

UKTV response to Ofcom consultation:

Notice of proposed change to L-DTPS licence obligations of
ESTV Limited (the local TV Licensee for London)

Responses close: 26 August 2014, 10am





About UKTV

UKTV is the multi-award winning media company that reaches over 42 million viewers per month.

UKTV's eleven imaginative brands - Watch, Dave, Gold, Alibi, Eden, Yesterday, Drama, Really, Home, Good Food and UKTV Play - include the most watched non-PSB channel, the most watched channel in the Factual genre and the most watched channels in the Lifestyle genre (Pay and Free). The company's most recent financial results showed a record-breaking year-end revenue of £262m, and operating profit at £71m.

UKTV has a truly innovative model, curating brand-defining commissions, high-profile acquisitions and the very best of BBC and Channel 4 content, and embracing technology to deliver inspired channels to audiences through Freeview, Sky, Virgin Media, BT TV, TalkTalk, YouView, iOS and PC. The network distributes its highly valued programmes to 200 territories around the world and supplies Sky with more hours of HD content than anyone else.

Now celebrating its 22nd year at the forefront of digital television, UKTV - an independent commercial joint venture between BBC Worldwide and Scripps Networks Interactive, Inc. (SNI) - is proud to be the only British broadcaster to be recognised by Best Companies.

This response represents the views of UKTV, and should not be assumed to reflect of the views of its shareholders.



UKTV

UKTV welcomes the opportunity to comment on Ofcom's Notice of proposed change to L-DTPS licence obligations of ESTV Limited ("**ESTV**") (the local TV licensee for London) (the "**Notice**").

UKTV is a national UK broadcaster and competes with a wide range of channels, including PSBs, commercial entertainment channels and local TV channels. This is UKTV's 22nd year of broadcasting and, after considerable investment over time, it has seen its portfolio grow to 11 network brands, including 10 channels, 4 of which are available on DTT – Dave (and Dave Ja Vu), Really, Yesterday and Drama at EPG positions 12 (and 25), 17, 19, and 20 respectively.

As a commercial broadcaster UKTV has over its 22 years invested heavily in the UK creative industries, in content, spectrum and broadcasting infrastructure. It is subject to and continues to work within the normal advertising rules. UKTV wishes to be free to operate in a level playing field in order to realise a fair return on its investments.

UKTV does not support the Proposal

The Notice raises several concerns for UKTV and it firmly believes that the proposed variations to the L-DTPS licence obligations of ESTV set out in the Notice (the "**Proposal**") are unjustified, discriminatory, not legitimate and do not reflect the statutory and policy regime intended for establishing and running local TV Services.

The Proposal seeks to materially dilute the local content obligations inherent in any L-DTPS licence and thus undermines the balance between the local content obligations required of local TV Service licensees and the considerable benefits accorded only to local TV licensees such as preferential EPG positions, subsidised spectrum costs and unlimited advertising opportunities.

In doing so the Proposal defeats the statutory intention to broaden the range of local television services available in London.

The Proposal confers on ESTV an unfair commercial advantage and unfairly discriminates against existing commercial broadcasters who have to compete in the open market for EPG positions and spectrum, both of which can command a significant commercial value, and who are subject to well established rules on the duration and frequency of advertising.

In addition the Proposal raises serious concerns about the commitment of ESTV to provide a truly comprehensive and inclusive Local TV service for London. UKTV is concerned that removing several of the "PSB like" burdens applicable to Local TV licensees whilst retaining the "PSB like" benefits can be seen to amount to an unjustified regulatory intervention in the commercial landscape.

UKTV's detailed reasons for these concerns, in the context of both the local TV regime, broadcasting regulation and the broadcasting market in the UK, are below.

Local licence regime and policy – requirement for local content

In setting out its vision of local television in 2011, the Government laid out clear policy objectives for the licensees of local channels. In the Foreword of the paper, "A new framework for local TV in the UK" (July 2011) the then Secretary of State, Jeremy Hunt stated:



“My vision for local TV is one which contributes to future economic growth and social wellbeing in the UK. Local TV will be a driver of growth in the media and creative industries; helping to increase local employment and skills and boosting local businesses. It will also have a vital role in contributing to local democracy. ..., local TV will have an important role in holding local politicians to account through coverage of news and current affairs....”

The requirement to establish a conducive environment to encourage local television, led to the introduction of a number of legislative provisions which provided a statutory advantage and regulatory holiday for local TV providers across the UK. In return for these advantages, a fundamental element of any local TV licence is the requirement to broadcast predominantly local content relevant to that broadcaster.

The Local Digital TV Programme Services Order 2012, (the “**Order**”) specifically sets out the obligations and benefits applicable to local licence holders and were clearly reproduced in Ofcom’s licence application document. These included the terms required to qualify as a licensee of an L-DTPS service and those considerations which Ofcom needed to take into account when determining the awarding of licences. UKTV considers it helpful to focus on those terms to emphasise the importance of locally relevant content to any L-DTPS Licence and to illustrate how ESTV’s proposed variations to its L-DTPS Licence represent a wholesale and unacceptable departure from the original requirements of any L-DTPS licence and the statutory intention of Local TV services. We reproduce these below and to illustrate the level of the local content requirements.

The Order states that a service will fall within an L-DTPS if it includes or would include a range of programmes which:

- (i) *Facilitate civic understanding and fair and well-informed debate through **coverage of local news and current affairs**;*
- (ii) *Reflect the lives and **concerns of communities and cultural interest** and traditions **in the area or locality**;*
- (iii) *Including content that **informs, educates and entertains and is not otherwise available through a digital programme service which is available across the UK.**¹*

(Emphasis added by UKTV)

Factors for consideration by Ofcom

- (a) *“The extent to which any proposed service would:*
 - (i) *Meet, or would meet, the needs **of the area or locality** where it is received;*
 - (ii) *Would be likely to **broaden the range of television programmes** available for viewing by persons living or working in that area or locality; and*
 - (iii) *Would be likely **to increase the number and range of programmes about that area or locality** that are available for such viewing and to increase the number of programmes made in that area or locality that would be so available; and*
- (b) *The ability of the licence application to maintain, the proposed service throughout the period of which the licence would be in force.*
- (c) *Please note that a service will be taken for the purposes of (a)(i) to meet the needs of an area or locality if, and only if:*
 - (i) *Its provision bring **social or economic benefits to the area or locality**, or to different categories of persons living or working in the area or locality; or*

¹ Article 3(5) of the s244 Order, *The Local Digital TV Programme Services Order 2012*



- (ii) *It caters for the tastes, interests and needs of some or all of the different descriptions of persons living or working in the area or locality (including, in particular, tastes, interests and needs that are of special relevance in the light of the descriptions of persons who do so live and work.)*²

(Emphasis added by UKTV)

From a policy perspective, it is imperative for the future of genuinely local television that the provisions set out in the Order are adhered to.

Local licence regime and policy – benefits to local TV licensees not received by non-PSB licence holders in exchange for the local content obligation

It is also worth noting that in order to support the Local TV services, given the limited commercial nature of such services, certain advantages have been bestowed on holders of L-DTPS Licences.

(a) EPG Prominence

Local TV is entitled to preferential treatment under the Digital UK EPG listing policy. Therefore ESTV operates in the highly valuable real estate of LCN 8 on Freeview and Youview. If changes are made to the LCNs under the Digital UK listing policy ESTV is entitled to the same benefits in respect of prominence as the national public service broadcasters.

EPG prominence is and has been a matter of much contention between platforms and licensees. A significant number of papers, including those commissioned by Ofcom in the recent past, have set out the value of EPG positioning to a broadcaster. Whilst we appreciate that there is no market for trading EPGs on Freeview, it must be borne in mind that this considerable advantage is available to local TV licensees by virtue of their status as providers of local content.

Had LCN 8 been available on the commercial market it would have attracted a significant premium to reflect its preferential listing position in relation to other broadcasters. To remove and dilute ESTV's programme commitments, allowing it to broadcast similar programme content to commercial broadcasters, whilst retaining ESTV's LCN prominence, not only frustrates the statutory intention for local TV services - to provide programmes which are *not otherwise available through a digital programme service*, but provides ESTV unfair commercial advantage in relation to other commercial broadcasters.

ESTV also receives a preferential EPG position on the Sky platform as local TV channels are in the same category as PSBs and under Sky's listing methodology such channels are afforded an appropriate degree of prominence. By launching a channel in the local TV launch queue, ESTV is not required to acquire an existing channel's EPG position (which is what commercial broadcasters would have to do to launch a new SD channel). This is a significant advantage and has resulted in London Live being granted slot 117 on the Sky EPG, which is high on the Sky EPG and confers a considerable advantage in terms of prominence for Sky customers. In order to retain this EPG listing advantage the channel must continue to qualify as a local TV service.

If ESTV was to launch on Sky as a commercial broadcaster it would need to acquire an EPG slot and would launch at the end of the Entertainment genre unless it bought a slot from another broadcaster in the genre, and this could be at considerable cost. UKTV estimates that launching at EPG slot 117 rather than the bottom of the genre on the Sky platform gives ESTV a 250% advantage in terms of reach potential and therefore advertising impacts.

² Guidance notes, Local Digital Television Programme Service (L-DTPS) Licence Application Form



UKTV also estimates the advantage in terms of reach potential and therefore advertising impacts across major platforms (DTT, Sky and Virgin Media) to be 150% and estimates the advertising revenue advantage of this to be approximately £10 million per annum.

(b) Restrictions on the costs which can be charged by the MUX owners

A range of conditions have been imposed on multiplex operators for local TV services, including the requirement to ensure good quality coverage and transmission but also and most significantly to only recover carriage costs from the local TV licensees at no greater than the costs of transmission.

Comux UK, the local TV mux is based on a shared ownership model which provides valuable finance to the local channels, covering transmission and central costs, technical assistance and business advice. This regime has been specifically put in place to encourage local TV services and is available only to local TV operators.

This gifted capacity provides significant savings to local TV services. UKTV estimates that the market rate for a regional SD DTT slot is £2 million - £3 million per annum.

(c) Exemption from Advertising Minutage Restrictions

Whilst still subject to the Ofcom Broadcasting Codes in respect of Advertising Scheduling, local TV licensees are exempt from the minutage restrictions imposed by the Audiovisual Media Services Regulations 2009. The ability of local TV licensees and therefore ESTV to schedule an unlimited amount of advertising in any one hour is a significant benefit.

We have considered the value of this to a commercial broadcaster by way of comparison. UKTV (and other commercial broadcasters) are restricted to an average of 9 minutes of advertising per hour. Therefore every advertising minute over 9 minutes that ESTV takes affords it the opportunity to deliver 11% more audience and therefore 11% more revenue (provided that there is demand) compared to commercial broadcasters. The difference is even greater for PSB channels, as they are only allowed an average of 7 minutes per hour - every minute (could) be worth 14% more revenue (again provided there is demand).

(d) BBC local programming funding

In addition the BBC guarantees the acquisition of a certain amount of programming from local television providers. This guaranteed income is another benefit received by local TV providers not available to commercial broadcasters.

Effect of the Proposal

The Proposal not only seeks to reduce the number of hours of local content, both first run and repeats, in order to allow different types of programming in the broadcast schedule to be substituted for hours of local content, but also seeks to caveat and dilute any remaining content commitments. There are four major elements of the proposal which we describe below:

1. The insertion of the phrase '**will endeavour to...**' in the obligation to provide an interactive news and entertainment service for those who live and work in the licensed area. This caveat dilutes the licence obligation, in effect to render it nugatory. This will allow ESTV to escape its obligation to provide an interactive local TV service and by doing so defeat the obligations of the statutory regime set out above as well as the Government policy set out above.



2. The insertion of the phrase ‘**where available will...**’ in the obligation to provide a service which includes hyper-local programming delivered through 33 digital platforms. This caveat similarly dilutes the licence obligation, in effect to render it nugatory, as the obligation falls away if it is not available.

The purpose of or requirement for this change is unclear from the Notice – is it a request to reduce the number of local areas in which the London Live service is available or it is a request to reduce the local services available overall? In any event such a wide caveat is not an open and transparent way to address any concerns in relation to the hyper-local service.

The combination of 1 and 2 removes ESTV’s accountability and with the first suggested change indicates a lack of commitment to its programming obligations. Similarly it will defeat the obligations of the statutory regime and the Government policy set out above.

3. **Reduction in local programming requirements generally** to completely remove any obligations in respect of repeats and therefore to reduce its local content obligations by more than half in year 1 and up to half in years 2 and 3. It is impossible to see how this can further the statutory and policy obligations for the provision of local content.

ESTV is in a privileged position as a local licensee in London as the pool of content which could fall into the definition of local programming for London is significant. In this context it would not be fair or reasonable to reduce the local content requirements for the region with arguably the broadest remit under the local content rules.

4. **Reduction in quotas in peak** from 4.5 hours per day (including repeats) to 1 hour per day. Typically 50% of viewing takes place in peak hours, which are 18.00 to 22.30.³

Taking into consideration the workforce of London, many of whom are commuters, peak time is indeed likely to be the time when the channel has most viewers available. To suggest that this is the time when acquired rather than locally produced or targeted programming will be broadcast means that a significant number of viewers will have little or no local programming available to them during the time they are most likely to watch television. This does little to broaden the range of television programmes generally available.

Both the individual elements and the aggregate effect of the Proposal severely undermines the notion of ESTV as a local broadcaster for London.

The Proposal defeats statutory obligations and policy objectives

It is plain from the description of the Proposal that it does not meet the statutory obligations set out in the Order, for example “*to broaden the range of television programmes available for viewing by persons living or working in that area or locality.*”

Neither does it meet the policy objectives set out by Jeremy Hunt, for example to “... *have an important role in holding local politicians to account through coverage of news and current affairs*”.

In UKTV’s opinion the changes set out in the Proposal would absolutely “result in a departure from the character of the service”, causing the Proposal to fail the statutory test which would allow Ofcom to approve it.

³ BARB, January to June 2014



The failure of ESTV to meet its initial business case forecasts does not justify the Proposal

The fact that ESTV has requested the changes set out in the Proposal, which amount to a severe reduction in its obligations to invest in local content, after only four months on air raises concerns in relation to its business model, ability to continue as London's local offering and commitment to providing London with a truly comprehensive and inclusive local London service.

However these are all matters it and Ofcom no doubt considered when making and evaluating the licence application and it is difficult to see that the position will have changed so radically in this short period.

In recent months, ESTV has argued⁴ that (i) its BARB rating is not genuinely reflective of its viewership; (ii) that BARB's misrepresentation means that it is very difficult to attract advertisers; and (iii) the advertising market within London is more difficult in that the majority of companies operating from London are either national or international and therefore already advertising on many of the national channels. This has always been the case for local TV. Indeed, Ofcom's original licensing document stated that the BARB measurement may not be the most appropriate measurement on which to rely in the case of local advertisers.⁵

In any event it is not a legitimate reason to change the local TV policy and application of the statutory regime.

The Proposal discriminates against other broadcasters

The Proposal, if implemented, would confer on ESTV an unfair commercial advantage as it would release ESTV from its programme content obligations whilst allowing it to retain its preferential EPG position, subsidised spectrum costs and unlimited advertising opportunities which were granted to enable the launch of a local service which by its nature has more limited commercial appeal. The Proposal reduces the local content obligations on ESTV to such an extent that they are close to the content requirements of commercial broadcasters who do not benefit from this preferential treatment.

Commercial broadcasters must compete in the open market for EPG positions, which can command a significant commercial value in attracting viewers and therefore advertising revenues, spectrum costs which are subject to arm's length commercial negotiation with spectrum providers, and are subject to well established rules on the duration and frequency of advertising.

A decision by Ofcom to grant the request of ESTV and implement the proposal would discriminate against commercial broadcasters in favour of a single local TV licensee. This would not meet Ofcom's obligations to impose regulation in a fair, reasonable and non-discriminatory manner.

Stakeholders have a legitimate expectation that the structure of the local TV regime will remain as originally constructed and at least will not be made less favourable to other broadcasters

The local TV policy and statutory regime has received considerable parliamentary and policy discussion and has been applied across the UK. It is reasonable and legitimate for stakeholders to expect the regime to remain in place as it is until changed at a policy level not on a piece by piece basis to suit individual local TV licensees.

⁴ London Live chief insists channel remains committed to local tv, The Guardian, accessed 21 August 2014, <http://www.theguardian.com/media/2014/jul/25/london-live-chief-local-tv-tim-kirkman-ofcom>

⁵ LOCAL TV: Making the Vision Happen Government response to the consultations on the Local TV Framework and Pioneer Locations and final policy position (DCMS) Published December 2011, Paragraphs 41 – 44



Implementation of the Proposal would establish an unfortunate and dangerous precedent regarding the fair, reasonable and non-discriminatory execution of a licence regime.

Conclusion

UKTV is wholly against any of the proposed variations to the L-DTPS licence obligations of ESTV. In its opinion implementation of the Proposal would amount to interference in the commercial broadcasting market by Ofcom beyond its statutory role of imposing industry wide regulation.

UKTV welcomes the opportunity to have raised these concerns with Ofcom and remains open to discuss them at any time.