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# Review of competition rules in the EPG Code

## Statement

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Review of competition rules in the EPG Code - Welsh overview

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**STATEMENT:**

Publication Date: 30 November 2020

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# 1. Overview

**This document sets out our decision to retain competition rules on electronic programme guide (EPG) providers to continue to support fair and effective competition.**

On-screen TV guides, or EPGs, enable viewers to find and select TV programmes on broadcast or 'linear' TV. Our EPG Code sets rules on EPG providers, including rules to protect fair and effective competition.

The Digital Economy Act 2017 introduced a requirement on us to review the EPG Code before 1 December 2020. We issued provisional conclusions of our review in August 2020. This document presents the final conclusions of our review.

## **What we have decided – in brief**

**Linear TV is still widely watched and valued, and EPGs are an important way to access this content.** There has been a huge change in how we engage with media since the EPG Code was issued in 2004. People are increasingly going online to access a variety of content and creating their own. Nonetheless, linear TV is still widely watched, and EPGs remain an important way to find linear TV programmes.

**Competition rules are still required.** In our view, it remains necessary to have rules in place on licensed EPG providers to engage with channel providers on fair, reasonable and non-discriminatory terms. This is to ensure that licensees do not enter into or maintain arrangements or engage in a practice which we would consider to be prejudicial to fair and effective competition. Stakeholders agreed with our provisional findings on the continued need for competition rules. We conclude it is more appropriate to have these rules rather than to solely rely on our powers under the Competition Act 1998.

**The existing rules are working well.** We have concluded that minor amendments to the existing rules are appropriate, which stakeholders broadly support. We now additionally require that consultations by EPG providers follow a transparent process and include reasonable timeframes both for channel providers to comment and for implementation of any changes to listings. Our decisions take immediate effect.

## 2. Background

2.1 In this section we summarise relevant background to this review including: linear TV and other content; the importance of EPGs in accessing linear TV content; the EPG providers; and details of this review.

### **Linear TV is still widely watched and highly valued, but its use is falling**

2.2 The last ten years have seen unprecedented change in the media sector, enabled by high speed internet access and connected devices. This enhanced connectivity has allowed new services to emerge, which are transforming the way we engage with media content. Consumers can now share videos through services such as YouTube and TikTok and watch TV shows whenever they want through on-demand services. Video on-demand includes Subscription Video-on-Demand (SVoD) services such as Netflix or Disney+,<sup>1</sup> as well as Broadcaster Video-on-Demand (BVoD). BVoD refers to on-demand services provided by broadcasters, such as the BBC iPlayer or the ITV Hub.<sup>2</sup>

2.3 People are increasingly going online to access a variety of different types of content such as social media, online news and also online video content.<sup>3</sup> In Q3 2020, 60% of UK homes had a subscription to at least one SVoD service (up from 53% in Q1 2020).<sup>4</sup>

2.4 In contrast, time spent watching linear TV has been falling over the last few years. In 2019, individuals spent on average 3 hours, 3 minutes watching linear TV (measured as content which is viewed at the time of broadcast or within seven days afterwards on a TV set), down from an average of 3 hours, 12 minutes in 2018 and 3 hours, 41 minutes in 2014.<sup>5</sup>

2.5 However, average individual consumption of linear TV remains significant and its ongoing importance to the nation was shown by the high peak levels of viewing achieved during the coronavirus (Covid-19) pandemic for programmes providing information of national significance. For instance, in the week commencing 23 March 2020, when the Prime Minister addressed the nation to announce the lockdown, average daily viewing of broadcast television peaked at 3 hours 46 minutes, its highest level since the last week of 2018.<sup>6</sup> Further, this form of viewing is likely to remain

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<sup>1</sup> Under paid SVoD, consumers pay a flat fee, usually on a monthly or annual basis, to stream and/or download content.

<sup>2</sup> BVoD services include BBC iPlayer, ITV Hub, All4, My5 and Sky Go. These services may offer more than just broadcast catch-up viewing and may be free to watch, advertising funded or paid for.

<sup>3</sup> In September 2019 the average time spent online each day by adults aged 18+ was 3 hours 29 minutes, up from 3 hours 11 minutes in 2018. Source: Comscore MMX Multi-Platform, Total Internet, Adults 18+, Sep 2018 & 2019, UK. Note: Does not include TV set use.

<sup>4</sup> Source: BARB Establishment Survey.

<sup>5</sup> Source: BARB. Individuals (age 4+).

<sup>6</sup> BARB. Figures quoted are for BARB standard seven-day consolidated viewing for individuals (aged 4+) unless otherwise stated. This includes viewing of programmes at the time of broadcast (live), recordings (such as on digital

particularly important for people who do not go online; this group includes some older viewers for whom linear TV remains a vital source of information and entertainment.<sup>7</sup>

- 2.6 Linear TV is therefore still an important way for broadcasters to reach their audiences, who consequently compete against each other for audiences and, for commercial channels, for advertising revenues.

## EPGs are an important way to find content

- 2.7 EPGs consist of the listing and/or promotion of television and radio channels and programmes together with a facility for obtaining access to those programmes.<sup>8</sup> The content of the EPG is carried in a data stream which is created by EPG providers and distributed via digital terrestrial television (DTT), satellite, cable TV, internet protocol (IP), or a combination of these methods. EPG data identifies content that is available either through a single delivery technology or, increasingly, a hybrid of technologies, including IP streaming.
- 2.8 EPG providers control the policy that determines a channel's listing position (i.e. the channel number) and the EPG's presentation (design, functionality and accessibility features). Each EPG operator administers its own EPG, with channels typically ranked in ascending numerical order. The allocation of channels to particular slots on the EPG may take into consideration factors such as grouping channels by genre, ownership or whether a channel is a public service channel and requires prominence.<sup>9</sup> Many EPGs enable viewers to scroll through individual channels, browse by page or filter results by genre, e.g. news. Consumers can scroll through EPGs to watch programmes live, see what is coming up next and, in some cases, what has already been shown.
- 2.9 For those wishing to view linear TV content, a platform's EPG remains an important way to find the channels and content that they want to watch.<sup>10</sup> The design of the EPGs is an important facilitator for viewers to search the content available. While many viewers may know the number of their favourite channels and input these directly, use of the

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video recorders (DVRs)), and through catch-up player services (e.g. apps on smart TVs) up to seven days after first broadcast (known as time-shifted viewing). Broadcast TV includes viewing via devices attached to the TV set, such as set-top boxes and streaming devices.

<sup>7</sup> Thirteen per cent of adults aged 16+ never go online, a figure that has been consistent since 2014. Older adults and those in DE households (where the chief income earner is a semi-skilled or unskilled manual worker, state pensioner, casual and lowest grade worker or unemployed with state benefits only) are more likely than average to be non-internet users (27% of DE adults, 30% of 65-74s and 51% of adults aged 75+). Working-age adults (16-64s) in DE households are more than four times as likely as those in non-DE households to not use the internet (13% vs. 3%), showing that differences in non-use of the internet are driven both by age and by socio-economic group. Source: Adults' Media Literacy Tracker 2019.

<sup>8</sup> Radio channels are also accessed through EPGs. Based on the most recent results 2020 Q1, 4% of radio listening was through digital TV (Source: RAJAR; 3-month weight).

<sup>9</sup> The EPG Code contains provisions relating to prominence or the easy discovery of public service broadcasting (PSB). More details on the PSB prominence rules can be found on the Ofcom website here: [Review of prominence for public service broadcasting](#) by Ofcom. 4 July 2019.

<sup>10</sup> BARB's Lifestyle Insights questionnaire shows that using the EPG is the most common answer to "how do you find out what's on TV" for all age groups, with the exception of over 65s, who are more likely to say that they use newspaper supplements. [EPG Prominence: A report on the discoverability of PSB and local TV services](#), by Ofcom. paragraph 3.33.

EPG to search for linear content is likely to remain an important way for many viewers to find content.<sup>11</sup>

## Higher EPG slots are more prominent and encourage increased viewing

- 2.10 Design of the EPG and the way viewers interact with the EPG, for instance, by scrolling around the EPG list, appears to exert a significant influence on the content that they ultimately view. Our recent review of the prominence provisions of the EPG Code considered the relationship between the viewing of channels and their position on the EPG.<sup>12</sup> We found that channels in higher EPG slots tend to get greater viewing figures,<sup>13</sup> although we noted that “EPG position is not the sole determinant of how much viewing a channel attracts as factors such as quality of content, brand value and marketing may also affect viewing”.<sup>14</sup>
- 2.11 All TV channels want their programmes to be seen by as many viewers as possible. For the commercial channels, higher levels of viewing tend to positively affect the amount of revenue they can raise through advertising, sponsorship etc. For the BBC, which is funded by licence revenues, higher levels of viewing helps it to fulfil its mission of “*serving all audiences* through the provision of impartial, high-quality and distinctive output and services which inform, educate and entertain” (emphasis added).
- 2.12 In our engagement with stakeholders during this review, broadcasters confirmed that slot positioning remains very important for channels.<sup>15</sup>

## EPG providers

- 2.13 Under the Broadcasting Act 1990 and Communications Act 2003, operators must obtain a “television licensable content service” (TLCS) licence to provide an EPG service for linear content, where they have general control over the content and facilities offered by the service.<sup>16</sup> TLCS licences are required for all EPG services that meet these

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<sup>11</sup> Some stakeholders emphasised the importance of user interfaces as means to access TV content. We discuss this in Section 4.

<sup>12</sup> [Review of prominence for public service broadcasting](#), by Ofcom. 4 July 2019.

<sup>13</sup> By which we mean a lower number which is closer to the start of the EPG.

<sup>14</sup> [Review of prominence for public service broadcasting: statement on changes to the EPG Code](#), Ofcom, July 2019, paragraph 3.9.

<sup>15</sup> The BBC and UKTV also noted this in response to our consultation. UKTV Consultation Response, page 1. BBC Consultation Response, Section 1.

<sup>16</sup> Under section 232(2) of the Communications Act 2003, a TLCS is defined as a service broadcast via satellite or distributed using an electronic communications network, which (a) is made available for reception by members of the public; and (b) has as its principal purpose the provision of television programmes or EPGs, or both. Under section 362 of the Communications Act 2003, the only person to be treated as providing the service (and thus requiring a TLCS licence) is the person with general control over which programmes and other services and facilities are comprised in the service (whether or not he has control of the content of individual programmes or of the broadcasting or distribution of the service).

requirements, regardless of the method of distribution of the underlying data (ie. DTT, satellite, cable TV, IP or a combination of methods).

- 2.14 The licensed EPG providers in the UK are currently Sky, Virgin Media, YouView, Freesat, Digital UK (which provides the Freeview EPG), BT, EE and STV.<sup>17</sup> Youview,<sup>18</sup> Freesat<sup>19</sup> and Digital UK<sup>20</sup> are in part owned by channel shareholders, and Sky and BT have their own channels. The EPG providers also vary in size (both in terms number of channels provided and number of end customers<sup>21</sup>) and in the practical features of their EPG policies (how slots are allocated and other terms and conditions with broadcasters).
- 2.15 Slots on Sky's EPG can be sold to another broadcaster.<sup>22</sup> Sky is not involved in the commercial transaction and does not gain financially from any slot trades between broadcasters, other than a small administrative levy known as a transfer fee. According to Sky's current price list,<sup>23</sup> broadcasters pay Sky a flat EPG listing charge of £21,000 per channel listed on the Sky EPG per annum. Broadcasters are also required to pay Sky a platform contribution charge. Different channels pay different platform contribution charges.
- 2.16 Virgin Media made changes to its EPG allocation methodology effective from July 2017.<sup>24</sup> This enabled Virgin Media to give channels a chance to make financial offers to Virgin Media for EPG positions. To date, Virgin Media has only allocated one slot (slot 106 to Channel Four Television Corporation) after inviting offers on the open market. Broadcasters agree commercial terms related to the EPG slot directly with Virgin Media (as the EPG provider) and do not trade slots between themselves. Broadcasters commit to paying a fee, over and above their existing carriage fee, but with Virgin Media retaining ownership of the slot. Broadcasters enter into a carriage agreement with Virgin Media relating to the provision of EPG services which, among other things, sets out the carriage fees payable to Virgin Media.
- 2.17 Digital UK provides the Freeview EPG.<sup>25</sup> There is no market for EPG slots on Freeview: Logical Channel Numbers (LCNs) on the Freeview platform are not the asset of channel providers and cannot be sold.<sup>26</sup> Digital UK's terms and conditions prescribe that

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<sup>17</sup> In June 2020, STV were issued with a TLCS Licence. The STV Player is primarily an on-demand service, STV are in the early stages of accommodating a small number of linear TV channels. STV's EPG allocation policy is first come first served.

<sup>18</sup> BBC, ITV, Channel 4, Channel 5, BT, TalkTalk and Arqiva are shareholders.

<sup>19</sup> Freesat is backed by the BBC and ITV.

<sup>20</sup> BBC, ITV, Channel 4 are channel shareholders.

<sup>21</sup> In Q1 2020, Sky provided 8.41m households in the UK, Virgin Media 3.91m households, Freeview 15.45m households, Freesat 1.08m households and Youview 1.83m households (including BT and TalkTalk TV). Source for those providers: UK households by TV platform Q1 2020 data: [The UK Television Landscape Report](#) by BARB 28 May 2020. BT's subscribers in Q1 2020 were 1.65m. Source for BT data, Ampere Analysis. STV Player has 3.7 million registered users and in any given month 1 million users visit the platform. STV has acquired over 3.7m registered users since 2009, live channel selection via the EPG is only available to a subset of STV player users.

<sup>22</sup> [Sky EPG Allocation Policy](#) Sky, 1 October 2020.

<sup>23</sup> [BSKYB and SSSL Published Price List](#), Sky and SSSL.

<sup>24</sup> [Virgin Media's listing policy](#), Virgin Media, 14 July 2017.

<sup>25</sup> [Digital UK LCN policy](#), Digital UK, 2 September 2020. [Consultation on Changes to Digital UK's LCN Policy](#). 18 November 2020.

<sup>26</sup> [Digital UK LCN Policy](#), Digital UK. 2 September 2020. Paragraph 7.1.

broadcasters must pay a carriage fee of £1 per annum if demanded by Digital UK.<sup>27</sup> Freeview channel listings are also used by BT,<sup>28</sup> EE<sup>29</sup> and Youview.<sup>30</sup>

- 2.18 Freesat<sup>31</sup> does not levy charges to channel providers directly in relation to EPG slot allocation. Its charging policy sets out its approach to other charges to channel providers.

## Our role and duties and details of this review

- 2.19 Ofcom is required to draw up, and from time to time review and revise, a code giving guidance as to the practices to be followed in the provision of EPGs (Section 310 of the Communications Act 2003 (the Act)).<sup>32</sup>
- 2.20 In 2004, Ofcom published a Code on EPGs.<sup>33</sup> The Code sets out the practices to be followed by EPG providers to:
- a) give appropriate prominence for public service channels;
  - b) provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
  - c) secure fair and effective competition.
- 2.21 In addition, section 318(1) of the Act requires Ofcom, at such intervals as they consider appropriate, to carry out a review of every code made or approved by them under or for the purposes of a broadcasting provision that has an effect for a competition purpose.
- 2.22 The Digital Economy Act 2017 introduced a requirement on Ofcom to review and revise the EPG Code before 1 December 2020.<sup>34</sup> We completed our review of the accessibility section of the EPG Code in 2018<sup>35</sup> and the prominence section in 2019.<sup>36</sup>
- 2.23 As noted above, the EPG Code also includes rules to secure fair and effective competition, including a requirement for EPG providers to engage with television channels in a fair, reasonable and non-discriminatory (FRND) way. In this review we have considered the fair and effective competition provisions of the EPG Code. We have considered:
- a) whether it remains appropriate to impose *ex ante* conditions on EPG providers to ensure fair and effective competition in the provision of licensed services;

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<sup>27</sup> [Digital UK LCN Allocation Terms and Conditions by Digital UK, 3 April 2017](#). Paragraph 4.3.

<sup>28</sup> BT applies YouView User Interface policy for linear channels. For pay TV channels, ordering considers factors such as audience expectation, genre, channel family groups, HD vs SD and type of service.

<sup>29</sup> The EE box is no longer for sale and is being withdrawn completely in early 2021.

<sup>30</sup> [Youview's user interface policy](#), Youview.

<sup>31</sup> [Freesat's listing policy](#), Freesat, 7 February 2017.

<sup>32</sup> The full legal framework is discussed in Section 3 of this document.

<sup>33</sup> [Statement on Code on Electronic Programme Guides, Statement by Ofcom, 26 July 2004](#).

<sup>34</sup> Sections 95(2) and (3) Digital Economy Act 2017.

<sup>35</sup> [EGP Accessibility Statement](#) Ofcom, 27 June 2018.

<sup>36</sup> [Review of prominence for public service broadcasting](#) by Ofcom. 4 July 2019.

- b) as required by section 317(2) of the Act, whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998; and
  - c) if *ex ante* rules remain appropriate, what rules are required to protect fair and effective competition.
- 2.24 The EPG Code also includes code review provisions which provide for Ofcom to review the Code at intervals of no more than two years, or more frequently if circumstances warrant it. In this review, we also take the opportunity to review these provisions. This review of the fair and effective competition provisions and the code review provisions will complete our review of the EPG Code.
- 2.25 In August 2020 we published a consultation on the provisional conclusions of our review.<sup>37</sup> We provisionally concluded that the rules continued to be necessary to ensure fair and effective competition and that *ex ante* rules remained appropriate. We proposed minor amendments to the existing rules including a revised requirement that consultations by EPG providers follow a transparent process and include reasonable timeframes both for channel providers to comment and for implementation of any changes to the allocation policy for listings. We also proposed to remove the intention to carry out a review of the EPG Code every two years and proposed to review the EPG Code as appropriate.
- 2.26 We received ten responses to our provisional conclusions. Stakeholders agreed there remained a need for competition rules and there was broad agreement with our proposed amendments to the EPG Code (although some respondents wanted us to go further in some respects). Stakeholders' consultation responses are published<sup>38</sup> and we discuss and address the points raised throughout this statement.

## Impact assessment

- 2.27 Impact assessments provide a valuable way of assessing different options for regulation and showing why the chosen option was preferred. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that, generally, we have to carry out impact assessments where our decisions would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out impact assessments in relation to the great majority of our policy decisions.<sup>39</sup>

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<sup>37</sup> [Review of Competition Rules in the EPG Code](#), Ofcom, 14 August 2020.

<sup>38</sup> We received responses from Arqiva, the BBC, Channel 4, Digital UK, Freesat, ITV, Sky, Square World, Name Withheld and UKTV. Arqiva's response is confidential and is not published on our website. Sky sent us an email which we have also not published. We received a response from Name Withheld on 19 November 2020 which is also confidential and has not been published. [Consultation Responses](#).

<sup>39</sup> For further information about our approach to impact assessments, see the guidelines, [Better policy-making: Ofcom's approach to impact assessment](#), Ofcom, 21 July 2005.

- 2.28 The analysis presented in our consultation document provided our assessment of the impact of our decisions and constitutes an impact assessment, as defined by section 7 of the Act.

## Equality impact assessment

- 2.29 We assess the potential impact of all our functions, policies, projects and practices on the following equality groups: age, disability, gender, gender reassignment, pregnancy and maternity, race, religion or belief and sexual orientation. This is known as an equality impact assessment (EIA). EIAs also assist us in making sure that we are meeting our principal duty of furthering the interests of citizens and consumers regardless of their background or identity.
- 2.30 We set out our EIA of our decisions in Annex 2. We consider that our decisions should have an over-arching positive impact on channel providers as well as all consumers and citizens who use EPGs. We consider that our decisions would not have a detrimental impact on any defined equality group.

## Structure of the statement

- 2.31 The remainder of this document is organised as follows:
- a) Section 3 sets out the legal framework;
  - b) Section 4 sets out our analysis and decisions;
  - c) Annex 1 sets our modified EPG Code; and
  - d) Annex 2 sets out the EIA.
- 2.32 Alongside this document [we have published an updated version of the EPG Code](#).

## 3. Legal framework

- 3.1 This section sets out the legislative basis for the fair and effective competition provisions in the EPG Code as well as details of the provisions in the EPG Code.

### The EPG Code

- 3.2 Section 310(1) of the Act requires Ofcom to draw up, and from time to time review and revise, a code giving guidance as to the practices to be followed in the provision of EPGs.
- 3.3 Further, under section 316(1) of the Act, Ofcom may impose conditions on broadcast licensees as it considers appropriate to ensure fair and effective competition in the provision of licensed services. According to section 232(2) of the Act, the provision of an EPG service constitutes a licensed service. Such conditions must include any conditions that Ofcom considers appropriate to prevent arrangements or practices that Ofcom considers would be prejudicial to fair and effective competition in the provision of licensed services or connected services (section 316(2)). Further, Ofcom may require compliance by the licence holder with codes for the purposes of such conditions and directions given to the licence holder for those purposes (section 316(3)).
- 3.4 In 2004, Ofcom published a Code on EPGs giving effect to the requirements under section 310 and imposing conditions to ensure fair and effective competition as permitted under section 316 of the Act.
- 3.5 In accordance with section 311(1) of the Act, a requirement to comply with the provisions of the EPG Code, including the provisions to ensure fair and effective competition, is included as a condition of a broadcast licence. Failure to comply with a requirement of the EPG Code (or any direction given by Ofcom for the purpose of ensuring fair and effective competition) will therefore amount to a contravention of the broadcast licence condition. Under section 237(1) of the Act, where Ofcom is satisfied that a holder of a relevant licence has contravened a condition of the licence, it may require them to pay a penalty of up to £250,000, or 5% of the licence holder's qualifying revenue,<sup>40</sup> whichever is the greater.

### Review of the fair and effective competition provisions

- 3.6 Section 318(1) of the Act requires Ofcom, at such intervals as they consider appropriate, to carry out a review of every code made or approved by them under or for the purposes of a broadcasting provision that has an effect for a competition purpose.
- 3.7 In addition, sections 95(2) and (3) of the Digital Economy Act 2017 require Ofcom to review and revise the EPG Code before 1 December 2020. In accordance with these requirements, we have separately reviewed the accessibility and prominence aspects of

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<sup>40</sup> As determined in accordance with section 237(5) of the Act.

the EPG Code. This review of the fair and effective competition provisions and the code review provisions will complete our review of the EPG Code.

3.8 We have also had regard to our general duties, as set out below.

## General duties

3.9 In carrying out its functions, Ofcom must have regard to its principal duty, set out in section 3(1) of the Act, to further the interests of:

- a) citizens in relation to communications matters; and
- b) consumers in relevant markets, where appropriate by promoting competition.

3.10 In carrying out Ofcom's statutory duties, it is further required by section 3 of the Act to have regard in all cases to a number of factors, including:

- a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed (section 3(3)(a)); and
- b) any other principles appearing to Ofcom to represent the best regulatory practice (section 3(3)(b)).

3.11 In addition, section 3(2) of the Act requires Ofcom to secure certain things in carrying out our statutory functions, including the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (section 3(2)(c)).

3.12 In carrying out its duties, Ofcom must also have regard to certain matters listed in section 3(4) of the Act, as appear to be relevant in the circumstances. Relevant matters include, in particular:

- a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the UK (section 3(4)(a));
- b) the desirability of promoting competition in relevant markets (section 3(4)(b));
- c) the desirability of encouraging investment and innovation in relevant markets (section 3(4)(d));
- d) the different interests of persons in the different parts of the UK, of the different ethnic communities within the UK and of persons living in rural and in urban areas (section 3(4)(l)); and
- e) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in sections 3(1) and (2) of the Act is reasonably practicable (section 3(4)(m)).

3.13 In performing Ofcom's duty to further the interests of consumers, it is also required to have regard in particular to the interests of those consumers in respect of choice, price, quality of service and value for money (section 3(5)).

- 3.14 Ofcom is also required to keep the carrying out of its functions under review to ensure that regulation does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary (section 6).

### **Primacy duties**

- 3.15 Under section 317(2) of the Act, before Ofcom may exercise its Broadcasting Act powers (which include powers exercised under section 316 of the Act) for a competition purpose, it has a duty to consider whether a more appropriate way of proceeding in relation to the matters in question would be under the Competition Act 1998.
- 3.16 In this context, a power is exercised for a competition purpose if the only or main reason for exercising it 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 considers would be prejudicial to fair and effective competition in the provision of licensed services or connected services (section 317(9)).
- 3.17 In addition, before modifying or revoking the provisions in the EPG Code that have an effect for a competition purpose, Ofcom must consult such persons as they consider appropriate (section 318(3)).
- 3.18 If Ofcom decides that a more appropriate way of proceeding would be under the Competition Act 1998, it may not, to the extent of that decision, exercise its Broadcasting Act powers in relation to that matter (section 317(3)). However, if it decides to exercise its Broadcasting Act powers for a competition purpose, under section 317(4) of the Act it must give a notification of this decision:
- a) to such persons, or published in an appropriate manner, as appears to Ofcom to be appropriate for bringing it to the attention of persons who are likely to be affected by this decision (sections 317(5)); and
  - b) which describes the rights of a person affected by the decision to appeal to the Competition Act Tribunal against so much of that decision as relates to the exercise of the competition purpose (sections 317(5) and (6)).

### **Provisions in the EPG Code**

- 3.19 Under the Broadcasting Act 1990, Ofcom licenses providers of EPGs that are ‘made available for reception by members of the public’ and consist of the listing or promotion (or both) of television programmes together with a facility for obtaining access to those programmes (the ‘EPG licensees’ or ‘EPG providers’). EPG licensees are required to ensure that the rules set out in the EPG Code are observed in the provision of EPGs.

### **Fair, reasonable and non-discriminatory treatment**

- 3.20 The EPG Code sets out (at paragraph 16) that EPG licensees are required to:

- a) ensure that any agreement with broadcasters for the provision of an EPG service is made on fair, reasonable and non-discriminatory terms;
- b) publish and comply with an objectively justifiable method of allocating listings. This does not preclude different methods – for example, objectively justifiable methods could include ‘first come, first served’, alphabetical listings, and those based on audience shares;
- c) refrain from giving undue prominence in any listing or display to a channel to which they are connected, except as required by the appropriate prominence provisions set out (reference is made to the prominence part of the EPG Code);
- d) carry out periodic reviews of their listing policy and of channel listings made in accordance with that policy, in consultation with channel providers;
- e) ensure that viewers are able to access all television and radio services included in the EPG service on the same basis, provided that the viewers are equipped to use the EPG service and to receive the relevant programme services;
- f) ensure that free-to-air services are at least as accessible as pay TV services, and that reception does not require additional equipment or commercial agreements over and above those required for the acquisition of the receiving equipment; and
- g) refrain from imposing any condition in an agreement for EPG services between an EPG operator and a channel provider specifying exclusivity to one EPG for any service or feature, including the ability to brand services and access to interactivity.

3.21 The Code also states (at paragraph 17) that “EPG licensees that are channel providers or are connected to a channel provider must ensure that access to and from all television services included in the EPG service is easily available to all viewers equipped to use the EPG service and to receive the relevant programme services.”

## Code review

3.22 The EPG Code (paragraph 18) discusses Ofcom’s intention to review the Code at intervals of no more than two years, or more frequently if circumstances warrant it.

3.23 The EPG Code (paragraph 19) also states that where appropriate, Ofcom will consider whether competition would facilitate the achievements of the objectives in the Code, and so obviate or reduce the need for regulation, or whether the promotion of competition requires continuing regulation.

## 4. Analysis and Decisions

4.1 In this section we set out our assessment of the FRND provisions and the code review provisions in the EPG Code as well as our decisions. We discuss stakeholder responses to our provisional conclusions throughout this section.

### Fair, reasonable and non-discriminatory provisions

#### Our approach

4.2 Our review of the fair and effective competition provisions has considered whether it is appropriate to revise or remove the FRND provisions. We have considered whether:

- a) it remains appropriate to impose *ex ante* conditions on EPG providers to ensure fair and effective competition in the provision of licensed services;
- b) as required by section 317(2) of the Act, a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998; and
- c) if *ex ante* rules remain appropriate, what rules are required to protect fair and effective competition.

#### Competition concerns

4.3 In this review we have considered whether it remains appropriate to impose rules on licensed EPG providers to ensure fair and effective competition. We have considered whether competition on its own would facilitate the achievement of the objectives in the EPG Code and so obviate or reduce the need for *ex ante* regulation, or whether the promotion of competition requires continuing regulation.

4.4 As discussed in our consultation, EPGs remain an important way for consumers to find and select linear TV content. EPG slot positions remain important and channels with higher EPG slots (positions close to the start of the EPG and sometimes near the start of sub-genres) tend to get relatively greater viewing figures. Stakeholders who commented on this point in response to our consultation agreed with the importance of linear TV and EPGs to find and select this content.<sup>41</sup>

4.5 Broadly, advertisers want their advertisements to be seen by as many people as possible, as quickly as possible. As a result, advertising slots within programmes which deliver mass audiences are very attractive to them. Channels which deliver mass audiences and high shares of viewing overall have tended to attract the highest shares of advertising revenues from media agencies (who purchase TV advertising on behalf of

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<sup>41</sup> ITV Consultation Response, page 2, UKTV Consultation Response, page 1, Square World Consultation Response, page 1, BBC Consultation Response, Section 1.

the advertisers). Therefore, slots nearer to the start of the EPG, which are associated with higher viewing shares, tend to command higher shares of advertising revenues.

- 4.6 In the current situation with the Covid-19 pandemic, the decline in economic activity has resulted in significant reductions in channels' revenues due to large falls in advertising spend. However, we do not think this has changed fundamental relationships within the market. In our view, it remains reasonable to assume that a channel's EPG position, its viewing shares and the shares of advertising revenues it attracts will continue to be linked and we have no evidence that Covid-19 has changed these factors.
- 4.7 As we outlined in our consultation, if channels wish to be present on a platform, they must agree terms for their inclusion on the EPG with the relevant EPG provider. EPG providers control the policy that determines a channel's listing position and they also control the EPG's presentation (including its design, functionality and accessibility features). The terms that EPG providers impose on channels for inclusion on the EPG could be discriminatory (for example, treating equivalent channels differently) and this could be prejudicial to fair and effective competition. This is because discriminatory treatment, e.g. placing a channel into a relatively less attractive slot, could constrain a particular channel's ability to compete effectively with other channels for viewers and advertising revenue. This could ultimately affect the quality and diversity of services received by viewers. We provisionally concluded that the FRND rules provide an effective backstop to prevent such conduct and are necessary to ensure fair and effective competition.
- 4.8 The stakeholders that raised this issue in their consultation responses all agreed that rules around EPG listing and allocation are necessary to ensure free and fair competition for broadcasters.<sup>42</sup> Name Withheld noted the importance of genuinely fair, reasonable and non-discriminatory placing on the EPG for new-entrant free-to-air television services. Name Withheld also suggested that EPG providers inherently discriminate in favour of related channels.<sup>43</sup>
- 4.9 As set out above, we recognise the risk of discriminatory treatment of channels by EPG providers, which why we consider rules to ensure fair and effective competition are necessary and provide an effective backstop to prevent behaviour that could be prejudicial to fair and effective competition. We do not consider that competition alone would facilitate the achievement of the objectives in the EPG Code.

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<sup>42</sup> Channel 4 Consultation Response, Digital UK Consultation Response, page 1, ITV Consultation Response, page 1.

<sup>43</sup> Name Withheld set out concerns about the manner of LCN listings for the DTT platform. In this review, we have considered the current EPG providers and the incentives on them to engage in behaviour that may prejudice fair and effective competition, including those providers with channel shareholders.

## **Ex ante rules remain appropriate**

- 4.10 As required by section 317(2) of the Act, before exercising our Broadcasting Act powers for a competition purpose, we have considered whether it would be more appropriate to deal with any unfair, unreasonable or discriminatory treatment that did arise under the Competition Act 1998.
- 4.11 In our consultation, we provisionally concluded that it would be more appropriate to exercise our Broadcasting Act powers for a competition purpose in these circumstances, for the following reasons:
- a) exercising our *ex ante* powers would allow Ofcom to issue directions to:
    - i) prevent behaviour that would be prejudicial to fair and effective competition; and
    - ii) ensure a wide range of channels that appeal to a variety of tastes and interests are available for consumers throughout the United Kingdom.
  - b) competition alone would not facilitate the achievement of the objectives in the EPG Code (to protect channels from discriminatory treatment by EPG providers), and the promotion of fair and effective competition therefore requires continuing regulation.
  - c) if Ofcom were to solely rely on competition law, it would be likely that any harm sustained by unfair, unreasonable or discriminatory treatment would have crystallised (such as allocating new slot positions) before Ofcom could seek remedies. This would be detrimental to the negatively affected channels (who might lose viewing and revenues). It would also be detrimental to consumers, who may become accustomed to channels' new slot positions and find repeated changes frustrating and inconvenient.
  - d) the fair and effective competition provisions in the EPG Code provide a clear framework to EPG providers and channels of the practices to be followed, while allowing them commercial freedom to develop an allocation policy that fits with their commercial objectives.
  - e) maintaining the fair and effective competition provisions, which have been in place since 2004, will provide continuity and certainty to EPG providers and channels.
  - f) licensees would retain the right to appeal to the Competition Appeal Tribunal in respect of a decision made by Ofcom under those rules relating to fair and effective competition.
- 4.12 Stakeholders responding to our consultation, agreed with the importance of the rules. In particular, UKTV<sup>44</sup> and Channel 4 agreed that exercising our *ex ante* powers is appropriate in this case.

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<sup>44</sup> UKTV Consultation Response, page 1.

- 4.13 We welcome agreement from stakeholders that exercising our *ex ante* powers is the most appropriate approach. Ofcom therefore maintains its view that EPG licensees should be required to comply with the FRND requirements set out in the EPG Code.

#### Decision to exercise broadcasting act powers for competition purpose

- 4.14 In conclusion, Ofcom therefore maintains its view that EPG licensees should be required to comply with the FRND requirements set out in the EPG Code.
- 4.15 Imposing these requirements amounts to an exercise by Ofcom of its Broadcasting Act power set out in section 317(1)(b) of the Act, to give an approval to a code for the purposes of the licence condition made under section 316 of the Act.
- 4.16 Ofcom is exercising its Broadcasting Act powers for a competition purpose in that the only or main reason for imposing the FRND requirements of the EPG Code is to secure that licensees do not enter into or maintain arrangements or engage in a practice which Ofcom would consider to be prejudicial to fair and effective competition.
- 4.17 As Ofcom has decided to exercise its Broadcasting Act powers for a competition purpose, Ofcom hereby gives notice of its decision (as required by section 317(4) of the Act). Further, as required by section 317(5) of the Act, Ofcom wishes to draw attention to the right of those affected by this decision to appeal against this decision to the Competition Appeal Tribunal.

#### Scope of the FRND rules and our review

- 4.18 In response to our consultation, we received some responses from stakeholders which relate to the scope of our review and the FRND rules.
- 4.19 Some stakeholders indicated that, given the pace of change broadcasters are facing, broader reform is also needed to ensure fair and effective competition. ITV highlighted that our review is necessary but not sufficient to ensure fair and effective competition of linear EPGs, as reform of the overall framework governing PSBs and platforms is needed.<sup>45</sup> The BBC considered the EPG Code should explicitly cover user interfaces<sup>46</sup> and noted that major smart TV manufacturers and “Big Tech” platforms are *de facto* EPG providers for IP channels, and should also be covered by the EPG Code, including the competition provisions.<sup>47</sup>
- 4.20 We agree that the media landscape is fast moving and we are undertaking broader work in this area. Last year we made recommendations to Government for new legislation to protect the prominence of PSB beyond the EPG, to ensure PSB content – linear and on demand - remains easy to find within the user interfaces of ‘smart’ TVs and other

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<sup>45</sup> ITV Consultation Response, page 2.

<sup>46</sup> User interfaces are the front end of a TV platform through which the user can search for and navigate channels, apps and content.

<sup>47</sup> BBC Consultation Response, Section 3.

connected devices.<sup>48</sup> As part of our recommendations we explained that the regulatory framework for prominence does not currently extend to PSBs' on-demand or online services, nor services that enable viewers to navigate and select TV programmes beyond the EPG, such as the user interfaces on smart TVs, set-top boxes and streaming sticks. We recommended that Government provide new powers in this area and continue to work with Government and industry on how our recommendations could be implemented. On connected TVs, we are undertaking further work in this area. Alongside our consultation on this review, we published an independent report by Mediatique on the market dynamics of connected TV gateways.<sup>49</sup> We are in the process of considering responses to the report by Mediatique and next steps on this work. We are also in the process of reviewing the future of PSB and plan to issue a consultation on this review in December 2020.<sup>50</sup>

- 4.21 In relation to the BBC's comments that smart TV manufacturers are *de facto* operating EPGs for IP channels, as discussed in paragraph 2.13, we note that an EPG licence – and therefore compliance with the EPG Code – is required for any operator that offers an EPG service for linear channels and has general control over the service, regardless of whether it is delivered via 'traditional' broadcast methods such as satellite or cable, or via IP. The presentation of solely non-linear content in a user interface is out of the scope of regulation, and we discuss the mixed presentation of linear and non-linear content below.
- 4.22 The BBC also noted in their response to our consultation that certain EPG providers include some "additional channel types" in their EPG, which do not appear to be explicitly governed by the EPG Code.<sup>51</sup> First, they noted that Virgin Media includes a home page at channel 100, consisting of marketing content and trailers, and occasional simulcasts of other channels. Second, they noted that Virgin Media has placeholders for Netflix and YouTube, as well as including its own video on-demand channel at position 700. The BBC queried whether it is permissible under the EPG Code to include such services in an EPG.
- 4.23 In respect of the BBC's comments around "additional channel types" such as Virgin Media's homepage at channel 100 or video on demand channels included in the EPG listings, we note there is no restriction in the EPG Code or the Act that prevents an EPG provider from allocating slots in its EPG for non-linear or promotional channels. However, given that the EPG service is a licensed service, the allocation of *all* slots within the EPG is subject to the rules set out in the EPG Code, including those designed to protect fair and effective competition. As such, we consider that the allocation of "additional channel types" to slots within the EPG are covered by the Code.

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<sup>48</sup> [Review of prominence for public service broadcasting](#), Recommendations to Government for a new framework to keep PSB TV prominent in an online world, Ofcom, 4 July 2019.

<sup>49</sup> [Connected TV gateways: review of market dynamics](#), Mediatique, A report for Ofcom, August 2020.

<sup>50</sup> Information about our recent Small Screen: Big Debate conference is available here:

<https://www.ofcom.org.uk/about-ofcom/latest/features-and-news/small-screen-big-debate-2020>.

<sup>51</sup> BBC Consultation Response, Section 3.

## The rules required to protect fair and effective competition

- 4.24 Having concluded that *ex ante* rules are appropriate to protect fair and effective competition, our review has also considered whether the existing rules remain appropriate or whether changes are required, having regard to our duties.
- 4.25 During this review, we have sought to understand whether the rules are helpful and what changes, if any, are needed. Stakeholders are generally supportive of the FRND rules,<sup>52</sup> which are considered an important framework for engagement between EPG providers and channel providers. Given there is considerable support for the current rules, we approached our assessment by looking at the existing rules and determining whether there is a case to amend them, rather than setting out “new” rules. In this respect, some broadcasters highlighted concerns around:
- a) the efficacy of consultations regarding changes to allocation policies by EPG providers: in particular, the timescales allowed to respond to proposed changes and the reasonableness of timeframes for implementing changes;<sup>53</sup> and
  - b) the flexibility granted to EPG providers to allocate listings on an ‘objectively justifiable’ basis.<sup>54</sup>
- 4.26 We discuss each of these topics in turn and set out our decisions in relation to these provisions.
- 4.27 We do not think it is necessary to amend the remaining requirements of the fair and effective competition provisions, as the majority of stakeholders have not raised issues or concerns with the other rules<sup>55</sup> and we consider the current framework is, in general, working well.<sup>56</sup> Similarly, we do not consider it necessary to introduce additional rules, noting that additional rules could involve the imposition of burdens which are unnecessary at present (and therefore would not be in line with our duties).<sup>57</sup>

### Periodic reviews of listing policy in consultation with channel providers

- 4.28 EPG providers are required to carry out periodic reviews of their listing policy and of channel listings made in accordance with that policy, in consultation with channel providers.

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<sup>52</sup> The exception to this is Name Withheld who set out that, in their view, the FRND provisions are ineffective and material change is necessary to make them fit for purpose, as well as a stronger enforcement programme to deal with alleged breaches. We discuss the main reforms proposed by Name Withheld throughout this section.

<sup>53</sup> Provision 16d) in the EPG Code, set out in Annex 1.

<sup>54</sup> Provision 16b) in the EPG Code, set out in Annex 1.

<sup>55</sup> The exception to this is Name Withheld, as noted above.

<sup>56</sup> Provisions 15, 16a), c), d)-g) and 17 in the EPG Code, set out in Annex 1.

<sup>57</sup> We were asked to consider providing guidance on the delivery of IP channels within the EPG Code in our stakeholder engagement prior to our consultation. The FRND provisions set a framework of principles of engagement between EPG providers and channel providers, given this, we do not think it is appropriate to introduce guidance on this issue in the provisions themselves. However, as discussed in paragraph 2.7, EPG data identifies content that is available either through a single delivery technology or, increasingly, a hybrid of technologies – including IP streaming.

- 4.29 As part of our review, some stakeholders raised concerns about the transparency and efficacy of consultations pending changes to allocation policies or listings. In our consultation, we proposed to amend the rule in the EPG Code to ensure:
- a) EPG providers set out reasons for amending listings policies, and consultation processes are clear and transparent;
  - b) there is sufficient time for channels to comment on consultations; and
  - c) EPG providers allow channels sufficient time for the implementation of changes following consultation.
- 4.30 The FRND rules apply at a framework level and allow the EPG providers flexibility in their approach. There are, however, principles which EPG providers should reflect in how they consult with channels to ensure that they are offered a genuine opportunity to engage. We proposed to amend the wording of the EPG Code to provide additional clarity to both EPG providers and channels on our expectations around consultation processes, as follows.
- 4.31 First, EPG providers' reviews of listing policies and channel listings in accordance with that policy, should be clear and transparent.<sup>58</sup> EPG providers should:
- a) inform all channels (or all affected channels if the review is limited in scope) of their intention to undertake a review. We would expect an EPG provider to have assessed who its key stakeholders are at an early stage; and
  - b) set out details of the review, including information about the scope of the review (including the issues being considered or proposed changes to the allocation policy), relevant thinking on those issues and details of next steps including a timetable of the review and an implementation plan (subject to consultation).
- 4.32 Second, in undertaking reviews, EPG providers should ensure there is a reasonable timeframe for consultation with channel providers as well as for implementation of outcomes of the review. The length of consultation and implementation will depend on a range of factors which will vary depending on the nature of the review. We did not consider it appropriate to set prescriptive rules on this. However, we noted that the framework EPG providers should apply needs to allow for reasonable timeframes. We suggested that relevant factors to take into account in the determination of what a reasonable timeframe for consultation might be include:
- a) how many channels are affected by the proposed change(s); and
  - b) the potential impact of any proposed change(s) on channel providers.
- 4.33 Finally, we said that we believed that the outcome of any review should clearly set out the decisions taken, including how channel providers' comments have been taken into account, and the implementation timeframe.

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<sup>58</sup> Whether the review is periodic or not, these principles should apply.

- 4.34 In light of the above principles, our consultation proposed to add the following sentence to the existing provision on consultation:<sup>59</sup>

*Consultations with channel providers should be transparent, have reasonable timeframes for comment and set reasonable implementation timeframes.*

- 4.35 Stakeholders were generally supportive of these proposed changes. In particular, Channel 4, ITV<sup>60</sup> and the BBC all welcomed these clarifications. UKTV and the BBC both said that they would like us to go further. The BBC said our explanatory text about what a transparent consultation with reasonable timeframes for comment and implementation should look like (discussed above) should be included in the EPG Code itself. The BBC considered that the proposed amendments to the provision did not reflect the sentiment that EPG providers have an obligation to follow due process and show proper consideration for the interests of the channels, and that EPG providers could decide to move channels without justification.<sup>61</sup>

- 4.36 We agree with the BBC on the importance of EPG providers carrying out genuine consultations, where channel providers' views are demonstrably taken into account in reasoned decisions. However, as the FRND rules in the EPG Code are a framework of principles, we do not think it is appropriate to include detailed requirements on transparency within the EPG Code itself. We have therefore decided not to include the explanatory text in the EPG Code but note this statement sets out our likely interpretation of these principles in the event of alleged contravention of the rules.

- 4.37 UKTV agreed with the need for transparency by EPG providers in their reviews of EPG policies. UKTV was concerned that unless the provision is specifically stated in the EPG Code, EPG providers will consider that the transparency obligation only obliges them to provide the *initial* rationale for the review, and that they will not explain how consulted parties' views have been taken into account. UKTV therefore proposed that we add the additional drafting "*including how channel providers' comments have been taken into account*" to the EPG Code.<sup>62</sup>

- 4.38 We agree with UKTV that transparency is important throughout consultation processes carried out by EPG providers, both at the initial stage as well as demonstrating how views from consulting parties have been taken into account in decision making. This is captured in our thinking above. Given this, we do not think it is necessary to add the additional drafting to the EPG Code itself and, as above, note that our likely interpretation of this matter is set out in this statement.

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<sup>59</sup> Provision 16d) in the EPG Code, set out in Annex 1.

<sup>60</sup> ITV Consultation Response, page 2.

<sup>61</sup> BBC Consultation Response, paragraph 2.1.

<sup>62</sup> UKTV Consultation Response, pages 1-2.

## Enforcement and appeals of consultation processes

- 4.39 Some stakeholders raised issues relating to enforcement and the ability to appeal the outcome of consultation processes undertaken by EPG providers, which we discuss in this section.
- 4.40 First, Square World suggested we should include an appeal provision, which would allow broadcasters to appeal any decisions made by EPG providers following their consultations.<sup>63</sup> In addition, Name Withheld proposed that Ofcom should take a stronger approach to enforcing alleged breaches of the EPG Code.
- 4.41 To clarify how the EPG Code is enforced, we have explained in Section 3 that EPG providers are required to comply with the provisions of the EPG Code, including the provisions to ensure fair and effective competition, as a condition of their licence. We have also noted that failure to comply with a requirement of the EPG Code will amount to a contravention of the broadcast licence condition, which could result in a financial penalty of up to £250,000, or 5% of the licence holder's qualifying revenue, whichever is the greater. Should a channel provider be concerned that an EPG provider has failed to adhere to the provisions during a consultation (or, indeed, any other provision contained in the EPG Code), they would be able to contact Ofcom to set out their concerns. Where appropriate, Ofcom will investigate allegations of contravention in accordance with our usual procedures for investigating breaches of competition related conditions in Broadcasting Act licences.<sup>64</sup>
- 4.42 As such, a procedure for 'appeal' to Ofcom already exists in the event a channel provider is concerned that an EPG provider has failed to consult, or to meet any of the other requirements in the Code. We therefore do not consider it necessary to add the requested text to the EPG Code itself.
- 4.43 Second, Name Withheld also proposed that Ofcom should reserve short-term remedial powers to intervene in alleged breaches of the Code, including but not limited to powers to prevent any changes being made to an EPG slot allocation while any complaints made about the allocation are under consideration. Similarly, UKTV<sup>65</sup> sought clarification in its consultation response around how Ofcom would reverse channel allocations should they be found to be non-compliant with the EPG Code.
- 4.44 In response to these comments, we considered whether it would be appropriate and proportionate to require EPG providers to delay implementing changes to allocated slots pending resolution of a complaint by an affected party. In considering this question, we noted that:

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<sup>63</sup> Square World Consultation Response, page 4.

<sup>64</sup> [Procedures for Investigating Breaches of Competition Related Conditions in Broadcasting Act licences](#), Guidelines, Ofcom, 28 June 2017. It should be noted that we cannot necessarily pursue every possible issue that comes to our attention and we target our action at the cases we think are most likely to produce good outcomes for citizens and consumers. See section 2 of the above Guidelines.

<sup>65</sup> UKTV Consultation Response, page 1.

- a) the *ex ante* rules, as currently drafted, set out requirements on EPG providers to give channel providers and broadcasters an opportunity to comment on proposed changes to allocation policies before they take effect;
- b) our proposed changes to the EPG Code would obligate EPG providers to allow a reasonable time for implementation of any changes to allocations (we discuss above how we would interpret these timeframes);
- c) in the event that a channel provider has concerns about an EPG provider's proposed changes to the allocation policies, they would have an opportunity to submit a complaint to Ofcom in advance of slot changes taking effect. Our enforcement processes are discussed above;
- d) there is little evidence to suggest that EPG providers are making changes to allocation policies in the absence of consultation with channel providers, meaning such an additional obligation may not be necessary or proportionate;
- e) imposing an obligation on EPG providers to delay implementation of changes in the event of a complaint to Ofcom could undermine the parties' ability to negotiate in good faith to resolve issues, potentially leaving the providers exposed to channel providers using the process as a tactic to delay changes, even where these may be compliant with the EPG Code; and
- f) if Ofcom considers that an EPG provider has not complied with the fair and effective competition rules of the EPG Code, Ofcom has the ability to direct EPG providers to take such steps as it considers appropriate to ensure fair and effective competition. In an appropriate case, this could potentially include a direction to reverse channel allocation decisions where this will ensure fair and effective competition and is not unduly detrimental to consumers.

4.45 Considering the above points in the round, we do not consider that it would be necessary or proportionate to impose a requirement on EPG providers to delay implementing changes in the event of a complaint.

#### Decision on consultation processes

4.46 In conclusion, we have decided to affirm our provisional conclusions and add the following sentence to the existing provision on consultation.<sup>66</sup> We have also decided it is not necessary nor proportionate to amend our enforcement or appeals processes for the reasons discussed above.

*Consultations with channel providers should be transparent, have reasonable timeframes for comment and set reasonable implementation timeframes.*

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<sup>66</sup> Provision 16d) in the EPG Code, set out in Annex 1.

### Objectively justifiable method of allocating listings

- 4.47 EPG providers are required to publish and comply with an objectively justifiable method of allocating listings. This does not preclude different methods – for example, objectively justifiable methods could include ‘first come, first served’, alphabetical listings, and those based on audience shares.
- 4.48 In our review, some broadcasters have asked us to provide guidance on what objectively justifiable methods might mean in practice and have suggested that the rules allow for too much flexibility for EPG providers, which could be abused. We therefore considered whether the rule in the EPG Code requires amending to clarify the requirement to set and comply with an objectively justifiable method for allocating listings.
- 4.49 We set out in our consultation that we consider that the term ‘objectively justifiable’ is one that is commonly used and understood. While the following description is not intended to amount to a ‘legal’ definition, in our view, an objectively justifiable method would be impartial, rational, dispassionate and reflect a legitimate aim. For example, an illegitimate aim would be an allocation method which aims to unduly favour channels that are connected to an EPG provider. The listing method used should be reasonable and proportionate to achieve the legitimate aim.
- 4.50 EPG providers employ a range of allocation policies, as discussed in Section 2. We note that the existing wording of the rule contains examples of methods that would be deemed objectively justifiable, while acknowledging that other methods may be appropriate. We continue to believe that it is appropriate for EPG providers to retain the flexibility to use a range of allocation methods – this should enable them to innovate in the design and use of their EPG, as their particular circumstances and EPG allow. We do not consider it appropriate to explicitly state the method providers should use, because this would be going further than our remit to address the risk of discriminatory treatment of channels. So long as the method being used by an EPG provider is objectively justifiable – and does not result in unfair, unreasonable or discriminatory treatment, which would in any case be in breach of other requirements in the EPG Code – this should be sufficient to protect against this concern.
- 4.51 In our consultation we also noted that EPG providers are required to carry out periodic reviews of their listing policy in consultation with channel providers (which we have decided to amend, as discussed above). This provision ensures that channel providers have an opportunity to comment on any proposed changes to allocation methods, including raising concerns if allocation methods proposed are, in channel providers’ views, not objectively justifiable. We provisionally concluded that we do not have evidence to support the assertion that the term ‘objectively justifiable’ could be abused by EPG providers.
- 4.52 In response to our consultation, Name Withheld disagreed with our position and stated that [X] had previously taken allocation decisions that would not have been objectively justifiable. It also proposed a requirement in the EPG Code (and relevant TLCS licences)

for national channels [§<] to be treated in the same manner in the allocation of channels as channels carried by other competing multiplexes.

- 4.53 In relation to these proposals, we discuss above that an objectively justifiable method of allocating lists would preclude methods which would result in unfair, unreasonable or discriminatory treatment, and consider this rule protects against Name Withheld’s concern.<sup>67</sup>
- 4.54 Channel 4 and Digital UK also commented on this topic in response to our consultation and welcomed our clarification around the term ‘objectively justifiable’. However, Channel 4 stated that they would welcome this clarification being introduced into the EPG Code itself.
- 4.55 We welcome stakeholders’ support for our clarification in our consultation. Our interpretation of ‘objectively justifiable’ is set out above. Given this, we do not consider it necessary or appropriate to introduce guidance to accompany the EPG Code and note that stakeholders can refer to this statement which sets out our views on this subject. We have concluded that the current wording of the rule is sufficiently clear, and amendment or additional guidance is neither necessary nor appropriate.

## EPG Code review provision

- 4.56 The code review provision sets out Ofcom’s intention to review the EPG Code at intervals of no more than two years, or more frequently if circumstances warrant it. We have taken the opportunity in this review to consider if this provision remains appropriate.
- 4.57 In practice, we have not reviewed the EPG Code at intervals of two years as this has not been necessary. Since the EPG Code was introduced in 2004, we have reviewed the accessibility and prominence parts of the EPG Code, and in this review we consider the FRND provisions as well as the code review provision.
- 4.58 In our consultation we set out that we consider there is still merit in including a provision in the EPG Code regarding reviews of the code. **However**, we no longer thought it necessary to include a specific timeframe for any such reviews within the EPG Code itself and considered it appropriate to introduce more flexibility to the timings of reviews. Our consultation therefore provisionally decided to remove the intention to carry out a review every two years and to revise the drafting to review the EPG Code “*as appropriate.*”<sup>68</sup>
- 4.59 Three stakeholders<sup>69</sup> responded to our consultation on this issue, noting the importance of regular reviews of the EPG Code.

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<sup>67</sup> We also note that the focus of this review is the EPG Code. We do not consider proposals to change other licences EPG providers may have as this is outside the scope of this review.

<sup>68</sup> Provision 18 in the EPG Code, set out in Annex 1.

<sup>69</sup> BBC Consultation Response, Section 2.2, Digital UK Consultation Response, UKTV Consultation Response, page 2.

- 4.60 UKTV referred to developments in the TV market, whereby the balance of power was favouring platforms and that Ofcom needs to look at the prominence of linear EPGs within user interfaces.<sup>70</sup> The BBC also noted the rapid pace of change in the media landscape and said this reinforced the importance of the EPG Code being reviewed at least every two years. Digital UK noted the two-yearly review is a helpful backstop and should remain in place as it ensures EPG providers remain mindful of the importance of the EPG Code's provisions and the importance Ofcom attaches to them.
- 4.61 We agree with stakeholders on the importance of the EPG Code as a framework of engagement between EPG providers and channel providers and note the support for the FRND rules we have examined as part of this review. We also agree with stakeholders that the media landscape is changing at rapid pace. However, we do not agree that the importance of the EPG Code together with the pace of change in the media landscape should mean we should be required to review the EPG Code at least every two years.
- 4.62 We continue to believe we require the flexibility to review the EPG Code at frequencies appropriate at the time, which may or may not be at least every two years. We note that we have not previously considered it appropriate to review the EPG Code with such frequency. We have therefore decided to update the provision to review this '*as appropriate*'. We discuss the scope of the FRND rules above and note the further work we are undertaking on broader reforms in this area.
- 4.63 The code review provision also sets out that as part of the review we will consult with stakeholders, including EPG providers, broadcasters, and disability groups and the sorts of issues we would consider in a review. We consider that these provisions are still appropriate. We also consider that in carrying out reviews of the EPG Code in the interests of transparency it is also appropriate for us to publish our consultations and statements on our website. We have decided to include our intention to publish consultations and statements on our website within the EPG Code. We have therefore added the following sentence to the provision:<sup>71</sup>
- In the interests of transparency Ofcom will also provide relevant information including its consultations and statements on its website.*
- 4.64 The provision also sets out issues we might consider in a review. We consider this provision is still appropriate, although the list of issues that is relevant to a particular review will depend on the circumstances. We note that in our reviews of the EPG Code over the past few years, we decided it was appropriate to review aspects of the EPG Code at different times which has meant different factors are relevant to each of those reviews.
- 4.65 Finally, the provision also sets out that, where appropriate, Ofcom will consider whether competition would facilitate the achievements of the objectives in the Code, and so obviate or reduce the need for regulation, or whether the promotion of competition

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<sup>70</sup> UKTV Consultation response, page 2.

<sup>71</sup> Provision 18 in the EPG Code, set out in Annex 1.

requires continuing regulation. This is an important provision (which we are taking into account in our assessment of the competition provisions as set out above) and we see no reason to amend the provision itself in this review.

## Summary of our decisions

- 4.66 We have concluded that discriminatory treatment of a channel by an EPG operator in terms of listings or presentation on an EPG could constrain its ability to compete effectively with other channels for audience share and advertising revenue and so could be prejudicial to fair and effective competition. This could ultimately affect the quality and diversity of services received by viewers. We have therefore decided to retain the fair and effective competition conditions imposed on EPG providers in the EPG Code.
- 4.67 As required by section 317(2) of the Act, before exercising its Broadcasting Act powers for a competition purpose Ofcom has considered whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998. Following consultation, we have concluded that *ex ante* rules would be more appropriate in these matters.
- 4.68 We have considered whether the existing rules remain appropriate or whether changes are required. In general, the rules are working well. However, we have decided to require that consultations by EPG providers follow a transparent process and include reasonable timeframes both for channel providers to comment and for implementation of any changes to listings.
- 4.69 We have also taken the opportunity to review and consult on the code review provisions. We believe it is appropriate to allow more flexibility on the timings of our reviews of the EPG Code, so have decided to review the EPG Code as appropriate rather than every two years. We will also include an additional sentence in the rules, in the interests of transparency, which sets out our intention to publish consultations and statements on our website. These decisions take effect from the date of this publication.

# A1. EPG Code – competition rules and code review

The relevant sections of the EPG Code are included below. Our revisions are marked up in yellow highlight, new text is highlighted, and text that we propose to remove has a line through (example). Alongside this document [we have published an updated version of the EPG Code](#).

## Fair, reasonable and non-discriminatory treatment

15. Ofcom has concluded that, in order to secure that the providers of EPGs licensed by Ofcom do not enter into or maintain any arrangements or engage in any practice that Ofcom considers would be prejudicial to fair and effective competition in the provision of the licensed radio or television services or of connected services as defined in section 316 of the Act, EPG providers should comply with the provisions set out in this section.

16. In particular, EPG licensees are required:

- a) to ensure that any agreement with broadcasters for the provision of an EPG service is made on fair, reasonable and non-discriminatory terms;
- b) to publish and comply with an objectively justifiable method of allocating listings. This does not preclude different methods – for example, objectively justifiable methods could include ‘first come, first served’, alphabetical listings, and those based on audience shares;
- c) to refrain from giving undue prominence in any listing or display to a channel to which they are connected, except as required by the appropriate prominence provisions [reference is made to the prominence section of the EPG Code];
- d) to carry out periodic reviews of their listing policy and of channel listings made in accordance with that policy, in consultation with channel providers. Consultations with channel providers should be transparent, have reasonable timeframes for comment and set reasonable implementation timeframes;
- e) to ensure that viewers are able to access all television and radio services included in the EPG service on the same basis, provided that the viewers are equipped to use the EPG service and to receive the relevant programme services;
- f) to ensure that free-to-air services are at least as accessible as pay TV services, and that reception does not require additional equipment or commercial agreements over and above those required for the acquisition of the receiving equipment; and
- g) to refrain from imposing any condition in an agreement for EPG services between an EPG operator and a channel provider specifying exclusivity to one EPG for any service or feature, including the ability to brand services and access to interactivity.

17. EPG licensees that are channel providers or are connected to a channel provider must ensure that access to and from all television services included in the EPG service is easily available to all viewers equipped to use the EPG service and to receive the relevant programme services.

## Code review

18. Ofcom intends to review the Code ~~at intervals of no more than two years, or more frequently if circumstances warrant it as appropriate.~~ As part of ~~the~~ any such review, it will consult stakeholders, including EPG providers, broadcasters, and disability groups. ~~In the interests of transparency Ofcom will also provide relevant information including its consultations and statements on its website.~~ The issues it will consider in reviews may include whether:

- a) the guidance on appropriate prominence is adequate, or needs to be amended;
- b) provisions on information and facilities need to be changed, having regard to technological and market developments, amongst other things; and/or
- c) *ex ante* regulation requiring EPG providers to give channels on their EPGs fair, reasonable and non-discriminatory treatment so as to ensure fair and effective competition remains appropriate.

19. Where appropriate, Ofcom will consider whether competition would facilitate the achievements of the objectives in the ~~e~~Code, and so obviate or reduce the need for regulation, or whether the promotion of competition requires continuing regulation.

## A2. Equality Impact Assessment

- A2.1 Section 149 of the Equality Act 2010 (the “2010 Act”) imposes a duty on Ofcom, when carrying out its functions, to have due regard to the need to eliminate discrimination, harassment, victimisation and other prohibited conduct related to the following protected characteristics: age; disability; gender reassignment; marriage and civil partnership; pregnancy and maternity; race; religion or belief; sex and sexual orientation. The 2010 Act also requires Ofcom to have due regard to the need to advance equality of opportunity and foster good relations between persons who share specified protected characteristics and persons who do not.
- A2.2 Section 75 of the Northern Ireland Act 1998 (the “1998 Act”) also imposes a duty on Ofcom, when carrying out its functions relating to Northern Ireland, to have due regard to the need to promote equality of opportunity and regard to the desirability of promoting good relations across a range of categories outlined in the 1998 Act. Ofcom’s Revised Northern Ireland Equality Scheme<sup>72</sup> explains how we comply with our statutory duties under the 1998 Act.
- A2.3 To help us comply with our duties under the 2010 Act and the 1998 Act, we assess the impact of our decisions on persons sharing protected characteristics and, in particular, whether they may discriminate against such persons or impact on equality of opportunity or good relations.
- A2.4 We have not considered it necessary to carry out separate EIAs in relation to race or sex equality or equality schemes under the Northern Ireland and Disability Equality Schemes. This is because we anticipate that our changes to the EPG Code will not have a differential impact on people of different sexes or ethnicities, consumers with protected characteristics in Northern Ireland or disabled consumers compared to consumers in general.
- A2.5 Our decisions to retain the competition rules and make minor amendments to the existing rules should help facilitate competition between channels delivering the best outcome including a wide range of services. We consider that our decisions should have an over-arching positive impact on channel providers as well as all consumers and citizens who use EPGs. We consider that our decisions would not have a detrimental impact on any defined equality group.

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<sup>72</sup> [Revised NI Equality Scheme for Ofcom](#), Updated December 2019.