

Channel 6

Introduction

1. The Channel 6 Consortium was a bidder for the London PSB licence in competition with ESTV. We note that ESTV is once again seeking to reduce its commitments to local programming very substantially. For the reasons stated below, we believe it would be unlawful for Ofcom to accede to that request and we therefore object to it.

Historical background

2. Ofcom's Broadcast Licensing Committee (BSC) considered in its reasoning for the award decision (published on 29th January 2013) that Channel 6 "would be likely to meet the needs of the area with some high quality local programming, however, the lower output of locally-targeted programming proposed by [Channel 6] in its programming commitments would result in a less locally distinctive service when compared with ESTV and London 8 and would therefore be less likely to meet the needs of the local area and to broaden the range of programmes made in or about the area than ESTV or London 8." The BSC therefore ruled out the Channel 6 bid for that reason alone (i.e. our substantially lower committed amount of local programming).
3. On 25th July 2014, Ofcom consulted on a request by ESTV substantially to reduce its local programming commitments. Annexed below is the submission made by the major law firm Fieldfisher on behalf of the Channel 6 Consortium as part of that consultation, which explained why it would have been unlawful for Ofcom to accede to that request, and Ofcom did not then agree to it.
4. We reaffirm Fieldfisher's conclusions which are equally applicable to the present application. Their submission should therefore be read as part of this paper, and we will not seek to paraphrase it here.

The current request by ESTV

5. On 14th September 2016, Ofcom consulted on ESTV's latest request to reduce its local programming commitments. We compare the effect of ESTV's request in the table below (figures conformed to hours per week for comparison purposes):

ESTV - analysis of request September 2016								
Year 3 commitments - comparison	ESTV bid	Channel 6	<u>ESTV bid more (less) than C6</u>	<u>ESTV bid more (less) than C6</u>	ESTV request	Channel 6	<u>ESTV request more (less) than C6</u>	<u>ESTV request more (less) than C6</u>
	Hours/week	Hours/week	Hours/week	%	Hours/week	Hours/week	Hours/week	%
Local								
1st run	70	38	32.0	84%	19.5	38	-(18.5)	-49%
Rpt	56	1.5	54.5	3633%	42	1.5	40.5	2700%
Unoriginal					14		14.0	NA
Total	126	39.5	86.5	219%	75.5	39.5	36.0	91%
Local in peak								
1st run	24.5	7	17.5	250%	7	7	0.0	0%
Rpt	7	0	7.0	NA	0	0	0.0	0%
Unoriginal					7		7.0	NA
Total	31.5	7	24.5	350%	14	7	7.0	100%
Local news and current affairs								
1st run	38.5	28	10.5	38%	19.5	28	-(8.5)	-30%
Rpt	3.5	0	3.5	NA	3.5	0	3.5	NA
Total	42	28	14.0	50%	23	28	-(5.0)	-18%

The yellow highlighted figures show where ESTV's current request would reduce their programming commitments to less (or no more) than those in our bid, undermining the result of the competitive auction. The following implications are particularly notable:

- a. First run local programmes would fall to only about half the amount we bid, whereas they came in at 84% more than us in the competitive auction: a 72% reduction from ESTV's original bid of 70 hours/week.
 - b. Local programming in peak time would now be no more than we bid, save for an hour a day of archive programming from third parties: a 56% reduction from ESTV's bid to 14 hours/week, even allowing for the third party archive programmes (a 78% reduction excluding those).
 - c. Perhaps most significant given the nature and purpose of the local PSB franchises, first run local news and current affairs would be halved from 38.5 hours/week in ESTV's bid, to just 19.5 hours/week – some 30% less than we bid. Even allowing for ESTV's 3.5 hours/week of repeated news bulletins, it would still amount to 18% less than we bid.
6. It is self-evident that allowing the proposed reduction would be unfair on us, given the nature of the competitive auction and the stated reason for our bid being unsuccessful. It would therefore be unlawful for Ofcom to agree to ESTV's application for the reasons set out in Fieldfisher's 2014 submission below.

Richard Horwood

On behalf of The Channel 6 Consortium

12th October 2016

**Submission by Fieldfisher on behalf of The Channel 6 Consortium on 26th August
2014**

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

Response submitted on behalf of The Channel 6 Consortium – 26 August 2014

1. We are submitting this response to Ofcom's "Notice of proposed change to L-DTPS licence obligations of ESTV Limited" dated 25 July 2014 ("the Notice") on behalf of the Channel 6 Corporation. The proposed change would, if accepted by Ofcom, significantly reduce the local television programming commitments in the local digital television programme service licence granted to ESTV Limited ("ESTV") on 23 January 2014 ("the Licence").

2. For the reasons set out in more detail below, we believe that Ofcom is not entitled to consent to the proposed change to the programming commitments as set out in the Notice. This is because:

(a) the proposed change would plainly amount to a departure from the character of the licensed service for the purposes of section 19(3B) of the Broadcasting Act 1996 ("1996 Act"), and

(b) in the context of the legislative scheme taken as a whole, Ofcom's policy statements in relation to the licensing of local TV, and the competitive award process that resulted in the grant of the Licence to ESTV, Ofcom could not be reasonably satisfied that all of the criteria set out in paragraphs (a) to (d) of section 19(3B) would be met.

3. In particular, Ofcom could not reasonably conclude, in the light of the relevant factual, policy and legal background, that:

(a) the departure from the character of the service proposed by ESTV was not substantial, and/or

(b) the reduction in the number and range of local programmes included in the licensed service was acceptable.

4. Furthermore, even if Ofcom had the power to consent to the proposed change, it would be irrational, based on the legislative, policy and factual background, for Ofcom to exercise its power to consent to the proposed change, in particular because of the real unfairness that would arise to other candidates in the application process that led to the grant of the Licence to ESTV.

A. Background

The legislative and policy context

5. Ofcom's statement of 10 May 2012 entitled "Licensing Local Television" ("the Local TV Statement") set out how Ofcom intended to exercise the powers and duties to license local television services which had recently been conferred on it pursuant to the Local Digital Television Programme Services Order 2012 ("the L-DTPS Order"). The L-

DTPS Order modifies certain provisions of the 1996 Act for the purpose, and only for the purpose, of enabling local TV licensing. References in this response to sections of the 1996 Act are references to the 1996 Act as modified by the L-DTPS Order.

6. The Local TV Statement was accompanied by an Invitation to Apply for L-DTPS Licences for the first 21 locations. These included the London area in respect of which the Licence was subsequently granted to ESTV.

7. The legislative scheme set out in the L-DTPS Order unsurprisingly places significant emphasis both on the local character of licensed services and on the maintenance of the local character of the service for the duration of the licence. Thus:

(a) Under section 18(2)(d) an application for an L-DTPS licence must be accompanied by "a detailed explanation of how the character of the service, as proposed in the application, is to be maintained for period for which the licence would be in force".

(b) Section 18(6) provides that:

"(6) OFCOM must, in determining whether and to whom to grant a local digital television programme service licence have regard to the followings factors:

(a) the extent to which any proposed service –

(i) meets, 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 the 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 applicant for the licence to maintain, throughout the period for which the licence would be in force, the proposed service."

(c) Under section 19(3A) Ofcom must include in an L-DTPS licence conditions for securing, among other things, that "the service is provided in the location specified by Ofcom" (section 19(3A)(a)) and that "the character of the licensed service, as proposed by the licence holder when making the application, is maintained for the duration of the licence" (section 19(3A)(c)).

(d) Section 19(3B) provides that:

"(3B) Conditions included in a [L-DTPS licence] may authorise Ofcom to consent to a departure from the character of the licensed service if they are satisfied:

(a) that the departure would not substantially alter the character of the service,

(b) that the departure would not unacceptably reduce, the number and range of the programmes about the area or locality for which the service is licensed,

(c) that the departure would not unacceptably reduce, the number of programmes made in the area or locality for which the service is licensed, and

(d) that the service would continue to meet the needs of the area or locality for which the service is licensed."

(e) Before deciding whether to consent to a departure from the character of the service on any of the grounds specified in section 19(3B)(b) to (d), Ofcom must, under section 19(3C) publish a notice and invite representations on the proposal.

8. The paramount importance of the local character of the service, and the maintenance of that character for the duration of the licence, was emphasised throughout the Local TV Statement. Notably, Ofcom decided that the programming commitments put forward by successful applicants would be made binding conditions of the licence. Ofcom's explanation for this in the light of comments received in the consultation preceding the Local TV Statement was as follows:

"5.10 As part of the application process, we proposed that applicants would draft their own Programming Commitments, and that these would be appended to the licence of the successful applicant as a binding licence condition. In the event that a broadcast licensee does not comply with its licence conditions, it can be subject to regulatory sanction, including licence revocation.

5.11 In the consultation we asked whether respondents agreed with the approach of inviting applicants to draft Programming Commitments to be written into licences, in order to secure programming output that meets the statutory requirements.

5.12 Many stakeholders agreed with this proposed requirement, responding only in the affirmative.

5.13 Some stakeholders expressed concern that this approach could limit the proposals applicants are prepared to make because they do not want to over-commit in binding licence conditions over a period of up to 12 years.

5.14 A number of stakeholders broadly agreed with the proposal, but suggested that the Programming Commitments should reflect the potential for changes in content production and delivery as each service develops, rather than binding licensees to a rigid set of commitments for the entire licence duration. It was suggested that the Programming Commitments should reflect in detail the first three years of broadcasting, and demonstrate the scope for development in the service after that period.

5.15 As regards the former point, **we do not want L-DTPS licence applicants to overpromise in their applications, and we encourage them to put forward realistic proposals based on their available resources. The application assessment will include**

Ofcom taking a view of whether Programming Commitments are realistic, given the proposed business plan.

5.16 Concerning the latter point, again we feel that **there is scope within the proposed Programming Commitments for L-DTPS licence applicants to set out realistic proposals for the duration of the licence.** However, in response to stakeholder comments on our draft L-DTPS application form, we have modified the guidance accompanying the L-DTPS application form, as well as some of the questions, to allow applicants the opportunity to describe how they see the service developing over the duration of the licence. We expect that there will have to be some flexibility with regard to emerging sector but it is important given that licences are awarded by ‘beauty parade’ to have a clear and binding set of proposals from applicants from the outset.

5.17 We also note that Ofcom has a statutory obligation to ensure that the character of the licensed service is maintained, and it is important for us to have clear commitments from applicants to enable us to fulfil this obligation."

(emphasis added)

9. To enable Ofcom to assess whether applicants for L-DTPS licences would be able to maintain the licensed service, Ofcom required applicants to provide budgets and funding for set up and the first three years of operation plus a clear strategy for sustaining the service for the duration of the licence (see Local TV Statement, paragraph 6.43 and the L-DTPS Licence Application Form).

10. Condition 5 (Character of the local digital television programme service) was included in the standard form L-DTPS licence accompanying the Local TV Statement requiring the Licensee to maintain the character of the Licensed Service (as defined in the licence) in accordance with the programming commitments set out in the Annex to the licence. Condition 5(2) authorised Ofcom to consent to a departure from the character of the Licensed Service in the circumstances set out in section 19(3B) of the 1996 Act.

11. It is also relevant to note that, as part of the legislative scheme for the introduction of local TV licensing, the Government amended section 310 of the Communications Act 2003 so as to include local TV channels in the list of "public service channels" to which providers of electronic programmes guides must give "appropriate prominence" in their listings. This is a valuable right for the newly-licensed local TV services which is not available to nearly all other commercial broadcasters and is given specifically to repay broadcasters who are willing to invest in and commit to local programming content. The only other commercial channels that benefit from appropriate prominence are the three main services from ITV, Channel 4 and Channel 5.

The Invitation to Apply for an L-DTPS licence in London, and Ofcom's award decision

12. In response to the Invitation to Apply for the London L-DTPS licence, Ofcom received five applications from:

- (a) City6 Limited t/a the Channel 6 Consortium ("Channel 6")
- (b) ESTV Limited
- (c) London 8 Limited
- (d) Made Television Limited
- (e) Your TV London Limited

13. After consideration of those applications and supporting evidence, Ofcom's Broadcast Licensing Committee ("BLC") decided on 29 January 2013 to award the London licence to ESTV.

14. The reasons published by Ofcom for the decision to award the London licence to ESTV ("the Account of Decision") indicate that the BLC took the view that the proposals of Made in London and Your TV London were less well developed than the other three applications in relation to the statutory criteria that Ofcom has to consider under section 18 of the 1996 Act, and those two proposals would not meet the needs of the area as a whole and in respect of its constituent parts as well as the proposals submitted by ESTV, Channel 6 and London 8.

15. The BLC considered that Channel 6 would be likely to meet the needs of the area with some high quality local programming. However, Channel 6's lower proposed commitment to locally-targeted programming would result, in the BLC's view, in a less locally distinctive service compared with ESTV and London 8. The BLC considered that ESTV and London 8 had put forward particularly strong applications by comparison (ie in relation to the committed amount of local programming output) and so ruled out Channel 6 for that reason alone.

16. In relation to ESTV and London 8, the BLC considered that each had:

- (a) "demonstrated a high level of understanding of the needs of the local population and presented coherent proposals to meet those needs in respect of both the population as a whole and its constituent communities";
- (b) "put forward programming proposals for a high level of original local content and gave the BLC confidence that their programming propositions would broaden the range of programming available in the area and the range of programming made in and about the area";
- (c) "demonstrated that they would be able to launch their proposed services, and would be able to maintain them for the duration of the licence. Both applicants had put forward business plans which were achievable on an equivalent basis."

17. As between ESTV and London 8, the BLC decided that ESTV's application was the strongest because:

- (a) ESTV demonstrated the greatest understanding of London's diverse communities;
- (b) ESTV's proposals covered a significant range of subjects and would therefore meet the needs of communities to the greatest extent;
- (c) ESTV's proposals provided important opportunities for close local community involvement;
- (d) ESTV was also in a particularly strong position to launch **and maintain** its proposed service, given its proposals for promoting and marketing the channel (emphasis added).

18. In relation to this last point, ESTV had relied heavily on its access to the Evening Standard to promote and market the channel. In response to question 4 of the licence application, ESTV stated:

"Marketing support

The London Evening Standard will guarantee £5million of media value annually across its newspaper and its fast-growing website to advertise and support the launch and ongoing programming of London Live. In addition, The Standard will commit to give London Live a daily newspaper listing of its programme schedule within the Standard TV pages, worth £3.1million market value. The Standard's 400 newspaper drop-points around London will also be turned into interactive hubs for publicising London Live debates and content."

19. Towards the end of the Account of Decision, under the heading "Next Steps", Ofcom noted that "the Programming Commitments proposed by each successful applicant will be written into licences and become binding requirements, and Ofcom will not allow these to materially change, as these commitments were part of the reason for the licence award".

20. The Licence was subsequently granted to ESTV on 23 January 2014 and came into force on 31 March 2014 and was expressed to remain in force, subject to its conditions, until 25 November 2025. London Live, ESTV's local TV channel, began broadcasting on 31 March 2014.

ESTV's proposed reduction in its programming commitments

21. On 25 July 2014, Ofcom published the Notice setting out certain proposed changes to the programming commitments in the Licence that ESTV had requested. Those changes are set out in the annex to this response together with ESTV's original programming commitments and those offered by Channel 6 and London 8 by way of comparison. Essentially the proposed changes involve a substantial reduction in the number of hours of locally-targeted programming that ESTV would be obliged to schedule in years one to three of the Licence. Under the proposed changes the overall numbers of hours of first run local programming (compared to ESTV's original commitment) would decline slightly in years two and three. However, the proposed changes envisage there being no commitment by ESTV to show any repeats of local programming, plus there would be a substantially

reduced commitment to local programming in peak time. The result would be a reduction in the overall hours of local programming per day from 18 to 8 and in peak time from 4.5 to 1.

22. Therefore, the proposed changes would, if accepted by Ofcom, result in a very large fall off in the total amount of time devoted to local programming on London Live. They would further, as a result of the reduced peak time commitment, diminish the local character of the service for the large of bulk of viewers.

23. In addition the proposed changes would water down ESTV's commitment that the service would provide an interactive news and entertainment service created in, for and by those who live and work in London, to one in which ESTV would "endeavour" to achieve this. They would also qualify ESTV's commitment to include hyper-local programming by reference to the availability of such programming.

24. Ofcom recognises that the changes would result in a departure from the character of the service as licensed (see the Notice, paragraph 1.8). In the Notice Ofcom seeks views on whether it should consent to such a departure from the character of the London Live service in the light of the statutory grounds in section 19(3B) of the 1996 Act, as set out above.

B. Ofcom's powers – general

25. Ofcom's decision making powers in the context of the licensing of local broadcasting services were considered in the case of R (on the application of Wildman) v Ofcom [2005] EWHC 1573. That case was an application for judicial review of a decision by Ofcom to award the independent radio licence for Ashford in Kent to Local Ashford Radio Kent Ltd. The statutory scheme in that case for ensuring and maintaining the local character of local sound broadcasting services is similar, although not identical, to the scheme for local television licensing.

26. In addressing the approach of the court in such a case, Mr Justice Stanley Burnton stated that:

"14. The preliminary point is the general approach of the Court in cases of the present kind. Parliament has not provided an appeal on the facts or on the law against Ofcom's decisions. Ofcom is an expert body, and it, and not the Court, has been given the responsibility for making the evaluations and exercising the discretions inherent in a licensing process that involves the selection of only one of a number of applicants to be awarded a licence. Ofcom's decisions may have substantial financial consequences, as may any decision of the Court to set aside a decision of Ofcom to award a licence to a particular applicant. In the exercise of its judicial review jurisdiction, the Court may set aside a decision of Ofcom if it is shown that it made a material error of law, but the power to do so is discretionary. In my judgment, the Court must exercise a high degree of caution before interfering with a decision such as the present, and do so only if it is shown that there has been **real unfairness to a candidate** or a significant error of law or other error giving rise to the power, on judicial review, to quash the decision.

15. In the present context, it is pertinent to refer to the speech of Lord Templeman in *R (TSW Broadcasting Ltd) v ITC* [1994] 2 LRC 414, at 424c–426a. It is sufficient to quote the last paragraph of that part of his speech:

“Judicial review does not issue merely because a decision maker has made a mistake and it is not permissible to probe the advice received by the decision maker or to require particulars or administer interrogatories or, as Mr Pollock on behalf of TSW suggested, to cross-examine in order to discover the existence of a mistake by the decision maker or the advisers to the decision makers. An applicant for judicial review must show more than a mistake on the part of the decision maker or his advisers. Where a decision is made in good faith following a proper procedure and as a result of conscientious consideration, an applicant for judicial review is not entitled to relief save on the grounds established by Lord Greene MR in *Associated Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229.”

(emphasis added)

27. Although, as Ofcom will be aware, the grounds established in *Wednesbury* namely that a decision may be challenged as unreasonable if it "is so unreasonable that no reasonable authority could ever have come to it" represent a high hurdle to overcome, it is to be noted that the judge in *Wildman* accepted that that threshold could be met if there had been real unfairness to a candidate in the licence application process.

C. Application to the proposed ESTV licence variation

28. Having regard to the relevant facts and the legislative and policy background, it is submitted that it would be unreasonable in the *Wednesbury* sense for Ofcom to agree to ESTV's proposed changes because of the "real unfairness" that would arise to other candidates in the application process that led to the grant of the Licence to ESTV.

29. There are two aspects to the exercise of Ofcom's powers which are discussed further below:

(a) First, whether Ofcom has the power to consent to the proposed change. For the power to exist, Ofcom must be satisfied that all four of the criteria set out in section 19(3B) and Condition 5(2) of the Licence apply.

(b) Second, whether, if Ofcom has the power, it should exercise its discretion to consent to the change.

C1. Ofcom's power to consent: the section 19(3B)/Condition 5(2) criteria

(a) The departure would not substantially alter the character of the service

30. Ofcom accepts in the Notice that the changes proposed by ESTV are significant changes to ESTV's Programming Commitments that would amount to a departure from the character of the service (paragraph 1.8). The question it has to answer for the purposes of

section 19(3B) is whether the changes are also substantial. We believe that that is plainly the case, in the light of the legal and policy background and all relevant facts.

31. Substantiality must include not only the magnitude of the change itself but also the impact of the change on the application process that led to the grant of the Licence to ESTV. This was recognised by Ofcom in the Account of Decision when it stated that:

"the Programming Commitments proposed by each successful applicant will be written into licences and become binding requirements, and Ofcom will not allow these to materially change, as these commitments were part of the reason for the licence award".

32. As outlined above, the programming commitments were of crucial importance to Ofcom in granting the licence to ESTV. Ofcom expected licence applicants to be prepared to stand behind their programming commitments as binding licence conditions. It also made it clear in the Local TV Statement that it expected applicants to make a realistic assessment of the commitments that they were prepared to offer and stand behind. It assessed applicants' financing and business plans to ensure that they had the ability to maintain those local programming commitments for the duration of the licence. One of the deciding factors in ESTV's favour in the final decision as between it and London 8 was the marketing support of the Evening Standard, London's principal local newspaper, that would be available to ESTV to help it maintain the service ie the service with the programming commitments offered by ESTV which helped it to win the licence.

33. Furthermore, although the programming commitments were not ultimately the deciding factor between ESTV and London 8 – Ofcom's award decision appeared to consider the two applicants to be roughly equal in that respect, although London 8 objectively committed to a greater amount of local programming – it is evident from comparing the commitments ESTV now proposes with the commitments of London 8 and Channel 6 that, had ESTV originally proposed the commitments set out in the Notice, Ofcom's assessment of those applications is likely to have been very different. Channel 6's application was ruled out solely on the basis of its much lower local programming output commitments than either ESTV or London 8. Had ESTV included the proposed programming commitments in its original application then either:

(a) ESTV should have been ruled out on the same basis as Channel 6 and the licence should have been awarded to London 8, or

(b) if London 8's proposals had been in some other respects inferior, counterbalancing its otherwise much larger local programming output commitments, then none of the three applications should have been ruled out on the basis of programming commitments alone, and Ofcom should have made its decision on other grounds.

34. Either way, Ofcom would inevitably have been led to make a different decision or a decision reached on a fundamentally different basis. It therefore follows that a decision that the proposed changes were not substantial would lead to real unfairness vis-à-vis Channel 6 and/or London 8.

35. Finally, ESTV's proposal to water down its commitments to interactive and hyper-local programming to essentially no commitment at all is entirely inconsistent both with the reasons why ESTV was selected over London 8 (see paragraph 17 above) and with Ofcom's stated aim of making the programming commitment binding licence obligations.

36. In these circumstances, and following Wildman, if Ofcom were to conclude that the proposed changes were not substantial, that would be unreasonable in the Wednesbury sense.

(b) The departure would not unacceptably reduce the number and range of the programmes about the area or locality for which the service is licensed

37. This test focuses on the number and range of programmes about the area or locality. Although it does not say so expressly, this test must be taken to refer to the number and range of programmes about the local area that are included in the licensed service (as distinct from programmes about the local area generally that may for example be broadcast by other broadcasters). ESTV's proposed change would clearly substantially reduce the absolute number of the local programmes broadcast on London Live, even if the number of new programmes made about London and broadcast on that service would be relatively unaffected by the proposed change.

38. In contrast to the previous criterion, the test that Ofcom has to apply here is whether the reduction is "acceptable". As with the previous test, Ofcom must take into account all the relevant factual and legal background and, again, when one takes that background into account, it is apparent that Ofcom could not reasonably conclude that the reduction proposed by ESTV is acceptable. If anything the position is stronger than in relation to the first test. This test focuses specifically on the number and range of programmes about the local area included in the licensed service. That is exactly what ESTV now proposes to reduce substantially, in circumstances where a commitment to a particular number and range of programmes about the local area in the service, and the licensee's ability to maintain that commitment, were and remain a central part of Ofcom's statutory duties and Ofcom's policy in granting licences. Furthermore, having committed to maintain its programming commitments for the duration of the Licence, ESTV now proposes a substantial reduction in those commitments a mere few months after the service has launched. It is hard to see how any reasonable regulator could find that acceptable, especially in circumstances where, in considering the applications it had received for the licence, it had rejected two otherwise acceptable proposals in favour of ESTV, and in one case – Channel 6 – solely because of its lower committed amount of local programming output.

(c) The departure would not unacceptably reduce, the number of programmes made in the area or locality for which the service is licensed

39. This test does not appear to be relevant here.

(d) The service would continue to meet the needs of the area or locality for which the service is licensed

40. Given that ESTV is not proposing to abandon local programming altogether, this test also does not appear to arise in this case.

41. It follows therefore that Ofcom could not reasonably conclude, in the light of the relevant factual, legal and policy background that:

(a) the departure from the character of the service as proposed by ESTV was not substantial, and/or

(b) the reduction in the number and range of local programmes included in London Live was acceptable.

42. Accordingly, Ofcom would not have the power to consent to the proposed changes and a decision to consent would therefore be unlawful.

C2. Ofcom's discretion as to whether to give its consent

43. If, contrary to the above, Ofcom does have the power to consent, then it will need to decide whether or not to exercise that power in ESTV's favour and the legal, factual and policy context is equally relevant to this question..

44. Ofcom would need to have regard to the impact of the proposed changes on the application process, and the points discussed above in that regard would be equally applicable here. Thus, it would similarly be irrational for Ofcom to consent to the proposed changes, in the light in particular of:

(a) the significance of the local programming commitments to Ofcom's policy in relation to local TV generally and to the award decision specifically,

(b) Ofcom's statement in the Account of Decision, cited above, that it would not consent to a "material" change in those commitments because they formed part of that decision,

(c) the fact that, had ESTV put forward the now-proposed programming commitments in its original application, the outcome of the award process would either have been different or reached on fundamentally different grounds, and

(d) the real unfairness that would thereby arise vis-à-vis Channel 6 and/or London 8.

45. This is reinforced by the timing of the matter. The award decision was made on 29 January 2013. The Licence was not granted until almost a year later on 23 January 2014 with an effective date of 31 March 2014. The request for change by ESTV would therefore have been made some time between the grant of the Licence and 25 July 2014 when the Notice was published.

46. It would appear to be highly unfair to other bidders in the licence application process if Ofcom were to permit ESTV substantially to reduce its voluntarily-offered programming commitments just a few months after the channel had launched, and after

ESTV had had a year to prepare for the launch of the channel in full knowledge of what its licence obligations would be before being formally bound by them.

47. In these circumstances, the only rational course for Ofcom to take would be to refuse consent to ESTV's proposed variation, and require it to stand behind the programming commitments it has given. If ESTV believes that it is unable to provide the service viably without the proposed changes, then the appropriate course would be for ESTV to indicate to Ofcom that it wished to surrender the Licence under section 19(1)(b) of the 1996 Act.

Fieldfisher

26 August 2014

Annex

1. Comparison between the local programming commitments in ESTV's original bid and their proposed variation for the first three years

	Year 1	
	<u>ESTV licence</u>	<u>ESTV proposed</u>
Hours of local programming per day		
First run:	8.0	8.0
Repeats:	10.0	0.0
Total	18.0	8.0

Hours of local programming per day in peak-time (6.00-10.30pm)		
First run:	3.0	1.0
Repeats:	1.5	0.0
Total	4.5	1.0

Hours and scheduling of local news and current affairs programming (e.g. how many bulletins a day and of what duration?)		
First run:	5.5	5.5
Repeats:	0.5	0.0
Total	6.0	5.5

	Year 2	
	<u>ESTV licence</u>	<u>ESTV proposed</u>
Hours of local programming per day		
First run:	9.0	8.0
Repeats:	9.0	0.0
Total	18.0	8.0

Hours of local programming per day in peak-time (6.00-10.30pm)		
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First run:	3.5	1.0
Repeats:	1.0	0.0
Total	4.5	1.0

Hours and scheduling of local news and current affairs programming (e.g. how many bulletins a day and of what duration?)

First run:	5.5	5.5
Repeats:	0.5	0.0
Total	6.0	5.5

Year 3

	<u>ESTV licence</u>	<u>ESTV proposed</u>
Hours of local programming per day		
First run:	10.0	8.0
Repeats:	8.0	0.0
Total	18.0	8.0

Hours of local programming per day in peak-time (6.00-10.30pm)

First run:	3.5	1.0
Repeats:	1.0	0.0
Total	4.5	1.0

Hours and scheduling of local news and current affairs programming (e.g. how many bulletins a day and of what duration?)

First run:	5.5	5.5
Repeats:	0.5	0.0
Total	6.0	5.5

Note

The figures in Annex 1 have been taken from the Notice of proposed change to L-DTPS licence obligations of ESTV Limited (as published by Ofcom).

2. Local programming commitments by the top three London bidders
(including the proposed variation by ESTV)

	Year 1			
	<u>ESTV</u> <u>licence</u>	<u>Channel</u> <u>6</u>	<u>London8</u>	<u>ESTV</u> <u>proposed</u>
Hours of local programming per week				
First run:	56.0	38.0	114.0	56.0
Repeats:	70.0	1.5	54.0	0.0
Total	126.0	39.5	168.0	56.0

Hours of local programming per week in peak-time (6.00-10.30pm)				
First run:	21.0	7.0	27.5	7.0
Repeats:	10.5	0.0	4.0	0.0
Total	31.5	7.0	31.5	7.0

Hours and scheduling of local news and current affairs programming (e.g. how many bulletins a day and of what duration?) (calculated per week)				
First run:	38.5	28.0	21.3	38.5
Repeats:	3.5	0.0	2.0	0.0
Total	42.0	28.0	23.3	38.5

	Year 2			
	<u>ESTV</u> <u>licence</u>	<u>Channel</u> <u>6</u>	<u>London8</u>	<u>ESTV</u> <u>proposed</u>
Hours of local programming per week				
First run:	63.0	38.0	114.0	56.0
Repeats:	63.0	1.5	54.0	0.0
Total	126.0	39.5	168.0	56.0

Hours of local programming per week in peak-time (6.00-10.30pm)

First run:	24.5	7.0	27.5	7.0
Repeats:	7.0	0.0	4.0	0.0
Total	31.5	7.0	31.5	7.0

Hours and scheduling of local news and current affairs programming (e.g. how many bulletins a day and of what duration?) (calculated per week)

First run:	38.5	28.0	21.3	38.5
Repeats:	3.5	0.0	2.0	0.0
Total	42.0	28.0	23.3	38.5

Year 3

	<u>ESTV</u> <u>licence</u>	<u>Channel</u> <u>6</u>	<u>London8</u>	<u>ESTV</u> <u>proposed</u>
Hours of local programming per week				
First run:	70.0	38.0	121.0	56.0
Repeats:	56.0	1.5	47.0	0.0
Total	126.0	39.5	168.0	56.0

Hours of local programming per week in peak-time (6.00-10.30pm)

First run:	24.5	7.0	27.5	7.0
Repeats:	7.0	0.0	4.0	0.0
Total	31.5	7.0	31.5	7.0

Hours and scheduling of local news and current affairs programming (e.g. how many bulletins a day and of what duration?) (calculated per week)

First run:	38.5	28.0	21.3	38.5
Repeats:	3.5	0.0	2.0	0.0
Total	42.0	28.0	23.3	38.5

Note

The figures in Annex 2 are taken from the licence application bids of Channel 6 and London8, the ESTV licence, and Ofcom's Notice of proposed change to L-DTPS licence obligations of ESTV Limited. To allow for comparison, where the figures were expressed on a daily basis, these have been multiplied by seven to reach a weekly total.