons, Paramount Comedy Sci-Fi, The Box, Trouble, VH-1 Classic, Animal Planet, Bravo, Extreme Sports, Jetix, LIVINGtv +1, MTV Hits, Bravo +1, God channel, Trouble Reload.			17.50
ntl Base pack	57 Channels: compared to Telewest Essential - only 3 UKTV channels (vs 13 on Telewest), no Sky Sports News, no Discovery Realtime, Nicktoons, Paramount Comedy, Sci-Fi, Animal Planet, MTV Hits amongst others. n.a. on Telewest Essential - has Sky Travel, E4+1, Bloomberg, Ideal World, Men and Motors, TMF, Sky One Mix, Channel ntl, Front Row, MTV, Discovery travel & Living and a number of other channels[86].			11
Telewest Supreme	113 Channels: Telewest Essential plus UKTV Style Gardens, E4+1, Bloomberg, Toonami, Men and Motors, TCM, MTV, MTV 2, MTV Base, MTV Dance, National Geographic, Nick Junior,			17.50

[83] Advertised prices may vary slightly due to different treatment of payment methods in advertised prices, i.e. we have attempted to eliminate discounts for paying by direct debit where possible.
[84] All prices not including compulsory line rental of an ntl or Telewest telephone line for 10.50 pcm.
[85] Plus: more 4, abc1, bid.tv, FTN, Price-drop.tv, QVC, Teachers TV, Community Channel, Hallmark Channel, Best Direct, E4+1,CiTV, CNN, Gems TV, Quiz TV, South Asia World, Speed Action TV.
[86] Screenshop, Front Row Preview Channel, Stop & Shop, Thane Direct, Thomas Cook TV, TMC, TV Travel Shop, TV Travel Shop 2, vh1, Yes 661.

	Nick Replay, Nickelodeon, Paramount Comedy 2, History Channel, TV 5, Adventure One, Discovery Channel +1, Discovery Travel and Living, Discovery Civilisations, Discovery Kids, Discovery Science, Discovery Wings, Jetix +1, Smash Hits, Kerrang!, Kiss Magic, Deutsche Welle, Fashion TV, Leonardo, LIVINGtv 2, Performance, Cartoon Network +1 and a number of other channels[87].	
ntl Family pack	113 Channels: compared to Telewest Supreme - 7 UKTV Channels less, no Sky Sports news, EuroNews, Bravo +1, The Music Factory, Fashion TV, Cartoon Network +1, LIVINGtv 2 and others[88]. n.a. on Telewest Supreme - has Sky Travel, Front Row, National Geographic +1, The Biography Channel, The History Channel +1, Classic FM TV amongst others[89].	19.50

Source: http://www.telewest.co.uk/websales/service.do?id=1; http://www.home.ntl.com/icat/television&source=ntlcomtv_link; both viewed 19 October 2005.

Table A4.4: Sky Packages

The main free to view channels are available in conjunction with the following packages:

Package	**Channels included (not exhaustive)**
Variety Mix	Sky One, UKTV Gold, UKTV Drama, The Comedy Channel, E4, Living TV.
Kids Mix	Discovery Kids, Cartoon Network, Boomerang, Nick Jr, Jetix, Nickelodeon.
Knowledge Mix	UKTV Documentary, Discovery, The History Channel, The Biography Channel, National Geographic Channel.
Style & Culture Mix	Sky Travel, UKTV Style, Discovery Real Time, Discovery Travel & Living.
Music Mix	the Amp, MTV, VH-1, the hits, flaunt.
News & Event Mix	Sky News, Sky Sports News, Fox News, CNBC, British Eurosport.

[87] VH1, Q, Reality TV, VH 1 Classic, VH-2, Boomerang, CITV, CNBC,CNN, Disney Channel, Gems TV, Player, Playhouse Disney, Quiz TV, South Asia World, Speed Action TV, The Horror Channel, The Biography Channel.
[88] Leonardo, VH-2, Nick Replay, Performance, TV Warehouse, Best Direct, God channel, Trouble Reload, Deutsche Welle.
[89] Screenshop, Front Row Preview Channel, Stop & Shop, Thane Direct, Thomas Cook TV, TV Travel Shop, TV Travel Shop 2, Yes 661, Scuzz, The Amp, flaunt, FX 289.

Subscribers can choose different combinations of these packages:

Package	**Feature**	**Price (per month)**
2 ‘Entertainment mixes’	2 choices from: Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix	£15
4 ‘Entertainment mixes’	4 choices from: Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix	£18
6 ‘Entertainment mixes’	Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix	£21
2 ‘Entertainment mixes’ plus Single ‘Premium Mix’	2 choices from: Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix 1 Choice of : Movies Mix, Sports Mix	£34
4 ‘Entertainment mixes’ plus Single ‘Premium Mix’	4 choices from: Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix 1 Choice of : Movies Mix, Sports Mix	£35
6 ‘Entertainment mixes’ plus Single ‘Premium Mix’	Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix 1 Choice of : Movies Mix, Sports Mix	£36
2 ‘Entertainment mixes’ plus Both ‘Premium Mixes’	2 choices from: Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix Movies Mix, Sports Mix	£40.50
4 ‘Entertainment mixes’ plus Both ‘Premium Mixes’	4 choices from: Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix Movies Mix, Sports Mix	£41.50
6 ‘Entertainment mixes’ plus Both ‘Premium Mixes’	Variety Mix, Kids Mix, Knowledge Mix, Style and Culture Mix, Music Mix, News & Events Mix	£42.50

Table A4.5: Summary of Packages offered by HomeChoice.

Package name	**Price**
HomeChoice Base 35 channels, 2MB, Freetime telephony (Free UK evening and weekend calls)	£17.99
HomeChoice Base 35 channels, 4MB, Freetime telephony (Free UK evening and weekend calls)	£22.99
HomeChoice Base 35 channels, up to 8MB, Freetime telephony (Free UK evening and weekend calls)	£27.99
HomeChoice Big 60 channels, 2MB, Freetime telephony (Free UK evening and weekend calls)	£27.99
HomeChoice Big 60 channels, 4MB, Freetime telephony (Free UK evening and weekend calls)	£32.99
HomeChoice Big 60 channels, up to 8MB, Freetime telephony (Free UK evening and weekend calls)	£37.99
HomeChoice Max 85 channels, 2MB, Freetime telephony (Free UK evening and weekend calls)	£37.99
HomeChoice Max 85 channels, 4MB, Freetime telephony (Free UK evening and weekend calls)	£42.99
HomeChoice Max 85 channels, up to 8MB, Freetime telephony (Free UK evening and weekend calls)	£47.99

Take-up of digital TV

Table 4.6 below presents key reasons offered by consumers as to the reasons why they chose a particular retail TV service.

Table 4.6: Reasons for platform choice[90]

Satellite/BSkyB (Base: 780)	Digital cable (Base: 306)	Analogue cable (Base: 96*)	Freeview (Base: 503)	Via broadband/ DSL (Base: 88*)
Better quality than cable (13%)	Cheapest method (14%)	Cheapest method (20%)	Cheapest method (21%)	Cheapest method (10%)
Cheapest method (11%)	Bundled with phone/internet (12%)	Bundled with phone/internet (5%)	Given Freeview box (12%)	Was what I wanted[91] (7%)
Additional channels (10%)	Already in home (8%)		Extra channels (10%)	Bundled with phone/internet (7%)
Only method in area (10%)	Only method in area (5%)		Cheaper than sky/cable on all TVs (9%)	
Already in home (7%)	Better than analogue cable (5%)		Better quality than cable (5%)	
For sports channels (5%)				
**Other (13%)	**Other (23%)	**Other (33%)	**Other (14%)	**Other (22%)
Don't know (35%)	Don't know (36%)	Don't know (43%)	Don't know (31%)	Don't know (57%)

** base less than 100 so treat as indicative only*
*** All other reasons mentioned by less than 5% of respondents each*

[90] 2110 UK adults with landline, ICM Research, 23-24 September 2005
[91] Responses such as "because we wanted it", "it was perfect", "my husband likes it".

Annex 5

Competition Legal Framework

Ofcom's duty to review the competition aspects of the cross-promotion code

A5.1 Under section 318 of the Communications Act 2003 ('the Communications Act'), Ofcom has a duty to review *"every code made or approved by them under or for the purposes of a broadcasting provision"* in so far as it has an effect for a competition purpose. A provision will have effect for a competition purpose if *"its only or main purpose is to secure that the holder of a Broadcasting Act licence does not enter into or maintain arrangements or engage in a practice which Ofcom consider, or would consider, to be prejudicial to fair and effective competition."*

A5.2 The competition aspects of the cross-promotion code were put in place to protect fair and effective competition and therefore Ofcom has a duty to review them in accordance with section 318.

Fair and effective competition condition

A5.3 The fair and effective competition condition is contained in all Broadcasting Act licences. It requires the following:

> *"(1) The Licensee shall:*
>
> *(a) not enter into or maintain any arrangement, or engage in any practice, which is prejudicial to fair and effective competition in the provision of licensed services or of connected services; and*
>
> *(b) comply with any code or guidance for the time being approved by Ofcom for the purpose of ensuring fair and effective competition in the provision of licensed services or of connected services;…"*

A5.4 Ofcom is able to enforce this condition on an *ex post* basis. However, it is also able to act in anticipation that an agreement or a course of conduct could be prejudicial to fair and effective competition and set a code or provide guidance.

Code under the fair and effective competition condition

A5.5 Section 317 of the Communications Act, applies to Ofcom's powers to approve codes that are set for the purposes of a Broadcasting Act licence condition. Where Ofcom uses its powers for a competition purpose, section 317 requires Ofcom to first consider whether the Competition Act 1998 is a more appropriate way to deal with the relevant issues and also requires Ofcom to publish a notification of its decision. A 'competition purpose' is defined in the same way as for section 318 set out above.