

# **Ofcom consultation: Prominence and accessibility on connected TV platforms - Draft code of practice and draft guidance on the agreement objectives**

## **ITV plc response**

### **Summary**

It is widely acknowledged that the traditional benefits of PSB status - linear prominence in regulated programme guides and access to DTT spectrum - have been declining in value for years, putting pressure on the sustainability of commercial PSB. The Media Act provisions around prominence, inclusion and dispute resolution are intended by Parliament to improve this position.

It therefore follows that Ofcom's Code of Practice and Guidance must, taken together, actively improve the position of PSBs compared to the terms they have so far negotiated on a purely market basis. If the position is not improved by Ofcom then Parliament's intervention will have delivered no additional PSB benefit.

Below, we explore in detail the ways in which we believe Ofcom might strengthen its Code and Guidance to ensure that they better deliver Parliament's intent.

## Comments on Annex 2 - Draft Code of Practice for Regulated Television Selection Services

### Delivering Parliament's intent

Ofcom makes clear in its consultation (3.135) that “*RTSS providers would be expected to provide appropriate prominence to DIPS ... without requiring payment.*” This reflects that regulated ‘appropriate prominence’ is required by law. ***Ofcom should make explicit in its Code that PSBs are not required to pay RTSS providers for this prominence.***

Regulated ‘appropriate prominence’ must result in PSB content and services being demonstrably more prominent than would have been the case absent intervention. The overarching effect of Ofcom’s Code of Practice must therefore be that PSB DIPS and the individual programmes and listed channels within them are more easily and more regularly discovered than they are today under deals negotiated on a purely commercial basis. This does not come through clearly enough in the guiding ‘high-level principles’ set out by Ofcom in its consultation (3.20). ***We suggest this overarching outcome is made explicit in the Code.***

Overall, though, our initial view is that Ofcom’s Code could effectively deliver on Parliament’s intent if Ofcom makes some adjustments, which we explore below.

### Comments on ‘The recommended actions’

Ofcom’s Code explains that RTSS providers “*may seek to comply with their duties by taking alternative actions*” and advise that in such circumstances they should “*maintain a record of what they have done and how they consider it meets the relevant duties.*” ***Ofcom needs to strengthen this provision, requiring RTSS providers to prove to DIPS providers (and Ofcom) how they have complied - not just to keep private internal records.*** The need for RTSS to provide data to DIPS when following Ofcom’s recommendations is covered further later in this response.

Given Ofcom allows RTSS providers the discretion to take a different approach than set out in its Code, ***we suggest Ofcom include within the Code its proposed high-level principles (suitably strengthened, as suggested above). Ofcom should also make clear that alternative approaches will not be compliant if the outcomes they deliver result in less prominence for DIPS than delivered by Ofcom’s recommended actions.***

### Combined effect of ‘app menus’ and ‘primary content areas’

We believe Ofcom’s intent is for its Code to allow RTSS to design their UIs in any number of ways whilst ensuring that PSB apps and content are always prominent within those areas of the UI most often served to users and/or most used by viewers to discover and access content. We endorse this approach. Our assumption is that this would, for instance, mean that if an RTSS offers a ‘homepage’ then PSB would be prominent within it. We think it is

also intended to capture a scenario where, perhaps, an RTSS defaults to a 'for you' screen at launch, rather than the homescreen. In such circumstances, PSB should be prominent in both pages. **We would welcome absolute clarity from Ofcom in its Code that this is the intent, to avoid potential gaming of RTSS design.**

## Comments on approach to 'App menus'

### Overall approach

We support the underpinning rationale of Ofcom's approach about the importance of app menus and the most visible tiles. We can see that the drafting of A1.2 to A1.4 is intended to help ensure that PSB DIPS are easy to find and access, alongside the biggest and best non-PSB streaming services, whilst also allowing platforms some commercial real estate and to meet audience expectations that all major streaming services will be easy to find. A1.5 ensures that RTSS providers cannot use other modes of design to undermine this intent.

However, we are concerned that in many cases ITVX is already in a better position than the minimum position for ITVX that Ofcom's Code requires (5th). For instance, ITVX already occupies slot 2 on Sky and Virgin, and position 4 on LG, Samsung and Google.

At best Ofcom's approach might help protect against some future world where such outcomes could no longer be negotiated unilaterally (a protection which is welcome to a limited extent). But there is a very real risk that Ofcom's approach might actually encourage RTSS providers to threaten to move ITVX to less prominent slots as a negotiating mechanism, whilst still complying with Ofcom's requirements.

Ofcom recognises this risk in its consultation (3.93): "*their positions could fall if the RTSS provider were to place them in the lowest positions in our proposed thresholds. However, this is uncertain.*" Whether or not this outcome is uncertain, there is no reason to facilitate this outcome through Ofcom's approach to implementation where it has broad discretion. If Ofcom actually undermines the current degree of prominence achieved by PSBs absent intervention it will have fundamentally undermined the intent of a regime designed by Parliament to actively improve PSB prominence. **Ofcom should include within its Code a requirement that the position of apps delivered through agreements compliant with the Code must be no worse than that secured under previous purely commercial deals.**

With reference to the argument put forward by one TSS (consultation 3.74) that "*the popularity and attractiveness of the content provided on an app has a much more significant impact on user engagement than the location of the app,*" we assume that TSS will be happy for DIPS to occupy the most prominent locations given they believe them to deliver such little benefit (and so presumably be of little commercial value to that TSS).

Ofcom suggests (consultation 3.80) that its proposals might mean that "*...younger audiences who may be more likely to consume content from non-PSB streaming players, may experience short-term disruption to their user journeys...*" We would observe that Parliament intends PSB to be universally prominent to all users, including younger audiences, and that

Ofcom itself is encouraging PSBs to appeal more to these audiences. Ensuring that younger audiences are prominently served DIPS (and the programmes within them) should be a regulatory priority, not an impact to justify away or apologise for.

### Mixed-use areas of UIs

Ofcom's Code requires DIPS to be "*visible in each app menu without the user needing to take any action after having navigated to the relevant app menu.*" A key area in which apps are often surfaced is the RTSS homepage, perhaps via an app carousel. In such circumstances, the app is in an area containing both apps and individual programme tiles, along with links to other areas of the RTSS. These might appear as multiple rails, for instance.

Ofcom's definition of 'app menu' suggests that this single rail would constitute an app menu. But, having navigated to this mixed area, app tiles are usually visible without users needing to have further "*navigated to the relevant app menu.*" ***We read Ofcom's guidance (esp. A1.2) as requiring PSB apps to be immediately visible within this app menu (i.e. a user has 'navigated to the relevant app menu' by virtue of navigating to the mixed-use area) but would welcome Ofcom making this explicit in its Code.*** The risk otherwise is that prominence is limited only to standalone app menus, or that PSB apps only become visible after some form of further navigation to the specific rail by the user.

This issue arises again, in relation to individual programmes, in Ofcom's guidance on 'primary content areas'. ***Again, we would welcome Ofcom providing clarity in its Code that no further navigation within mixed-use areas is required.***

In both instances, PSB apps and programmes should be immediately visible and prominent as soon as such menus appear on screen.

### User choice

Ofcom's consultation (3.81) gives only a cursory explanation of its approach to user choice in the Code. We are very concerned about the potential unintended consequences of A1.6. Whilst we can understand that some degree of user customisation might be allowed, this appears to open the door to RTSS providers to find ways to undermine the wider intent of the rules.

For instance, an out-the-box set-up process might ask users if they want a number of non-PSB services to be included at the top of key UI areas, such as homepage app rails. If the user selects 'yes' to all of Netflix, YouTube, Amazon Prime Video, Disney+, HBO Max etc would this constitute "*users ... deciding the order of internet programme services included as apps*" as per Ofcom's draft?

Similarly, could an RTSS periodically present users with an option to remove PSB apps from key areas (or the RTSS entirely)? For instance, 'You haven't used ITVX for a while. Remove from homescreen/device?'

The power of defaults and ‘dark pattern’ design is widely reported and should not be allowed to undermine PSB prominence. **Ofcom must make clear that the deployment of such features should not be allowed if the effect is to reduce PSB prominence.**

A related risk is the increasingly common deployment of ‘most used’ app rails or dynamic app menus. Again, if such functionality were regarded as ‘user choice’ then Ofcom would effectively be allowing platforms to remove PSB apps from view for some viewers. In such circumstances, it is likely to be lighter PSB viewers that would see less PSB content promoted. This would reduce the value of PSB prominence, as it would become limited to heavy viewers who are already easier to reach, and undermine the principle that PSB should be universally prominent, on which the intervention is based in the first place. **Ofcom must ensure that the Code guarantees that PSB prominence is delivered to all audiences, not just heavy PSB viewers.**

In terms of delivering the legal framework, we cannot see how it would be compatible for PSBs to end up with little to no prominence at all but, based on Ofcom’s approach, it would seem to regard such an outcome as appropriate. **Ofcom should explain why it believes such an outcome would be compatible with the legal framework determined by Parliament.**

In the event that user choice is supported in some form, we would expect the extent to which PSB apps can be moved to be aligned with the degree of customisation possible for the platform’s own apps (i.e. it would not be appropriate for platform apps to be fixed and immovable when PSB apps can be moved) or major commercial apps (i.e. it should not be possible for platforms to offer fixed and non-customisable slots to the highest bidder). **Ofcom should include this provision within its Code.**

### Ingest / hybrid models

In A1.2, Ofcom proposes that the rules around app menus apply where “*a designated internet programme service is included in the regulated television selection service as an app.*” **We believe Ofcom should broaden this to ensure that DIPS are also prominent in ‘app-like’ menus in the event a platform wishes to host and deliver content itself (‘ingest model’) but present the choice of streaming services in the familiar format of ‘apps’.**

We explore below the interaction between Ofcom’s prominence Code, its Guidance on terms - and how they might, taken together, operate when some or all platform functions are not app-based.

## **Primary content areas**

### Overall approach

We support the majority of Ofcom’s proposed approach to primary content areas.

A2.2 should help ensure that PSB content is routinely and prominently promoted alongside the best of non-PSB content, broadly in line with current viewing levels and audience expectations, and not undermined by the format of that promotion.

### Proportion of promotional space for PSB

Ofcom calls for evidence on the current degree of prominence accorded to PSB programmes versus others (consultation 3.112). Should this evidence demonstrate that PSB content is already receiving in excess of 50% of promotion in primary content area then Ofcom should amend its guidance to ensure that it does not result in PSB being made less visible in future by virtue of setting a lower floor.

We would be hugely concerned were Ofcom to consider reducing the level of prominence allocated to PSBs. Already the overall approach adopted a) represents a significantly lower degree of prominence for PSB than was historically the case when linear EPGs were the primary route to content and b) does not represent a material increase in prominence versus the levels already delivered absent regulatory intervention. Unless Ofcom actively improves the position of PSBs versus today then it will have failed to deliver Parliament's intent.

### Allocation of prominence to individual PSBs

We anticipate that Ofcom's requirement that "*the degree of prominence given to public service programmes ... is no less than the degree of prominence given to programmes which are not public service programmes*" will result in a de facto 50/50 split of promotional space - the platform cannot allocate less than that, but will also have no incentive to offer more than that for free.

Our working assumption is that Ofcom intends for PSBs to be free to agree terms with platforms for additional prominence on top of regulated 'appropriate prominence' as part of 'additional terms' but not to have such a requirement imposed on them unilaterally by platforms as a term of inclusion. This paid-for prominence must be from within the 50% of the promotional space not allocated to PSBs, in competition with others in the market.

We broadly support the principles that lie behind proposals in A2.3 - 2.4. However, we are concerned that Ofcom is not clearer about the levels of prominence expected for each PSB individually, nor how Ofcom's guidance is intended to interact with any paid-for promotion agreed as 'additional terms'.

Ofcom states in its consultation (3.130) that "*Our proposal should ensure an appropriate degree of prominence is secured for public service content from each DIPS, while allowing RTSS providers to determine how to achieve this in a way that is appropriate for their RTSS and their users.*" However, as drafted, there appears to be nothing stopping the BBC, for instance, from being granted the vast majority of total PSB promotional space, with little allocated to other PSBs.

Indeed, platforms might be incentivised to provide commercial PSBs with a very low proportion of the total PSB inventory, forcing them to instead pay for prominence they should receive for free under the regulatory regime.

Any propensity by ITV (or others) to pay for 'additional' prominence might even further incentivise platforms to reduce their individual allocations of 'appropriate' prominence over time - perhaps increasing the allocation of 'appropriate' space to the BBC and forcing commercial PSBs to pay to maintain previous degrees of prominence.

***We therefore suggest Ofcom defines minimum 'floors' for prominence for each PSB within the 50% overall allocation.***

Such minimums could, taken together, represent less than the total 50%, giving platforms and PSBs room to negotiate and best reflect user needs. This would reflect the approach adopted by ETV for PSB-owned and operated Freely, where business rules have been agreed covering the proportion of total promotional inventory allocated to PSB members overall, and minimum guaranteed proportions of that total for each PSB. The result of that framework for Freely has so far been promotion allocated as follows (average since launch, measured and reported quarterly):

[X]

We are not sure it would be appropriate or practical for PSBs to collectively impose such an approach in relation to third party platforms, so believe ***Ofcom needs to take this step in its Code.***

This would not entirely remove the potential for gaming by the RTSS in relation to the allocations, where even small variations in levels of prominence may have a profound impact. ***An additional safeguard would be for Ofcom to require the RTSS provider to provide (or publish) the allocations of both 'appropriate' and 'additional' prominence for each PSB each year before any commercial negotiation about additional inventory.***

It would also be helpful for Ofcom to clarify how its requirements around the order of prominence apply in relation to 'appropriate' and 'additional' prominence. For instance, in the event that ITV pays for 'additional' promotion such that its combined 'appropriate' and 'paid for' prominence overall was greater than the BBC's initial allocation of 'appropriate' prominence, would the BBC then be entitled to further free 'appropriate' prominence in order to ensure it was still the most promoted PSB service, as per A2.4 of Ofcom's Code? Or is it only the BBC's allocation of 'appropriate' inventory that must be greater than ITV's? We assume the latter - if so, ***Ofcom should make this clear.***

#### Access to content

We believe we understand the intent behind Ofcom's clause A2.5, which we think aims to ensure viewers can easily access content from all 'primary content areas' by helping ensure programmes from DIPS are prominently included in all such areas. As drafted, the clause

should prevent RTSS providers from refusing to include remit-delivering PSB content within those areas, which is an important protection to maintain.

### User choice

Unlike in relation to app menus, Ofcom has not included a carve out in ‘primary content areas’ in relation to user customisation. We support this decision. Were other responses to push for the inclusion of such a clause we would have the same strong concerns as outlined above in relation to apps.

### **Search**

We are broadly supportive of Ofcom’s framework. However, we believe that **Ofcom needs to expand A3.4 (defining relevance) to ensure that factors other than past viewer behaviour are taken into account.** For instance, in response to a search for ‘drama’, a genre widely offered by PSBs, it would be at odds with the purpose of the regime if PSB drama were not prominently featured in search results if a viewer had not watched a PSB drama previously or recently. Other factors for consideration in determining relevance might include the extent to which PSBs offer content in certain genres, the recency of release, and levels of linear viewing (an indicator of viewer demand).

### **Listed channels**

We agree with Ofcom’s proposed ordering of listed channels.

In regards to allowing legally-granted prominence to be overridden by user choice, we have the same concerns as outlined above in relation to app menus. We are not aware of any comparable provision in relation to Ofcom-regulated EPGs. **Ofcom should amend the Code to reflect this.**

### **Attribution**

We strongly agree with Ofcom’s proposed approach in A5.2 and A5.3 that any PSB content promoted within the RTSS should be clearly attributed to the PSB.

However, we are concerned by the discussion in the consultation document (3.232) of the expected approach when a given programme is available from multiple sources, and how this interacts with the degree of prominence to be delivered to PSBs in primary content areas. Ofcom states that:

*“...some implementation challenges might arise, for example in search results where specific programmes are available from multiple IPS. However, we consider these risks to be limited, and that RTSS providers should be able to overcome them. For example, in addition to attributing the programme to the DIPs as appropriate, an*

*RTSS provider might also choose to attribute the content to any other IPS in which it is included. This approach may also be necessary on non-regionalised platforms where Channel 3 content should be attributed to both ITV and STV.”*

In relation to this concept at a headline level, in our experience promotional tiles are not inactive ‘print ads’ - they tend to actively provide direct access to specific programme assets from a single specific given provider.

If Ofcom envisages some kind of menu-based approach, allowing users to select from a list of providers, then it should make this clear - and specify that PSBs should be entitled to prominence within such a list.

But, more usually, where such functionality does not exist, attribution should be only to the programme provider that will deliver the show should the user select the relevant tile. We would find it very odd indeed if PSB prominence were delivered through links to other people’s content.

***Ofcom needs to provide greater clarity in its Code - or to make clear that, given none of this is articulated within the Code currently, that RTSS and DIPS are free to agree the terms of attribution as part of ‘core’ terms.***

## **Approach to regionality**

We believe that challenges and unintended consequences may arise from Ofcom’s Code in relation to its application to ITV and STV in particular. This may stem from a degree of misunderstanding about the nature of ITVX and STV Player versus the linear channel 3 service.

In A1.4(d), Ofcom’s proposed approach to regionalised RTSS outside of Wales suggests that it regards ITVX as a regional service, distributed and available to users only in alignment with ITV’s regionalised broadcast channel 3 licences (i.e. that ITVX is a service for all areas of the UK excluding the two areas of Scotland where STV holds the relevant C3 licences). This is not the case.

Unlike the linear Channel 3 service, ITVX is available in all parts of the UK, including to viewers in Scotland. ITVX users in Scotland are able to watch public service remit content on ITVX in a variety of circumstances:

- Viewing any Channel 3 content after STV’s 30 day exclusivity period following a programme’s initial TX on the network (series stacking extends this period for titles earlier in the series)
- Simulcasts of all ITV digital portfolio channels included within our Statement of Programme Policy.
- All other ITV content including:
  - On-demand programmes originally broadcast on our digital portfolio channels.
  - On demand ‘archive’ Channel 3 content (not available on the STV Player from 1 year after TX)

- Content acquired solely for ITVX
- Content exclusively available within ITVX Premium.

The only content on ITVX that viewers in Scotland are unable to access on ITVX is:

- the ITV1 live simulcast; and
- on-demand ITV1 programming which is made available prior to TX (a preview) or within the first 30 days of broadcast (as may be extended via series stacking).

If users in Scotland try to access this subset of content within ITVX then it will block such requests and point users to STV Player.

This UK-wide availability of ITVX is reflected in many of our contracts with RTSS, which are simply for the UK-wide inclusion and promotion of ITVX and its programmes, not a restricted deal only for inclusion within our linear licence areas.

***Given this, whilst it is clearly appropriate for STV to be the most prominent of the Channel 3 service providers in Scotland-specific RTSS implementations (particularly in relation to access to the linear channel 3 service), we disagree with the exclusion of ITVX from prominence requirements in such circumstances. ITVX and its programmes should still be included and appropriately prominent in Scotland. Inclusion of ITVX in Scotland should not be regarded as an 'additional term' in relation to Ofcom's Guidance.***

A further issue relates to Ofcom's position on the attribution of ITV and STV programmes within non-regionalised RTSS, where Ofcom proposes dual attribution.

It is true that some (primarily global) RTSS providers choose not to regionalise their UI for different areas of the UK (and it is a choice, given they do 'regionalise' to the extent that UK users see a different UI to users in other countries). However, as noted above, users' access to different IPS (and their programmes) included within such an RTSS may still vary by nation.

If, as Ofcom suggests, content promoted within a non-regionalised RTSS is all attributed to both ITV and STV, then audiences may find their access to the promoted content blocked if they select the wrong DIPS. If they are not offered a choice of IPS to use (because, as noted above, most tiles lead only to one specific IPS) then many users may experience this problem. In such circumstances it is misleading for audiences to be told a programme is from both providers, and means part of the 'appropriate prominence' delivered to the PSB is wasted. Dual attribution may also represent a material worsening in ITV's

Alternatively, if ITV and STV are instead separately attributed and each granted a share of prominence (within the 50% allocated to PSBs, in line with the order of apps in a non-regionalised RTSS), this would mean viewers across the UK would see tiles for both ITV and STV, but again would only have entitlement to view those shows in some circumstances, leading to a high number of 'dead' link outcomes. And, again, a significant amount of PSB prominence would be wasted on journeys that cannot result in viewing.

Beyond live and the initial catch-up period outlined above, 'Channel 3 content' might be included in only one of ITVX or STV Player rather than both. In such circumstances, dual attribution would be factually incorrect and lead some viewers to dead links within the DIPS that does not host the content.

In all of the scenarios above, it is also unclear how Ofcom considers such attribution is likely to work practically. From ITV's perspective, we provide an RTSS with links to the content alongside relevant metadata (an image - either with an ITV logo burnt in, or with a separate ITV logo for the RTSS to use, deeplink information etc). In order to accurately determine whether a show would need to be ITV-branded, STV-branded, or dual-branded, a platform would need to know on a daily basis where the content was being hosted and what access rights the user has. To our knowledge, given ITVX and STV Player are completely different services technically, at present there is no shared content ID or similar from which to draw, potentially requiring platforms to build the relevant solution.

In all instances the requirement to revoke assets and redeliver them in different/bespoke forms may bring costs and management overheads for both DIPS and RTSS providers.

***Given the potential for poor consumer outcomes and technical problems arising from Ofcom's approach to the inclusion and prominence of ITV and STV DIPS, we suggest Ofcom needs to consider this area further.***

## **Accessibility**

We broadly agree with the intent behind Ofcom's proposed approach, with just two observations on key details.

We believe that Ofcom's proposed requirements around '*Making use of the regulated television selection service*' are intended to operate only when users are navigating the RTSS UI rather than once they choose to access one of the content services included. This is important because RTSS-designed and operated features in the areas Ofcom highlights (such as text-to-speech or image enlargement) would not work within apps such as ITVX.

Ofcom also proposes requirements on RTSS in relation to "*Being informed about – and able to make use of - available assistance for disabled people on IPS.*" We agree that it is sensible for this requirement to apply only if "*the provider possesses metadata on the availability of assistance for disabled people in relation to that programme.*" Clearly if the RTSS does not hold the data then such a requirement is undeliverable. We believe terms about the provision of such data falls outside the scope of Ofcom's Guidance but welcome Ofcom's intention to "*work with our biannual Accessibility Forum to facilitate industry collaboration on metadata sharing and standardisation to further increase the effectiveness of this recommendation.*" We set out a range of concerns in relation to the provision of metadata in the relevance sections below and would hope that, in relation to metadata about accessibility, Ofcom's Forum might help resolve them.

## **Other issues arising**

## Continue watching

Ofcom states (consultation 3.117) that it is “*proposing to exclude any part of the disaggregated content areas which enable users to continue watching programmes they have already started watching, or to access programmes they have stored or saved, such as ‘continue watching’ or ‘my list’.*” This is reflected in the definitions within the Code itself.

In terms of proscribing levels of ‘appropriate prominence’, we agree with this approach. As long as such functions are literally entirely personalised links to the last ‘X’ shows watched by that account then imposing a prominence requirement makes no sense.

However, we believe that programmes watched recently in DIPS should appear within such menus, even absent prominence requirements. This is likely to be what audiences would expect. In relation to Ofcom’s Guidance, we therefore believe the inclusion of PSB content within such menus (via a deeplink to the relevant DIPS) should be regarded as a ‘core’ term of inclusion.

As we explore below in relation to other aspects of the DIPS-RTSS relationship, we would welcome clarity on how Ofcom’s Guidance is intended to apply in circumstances where inclusion within a given function is on terms which the platform states are non-negotiable but are such that they would undermine the economics of PSB (e.g. mandatory ad-skipping or disaggregated content provision).

## **Areas not fully addressed by Ofcom’s current draft**

### Link to Guidance on Agreement Objectives

Establishing the extent to which DIPS (and their programmes) should be made prominent does not address the need for a broader agreement to be in place in order for the DIPS to be included and to fully function. For instance, the Code establishes that a listed linear channel must be included prominently but it does not determine whether that channel plays out from within the relevant PSB DIPS (via a deeplink) or within the RTSS (through the provision of the channel by the RTSS itself). ***Ofcom should make clear in its Code that such terms will be regulated as ‘core’ under Ofcom’s Guidance on Agreement Objectives.***

### Deciding which content is promoted and who it is promoted to within the RTSS

Ofcom’s guidance is sensibly based on a world where a significant amount of promotion is to individual programme titles rather than to the overarching content services they sit within. This reflects market norms.

However, Ofcom’s guidance is silent on which programmes from a DIPS should be promoted, who the programmes should be promoted to, and who should make those decisions. Given the default position, from a technical standpoint, is that areas outside PSB apps will be controlled by the RTSS, this poses risks to the delivery of public service

outcomes unless the selection of content to be promoted and the target audience of that promotion are regulated as a 'core' terms under Ofcom's Guidance on Agreement Objectives.

Otherwise RTSS providers might be incentivised to:

- Charge PSBs for any control over which shows are promoted or who is targeted
- Undermine PSB delivery through their choice of which content is promoted, perhaps making PSB services look less appealing than their global counterparts, or choosing shows that need less promotion (perhaps due to high existing consumer awareness)
- Undermine PSB delivery in who programmes are promoted to, for instance targeting promotions only at heavy ITV users rather than the lighter users it is harder to reach
- Use prominence as commercial leverage [X]

***Ofcom should address this in its Code by making clear that terms on which shows are promoted and to who should be regarded as core.***

#### Role of personalisation, algorithms and AI

We increasingly hear that platforms intend for their UIs to function 'only via personalisation, algorithms and AI' and so we are told that 'they cannot control what is surfaced'. Ofcom is explicit in its 'definitions and interpretations' that such platform design does not prevent a person having general control of an RTSS. ***Ofcom should also make clear in the body of its Code that the use of algorithms or AI in any form (e.g. chatbots, AI assistants, generative recommendations) to power content recommendations and discovery in regulated areas of the RTSS (e.g. 'primary content areas' or 'search') does not override the legal requirement for the RTSS to deliver prominence in such menus for PSB DIPS.***

We are also aware that some platforms and services are moving to a model whereby on start-up a user is taken to a 'for you' style screen, tailored to them, rather than to a more traditional 'home page' experience that is common to all (even if specific content promoted varies). ***Ofcom should make clear that such approaches would be regarded as 'primary content areas' and 'app menus' for the purposes of the Code.***

#### Content available from multiple sources

In some cases, a particular show might be available from multiple sources within a single RTSS. In presenting results to users, Ofcom should make clear that free PSB content should always be the default option (if the platform operates a default) and/or the most prominent option in such circumstances.

#### Oversight and reporting

Whilst we generally support Ofcom's intent to encourage most issues to be resolved between DIPS and RTSS providers, the guidance needs to address areas of knowledge asymmetry that could undermine such negotiations.

In relation to prominence, DIPS will have no knowledge of which areas of a UI are most used, how 'promotion' is measured by the platform (other than to the extent areas may have been offered for sale to the DIPS provider by the RTSS provider outside the scope of these wider agreements), nor how to assess how any given offer or outline of promotion and prominence compares to that offered to other providers. In its consultation, Ofcom says that it expects that RTSS providers will need to "*explain the specific measures that they will take to follow the Code actions as part of their negotiations with DIPS providers and include these measures in their agreements.*" **We believe Ofcom needs to go further and require RTSS providers to release such information to DIPS prior to negotiations to enable them to assess whether appropriate prominence is being offered.**

Once agreements are in place, **RTSS providers should also be expected to report on the delivery of prominence to DIPS providers.** It is also likely that platforms will have insights into the effectiveness of content promotion - perhaps through conversion rates (views of promoted content on homescreen resulting in viewing of the promoted show) or any AB testing (e.g. use of personalised content imagery for different viewers). Again, we would expect DIPS providers to receive such insight free of charge in order to optimise PSB delivery.

Ofcom's Code "*advise[s] providers to keep a record of how they have followed the recommendations in this Code.*" This is necessary but not sufficient. **Ofcom needs to require providers to ensure DIPS providers have ready access to information both to inform negotiations and to ensure the terms of agreements are met.**

## Comments on Annex 3 - Draft Guidance on Agreement Objectives

### The importance of PSB sustainability is not sufficiently reflected in Ofcom's draft Guidance

In bringing forth new legislation to address changing audience behaviours and market conditions, the Government made clear that its new regime for prominence, inclusion and dispute resolution was intended to ensure that:

*"...PSB on-demand services are made available on terms that are consistent with the sustainable delivery of PSB obligations"* (Up Next White Paper)

This commitment to the sustainability of PSB was reflected in the Media Act itself, which includes an agreement objective that:

*"...the arrangements made between the provider of that designated internet programme service and the provider of a regulated television selection service **do not adversely affect** the ability of the provider of that channel to fulfil the public service remit for that channel..."* (Media Act 2024)

The delivery of ITV's public service remit requires very significant investment in original UK content each year, even more so with the imposition of a specific regional production spend quota of approaching £200m pa. The economics of ITVX are therefore just as important as the concepts of prominence and accessibility within the new regime - without a sustainable business model there will be no content for RTSS providers to make prominent and accessible.

The legal requirement to ensure 'no adverse effect' on PSB remit delivery is not caveated, unlike the objective that terms should not:

*"...**disproportionately restrict** how the provider of a regulated television selection service may make innovations in the ways that users may select and access internet programme services or programmes included in such services."*

Ofcom's introduction to its Guidance recognises that *"there is potential for conflict between the PSR Objective and the Innovation Objective."* It intends its Guidance to *"assist providers in resolving any such conflict."* We absolutely recognise this tension, which we see play out in almost all our negotiations, and share Ofcom's desire for its Guidance to help reduce the potential for conflict.

In assessing whether Ofcom's Guidance is likely to have this effect, the first thing to recall is Parliament's intended negotiating position for PSBs and platform providers. The law is very clear that there can be 'no adverse affect' on the delivery of the PSB remit. By contrast, consideration of the impact on platforms is limited to ensuring terms do not 'disproportionately restrict' and only in relation to the way the RTSS deliver innovation 'in the ways that users may select and access internet programme services or programmes included in such services'. This is a much more constrained protection but we are concerned

that Ofcom appears to give too much weight to potential impacts on innovation. It is hard to see how interventions around PSB inclusion and prominence could have any bearing at all on innovation, in this constrained sense, by global platforms of markedly greater scale than PSBs.

By contrast, it is clear that Parliament's priority in passing the Media Act was to sustain PSB. However, this key pillar of the regime is not referenced at all in the summary of Ofcom's consultation, and only very briefly elsewhere.

The recognition of this key Parliamentary objective is critical when it comes to considering how Ofcom's concepts of 'included', 'core' and 'additional' are to be understood, and how they interact with Ofcom's general payments principle. We explore these issues below.

### **Defining concepts of 'included', 'core' and 'additional' terms**

The single most challenging aspect of Ofcom's Guidance as drafted is identifying what it means to 'be included' and which terms Ofcom will regard as 'core' and 'additional'. There are two key risks here:

1. That PSBs are held to ransom over 'additional' terms: if terms are defined as 'additional' when they are in effect central to the ability of the PSB to fully operate and monetise its DIPS, then the RTSS provider will have extraordinary power to extract value from the PSB system through supposedly additional terms. Ofcom appears to recognise this when it says that "*While additional terms are subject to commercial negotiation, providers must still ensure that such terms are consistent with the Agreement Objectives and with the overarching aim of the Prominence Regime.*" Far better to get 'core' terms right from the outset than rely on such a proviso, which we explore further below.
2. Heightened risk of disputes: Absent a shared understanding of these terms, the risk is that DIPS and RTSS providers are unable to agree terms at all, with Ofcom likely to face a wave of disputes from the off despite its desire that its Guidance prevent this. Regulation by legal dispute is highly undesirable and represents an unacceptable commercial and legal risk for PSBs.

Below we set out our understanding of these terms, and suggest that Ofcom seeks to offer greater clarity in its Code and Guidance as appropriate.

#### Defining 'reasonably necessary' / 'core'

In setting out relevant factors to be considered as to which terms are 'core' and 'additional', ***Ofcom should ensure that the list gives sufficient guidance as to the outcomes anticipated.***

From an ITV perspective, the following outcomes are necessary and so need to be captured within 'core' terms:

*Terms related to inclusion*

- Audiences are presented a familiar service which broadly looks and feels like other versions of ITVX - for instance, in terms of branding, functionality and routes to content
- The service offers broadly the same content catalogue - though there may be some variations by platform due to contractual limitations, all audiences should have access to the vast majority of the service's public service remit content
- Audiences are able to watch programmes in the DIPS regardless of where on the RTSS they discover them
- Adequate content protections are in place through DRM
- In-app accessibility features work as intended
- The underlying business model of ITVX is enabled - including, where relevant, user ID matching, sign-in, ITV able to sell and deliver all the forms of advertising offered on ITVX elsewhere, and the ability to operate a premium upgrade
- ITV has insight into its audiences

*Terms related to prominence*

- The app is easy to find and access within all app pages on the RTSS, as per Ofcom's Code
- Content from within the DIPS is easy to find and access within all sections of the RTSS within scope of Ofcom's Code (e.g. primary content areas, search etc)
- ITV is able to understand how its content was made prominent (in line with Ofcom's Code) by the RTSS

These could be captured in the same style as the 'relevant factors' already included. For instance, the importance of the business model could result in the following relevant factor:

*"The needs of DIPS providers to optimally monetise their service such that there is no adverse effect on the ability of the provider to fulfil the public service remit"*

In the event of disagreement between DIPS and RTSS providers, this will ensure that platforms cannot undermine PSB economics by citing 'audience preferences' or 'technical issues'.

Examples of 'core' terms that might arise from the approach outlined above could include:

- Provision of appropriate technical information by the RTSS to enable the DIPS provider to make necessary modifications, and a fully-functional testing environment pre-launch
- Full technical support and analytics from the RTSS to ensure the DIPS functions on an ongoing basis, including incident response

- Provision of deeplinks by the DIPS, and integration of those deeplinks by the RTSS, to enable viewers to watch programmes discovered within the RTSS
- Deeplink tagging or referrers embedded in the deeplinks (e.g. a suffix on the deeplink request with the source of the click to identify Homepage Row 1 Position 1) between RTSS and DIPS - to understand the source of user journeys beginning within the RTSS and to enable ad models to function
- Provision of a catalogue of metadata (i.e. all/most metadata fields relating to 100% of the content on the DIPS service) by DIPS to RTSS to enable prominence requirements, with express limitations of the usage of that data solely for the purpose of enabling the prominence - for example, an RTSS with a proprietary LLM must not be allowed to pass the metadata catalogue through the model and obtain the benefit of the training absent commercial agreement with the DIPS provider (an 'additional' term)
- Data about how prominence was delivered, based on the methodology adopted by the RTSS, with reference to a) the position of PSBs taken together versus non-PSBs taken together; b) the position of ITVX relative to other individual PSBs; and c) the position of ITVX relative to other individual non-PSBs. Information on ITVX prominence should also include which shows were promoted, when and for how long they were promoted, within which areas of the RTSS interface, to which users they were promoted.
- Information about viewing to DIPS content taking place within the RTSS - for instance, through data that allows us understanding of who is watching, what they are watching, and when they are watching - in real time
- ITVX Premium access for customers signed up off RTSS

These terms are non-exhaustive but we think it is important that there is a shared understanding from the outset as far as possible.

### Defining 'additional'

Following the approach adopted by Ofcom in its draft, 'additional' terms are by definition anything not covered above. We agree that Ofcom cannot be definitive about this in its Guidance. Here we provide some examples of terms we would generally regard as additional. We would oppose any calls for them to be regulated as 'core'.

### *Paid-for promotion over and above 'appropriate prominence' required by Ofcom's Code*

We think it is right that DIPS and RTSS providers should be free to negotiate additional paid-for promotion / marketing / advertising as long as this does not undermine the compliance of the RTSS with Ofcom's Code. We make some suggestions as to how Ofcom's Code could be made clearer in this regard above.

Any payment for additional promotion should be entirely voluntary. [X] We welcome that Ofcom views such terms as unacceptable payments where it defines 'payment' to include:

*"...any direct fees or revenue shares, as well as indirect payments. Indirect payments may arise where the inclusion of DIPS in RTSS or the provision of appropriate prominence is made conditional on accepting other terms that affect the value transfer in contracts."*

We recognise that any agreement delivering prominence for non-PSR content will be an additional term.

#### *Additional metadata provision*

We recognise that it is reasonable for the provision of some existing metadata to be regarded as 'core' (as set out above). However, this provision should be only of such data sufficient for the RTSS to deliver its obligations under the Media Act (e.g. prominence).

It is likely that the form of this data might vary by RTSS and by DIPS. For instance, some RTSS may offer only high-level recommendations and personalisation (e.g. 'UK drama') whilst others may have far more sophisticated systems (e.g. 'UK-made, police and crime thriller, set in Wales, starring Martin Clunes').

It seems likely that the more a DIPS provider is able to provide the metadata that is assessed by the platform, the better the recommendations of RTSS providers will be. However, it is possible that DIPS providers may not have all such data, or that the DIPS may have more sophisticated data than the RTSS can use. ***Data provision under 'core' terms should not require the creation or acquisition of additional data by the DIPS, the translation of existing data into alternative formats by the DIPS provider, nor the provision of data that the RTSS cannot use to deliver its prominence requirements.***

#### *Metadata usage*

Provision of metadata as 'core' should be strictly on the basis that it is used by the RTSS only to deliver its obligations under the Media Act (e.g. prominence). The use of proprietary PSB data for other purposes (e.g. training AI models, enriching platform ad sales data, enhancing their own content offer) should clearly be regarded as 'additional' so requiring commercial agreement.

[X]

There appear to be striking parallels between this situation and the CMA's discussion of the relationship between Google and publishers in its *Consultation: Publisher Conduct Requirement - Google's general search services*. Publishers face a similar problem - with the degree of integration required to drive discoverability of their content also leading to the use of their content for the training and grounding of wider AI models by Google.

The CMA observes that whilst publishers could in theory choose to opt out of being used as an input to AI Overviews and AI Mode in order to reduce this risk (and incentivise commercial agreement around the use of their content by AI), the “...use of this control is likely to affect their organic search ranking and reduce traffic...” and that “Evidence from a study produced by Google showed that removing snippets [from Google Search results] reduced traffic [to publisher websites] by nearly half.” The CMA concludes that “As such existing controls do not give publishers effective choice over the user of their content in search generative AI features.”

In seeking to address these issues, the CMA’s focus has been on greater controls and transparency. We also note that the CMA is considering commitments offered by Apple and Google (in the context of the CMA’s designation of Apple and Google as having Strategic Market Status in the provision of mobile platforms) seeking to:

*“ensur[e] app developers data is not used to inform the development of their own apps, additional transparency around how access to app developer’s data is controlled and in relation to data separation mechanisms, products and services, and channels to receive complaints<sup>1</sup>”.*

This approach also echoes obligations contained in the EU Digital Markets Act which obliges gatekeepers to not use non-public data, provided in the context of their use of the gatekeeper’ platform, in competition with business users.

Requiring RTSS to provide warranties over the use of data/information provided by DIPS appears to be in line with these cases and, therefore, not an unreasonable expectation.

However, as drafted, Ofcom’s Code and Guidance suggests it is likely that PSBs will be required by Ofcom to provide metadata to RTSS to facilitate prominence and content discovery, leaving us without even a theoretical ability to walk away. ***It is therefore critical that Ofcom amends its Code and Guidance to make clear that the provision of metadata is a) limited to only that necessary to ensure DIPS are included and made prominent, and b) that the RTSS providers are not able to use such data for any other purposes.***

We are uncertain how Ofcom’s Guidance is intended to address circumstances in which such ring-fencing of data usage is, according to the RTSS, impossible. This would have a profound impact on the economics of PSB.

#### *Additional audience data*

Ofcom states that:

*“...terms about the provision of audience data are generally additional terms on the basis that they are not reasonably necessary for the inclusion of DIPS in RTSS.”*

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<sup>1</sup> <https://competitionandmarkets.blog.gov.uk/2026/02/10/improving-the-way-apple-and-google-deliver-app-store-services-and-enhancing-ios-interoperability-in-the-uk/>

In an app-based world, the DIPS provider will have direct knowledge about audience behaviour within the DIPS but not the wider RTSS, while the RTSS provider will have direct knowledge about audience behaviour within the RTSS (and potentially within the DIPS too, depending on the technology deployed within the device). We therefore take Ofcom's position to relate to the sharing of such data between the DIPS and RTSS provider. We agree that such data exchange should be covered via 'additional' terms.

In circumstances where significant functionality is delivered outside apps, by the RTSS, then we would expect to receive comparable data to that which we would have received were consumption to take place within the DIPS. This will be necessary in relation to advertising sales, audience insight, and any personalisation still delivered by the DIPS. Were such audience data regarded as 'additional' in such circumstances then DIPS providers would be vulnerable to RTSS providers exploiting this loophole.

A final potentially relevant area is user ID and source information from the RTSS UI. Generally, for a DIPS to function optimally and in order to make sense of any data on prominence provided by the RTSS, we will need the RTSS to ensure that we are provided with a user ID that we are able to match to our own. In an app-based world, a DIPS provider is able to collect the User ID from the login process, however, information and understanding of viewer journeys can only be obtained from that point on. We therefore need a referrer at the point a deeplink is clicked in the platform UI to understand how users are finding the content. Today these referrers vary by platform, but are usually suffixes appended by the platform in the request to ITVX that ITVX can catalogue and analyse to optimise content surfacing, delivery and metadata. **Such 'audience data' should be regarded as 'core'.**

### *Disaggregated playback*

To enable content to be viewed within a DIPS when it is discovered and/or promoted within the RTSS (rather than the DIPS app), we recognise that the provision of a deeplink will be a 'core' term.

Where a platform prefers linear and/or on-demand playback to be via the RTSS interface rather than in-app, this should be subject to commercial negotiation. As explored above, we have already agreed to such approaches where we have been able to successfully negotiate terms that offset any negative impact on ITV that arise, a critical part of any such implementations.

We are uncertain how Ofcom's Guidance is intended to address circumstances in which disaggregated playback is, according to the RTSS, the only option available. This would have a profound impact on the economics of PSB. We explore this issue below.

### *RTSS functionality*

We recognise that RTSS may offer functionality beyond that offered by DIPS, such as PVR and ad-skipping. We recognise that platforms may wish to integrate such functions with

DIPS. We are open to such discussions but again they must be on a commercial basis and allow for payments.

We are uncertain how Ofcom's Guidance is intended to address circumstances in which such functions cannot, according to the RTSS, be opted out of by DIPS. This would have a profound impact on the economics of PSB. We explore this issue below.

#### *Mandatory use of platform or platform-preferred ad sales*

Different DIPS may well have different approaches to ad sales, so Ofcom's Guidance will need to recognise this. What is clear though is that RTSS should not be able to dictate how ad sales works for DIPS. Terms mandating the use of RTSS ad sales or RTSS-preferred providers must clearly be 'additional' and so subject to commercial negotiation.

#### *ITVX Premium sales or user payment facilitation by RTSS*

As set out above, we agree that the inclusion of Premium / non-PSR content within the DIPS and the ability of audiences to access that content will be part of 'core' terms. We also agree that any agreement between the RTSS and DIPS for the RTSS to offer and facilitate subscriptions or consumer payments would be an 'additional' term.

#### Defining 'included'

Above we have tried to draw as bright a line as possible between 'core' and 'additional' terms, in order to reduce the risk of disputes. But we recognise that Guidance cannot be exhaustive and definitive in all circumstances.

***We believe that the general ambiguity in Ofcom's Guidance would be reduced if it were clearer at the outset that 'inclusion' of a DIPS means that it should function not only as audiences expect but also in line with the way in which it has been designed by the DIPS provider.***

For instance, 'included' might be defined as follows:

*'Included means such that the DIPS is able to function as if it would on a platform owned-and-operated by the DIPS provider or comparable RTSS providers, [or to equivalent standards mutually agreed between the DIPS and RTSS provider]'*

This allows for minor variations in what constitute 'core' terms depending on the specific circumstances but also makes clear that such variations cannot be such that they have an adverse effect on the ability of the DIPS provider to meet their PSB remit.

Whether the wording in brackets above is included depends on how Ofcom wishes to approach the issue of payments, which we explore further below, in particular the circumstances in which the action of including a DIPS results in a suboptimal commercial

outcome for the PSB due to design features that are an inherent part of the RTSS rather than separately-negotiable.

By way of example, we can see a broad direction of travel for platforms seeking to be one-stop-shops for all content. They want to ensure that their customers can access any IPS available, sometimes seeking to bundle access to multiple IPS together into a single subscription. On a technical level, RTSS are seeking to ensure that their customers can then find and access these services as easily and smoothly as possible.

In such circumstances it is not hard to envisage platforms building an integrated experience. Instead of multiple IPS all operated individually by different content providers, the RTSS itself might host and distribute all the content. In such circumstances the RTSS may offer only a single model of playout and functionality - perhaps with ad-skipping/pause/rewind or disaggregated linear feeds as standard. It may have integrated its content recommendation algorithms and AI into its wider portfolio of global products, with no ability to ring-fence metadata provided by DIPS to deliver prominence.

Including ITVX and/or a disaggregated ITV1 stream in such circumstances would immediately impose a very significant financial cost on ITV compared to alternative platforms / approaches. But we do not appear to have the ability to withhold ITVX from such an RTSS. The logical position in such circumstances could be for the RTSS to agree to compensatory payments to the DIPS provider to offset such losses - resulting in the 'equivalent standards' referenced in our drafting above.

If such payments were allowed, then we suggest Ofcom retains the wording in brackets. If Ofcom believes that such payments would not be compatible with the regime then the wording in brackets should be removed - with further guidance provided to ensure that PSB economics (and so the delivery of the PSB remit) are not undermined due to the design choices of global platforms.

## **Payments: general principle**

### Overall approach

We can see that Ofcom is attempting to deliver Guidance that embodies the 'zero net fees' principle that was much-debated prior to the passing of the Media Act. Most obviously:

- Avoiding 'ransom' payments: Ofcom states that its payments general principle: *"reflects DIPS and RTSS providers' respective MOMI obligations and the obligation of RTSS providers to give appropriate prominence to DIPS (including PSR content and any listed channels in those DIPS)."* We take this to be intended to prevent 'ransom' payments being extracted from either party as the 'price' of inclusion.
- Precluding revenue share requirements: Beyond such 'ransom' payments, it is also very clear that mandatory revenue share requirements from DIPS providers to RTSS providers, or the requirement to gift or subsidise inventory, would fail the agreement objective that there must be no adverse impact on PSB remit delivery. This is true even if such terms are regarded by the RTSS provider as the standard terms on

which it operates with all content providers. As Ofcom itself warned in *Transmission Critical*, the future of PSB is under threat and so any further erosion of PSBs revenues would by definition have an adverse impact. We therefore welcome Ofcom's clarity that revenue shares would constitute such a restricted 'payment' for inclusion and so not be compatible with the regime.

We think these high-level interventions are sensible and in keeping with Parliament's intent.

However, we do have some concerns about Ofcom's approach to payments will interact with the concepts of 'core' and 'additional' terms.

#### Might 'core' terms undermine the delivery of the PSB remit?

Ofcom's approach works best when understood as applying to the inclusion of the DIPS as an app, that to a significant extent then operates independently of the RTSS once installed, with areas of collaboration or joint functionality rather limited. Subject to our comments above on defining 'core' and 'additional' carefully, we can see how the Guidance might mainly deliver workable outcomes.

However, as flagged above, we can see many areas in which 'core' terms could come at a significant cost to the DIPS provider or entail some form of payment. For instance:

- If an RTSS operated an ingest-only model - acting as a single overarching content aggregator rather than hosting individual apps - then 'reasonably necessary' terms for inclusion might entail the provision of ITV content assets to that provider, to be delivered by them to their users. In such circumstances, the RTSS would need to pay for last-mile delivery to viewers - but might this constitute an 'indirect payment' and so be prohibited?
- In the same scenario, were the platform's ad-skipping functionality to be universally deployed across all IPS then this would automatically function on ingested PSB content, undermining the economics of PSB unless a compensatory payment were allowed - but again, the general payments principle would seem to preclude that?
- If the platform offered a premium ad-free environment, or a number of ad-free functions within its RTSS, a payment to compensate for the loss of DIPS ad revenue would be needed but potentially prohibited under this general principle?

In essence, if the inherent form of an RTSS (as a whole or in certain functions) has the effect of turning 'additional' terms into 'core' terms in such a way that PSB economics are undermined, how is the Guidance anticipated to function?

[X]

[X] But if the RTSS is expected to include and deliver prominence for DIPS content in such areas, how does that expectation interact with the concept of 'core' terms for inclusion? It surely cannot be right that we would be expected to support such an outcome without payments.

Equally, it would be unfortunate if PSB DIPS were not included within key areas of the UI because they are excluded from prominence requirements, or because platforms are prevented from compensating for any loss of revenue.

#### The risk of relying on 'exception' clauses

Ofcom seems to recognise this issue to some extent in relation to the 'steps to enable and maintain inclusion of DIPS' section of its Guidance, where Ofcom recognises that:

*“DIPS will normally be delivered in the form of an app. However, there may be circumstances where this is not the case – for example, where an RTSS provider wants its RTSS to operate in a way that includes DIPS that are not apps, or where a DIPS provider wants to offer its DIPS in a form that is not an app. In these exceptional circumstances, we consider that it may be consistent with the Agreement Objectives for payments to be made by the provider who wishes to offer or include (as applicable) the DIPS that is not an app.”*

We understand the broad concept here - many current RTSS implementations appear to lean heavily on an app-led experience. We can therefore understand why Ofcom states that *“DIPS will normally be delivered in the form of an app.”* Ofcom recognises that *“there may be circumstances where this is not the case”* but regards such an approach as *“exceptional circumstances.”*

We would go further and say that such approaches are not 'exceptional' at all. The market already appears to be looking to address challenges arising for users from the proliferation of apps and the friction that can be created in navigating between them. It seems likely to us that many more RTSS providers will seek alternative ways of operating to offer more seamless experiences to their users. In our experience some RTSS already have substantial 'out of app' design elements (we will refer to such implementations as 'hybrid').

In such circumstance, not only do we agree with Ofcom that *“it may be consistent with the Agreement Objectives for payments to be made by the provider who wishes to offer or include (as applicable) the DIPS that is not an app”* but we suspect such payments may be more routinely necessary even where integration is primarily app-based. For instance, to address any loss of value to DIPS providers from being required to disaggregate their programmes or services / allow payout to take place outside of DIPS should 'core' terms require it, or to facilitate inclusion and prominence in areas without ad capability.

***We believe Ofcom needs to further consider the interplay between 'payments' and the concepts of 'inclusion', 'core' and 'additional' terms, whilst maintaining its overarching principle that 'ransom' payments and revenue shares are incompatible.***

#### Applicability of agreement objectives to 'additional terms'

A related issue is the applicability of agreement objectives to 'additional terms'. Ofcom's Guidance is clear (at 2.4) that it *“will only apply to the terms that relate to: (i) the inclusion of*

the DIPS in the RTSS; and (ii) appropriate prominence” and (at 2.13) that there can be payments in relation to ‘additional terms’:

*“It follows from the general principle in paragraph 2.10 above that we consider it would generally be consistent with the Agreement Objectives if DIPS and RTSS providers were to require payments for any terms of the MOMI arrangements that are not “core terms”. We refer to such terms as “additional terms” in this Guidance.”*

We agree it makes sense that DIPS and RTSS providers might want to agree to additional elements of a contract, beyond those required for the inclusion and optimal functioning of the DIPS, and that these might include payments.

However, Ofcom almost immediately goes on to say in 2.15 that:

*“While additional terms are subject to commercial negotiation, providers must still ensure that such terms are consistent with the Agreement Objectives and with the overarching aim of the Prominence Regime.”*

Given Ofcom has concluded that payments in either direction are incompatible with the agreement objectives, this appears contradictory to the idea that payments for ‘additional terms’ could be consistent with the agreement objectives.

As we have set out above, even where payments are not ‘necessary for the inclusion of the DIPS’, they can still be mutually beneficial. For instance, such payments allow PSBs to voluntarily support aspects of platform functionality, [X] that would otherwise undermine the ability of the PSB to deliver its remit (absent compensation to the PSB).

If such payments are prevented then the result is likely to be either a suboptimal user experience (as such functionality will be refused by the PSB in contrast to other providers on the platform) or damage to PSB economics (if the platform implements such functionality absent PSB agreement or the PSB feels it has to accept without compensation).

***Ofcom needs to ensure that its approach to payments for ‘additional’ terms aligns with the approach it takes to the issues raised above as to how ‘included’ and ‘core’ / ‘additional’ terms are defined.***

The law does not preclude the sorts of payments explored above

As set out above, there are a range of reasons that payment from RTSS to DIPS might be necessary or preferable. Beyond the limited circumstances of a PSB withholding its DIPS to extract some kind of ‘ransom’ payment, it is unclear why Ofcom believes it would “...be inconsistent with the Agreement Objectives for ... the DIPS provider ... to require payment from [RTSS providers].” (Draft Guidance on Agreement Objectives, p.8). Such a requirement does not undermine delivery of any of the three Agreement objectives:

- It would not reduce the prominence of DIPS;
- It would not adversely impact PSB remit delivery (quite the opposite); and

- It would not stop RTSS innovation in the ways users may select and access internet programme services or programmes (unless the payment was so big as to undermine global platform businesses).

Indeed, we can see nothing in law that supports Ofcom's decision to design the regime in this way - there is no broad economic protection for RTSS providers written into law, simply a requirement for terms between PSBs and platforms to involve no disproportionate restriction on the way in which RTSS providers surface content and services.

This is not an attempt to argue for a power for PSBs to impose punitive charging simply for inclusion of DIPS. Instead, it is a reflection of the fact that it is possible that some RTSS might (perhaps legitimately) wish to design their service in a way that has the (unintended) effect of undermining the economics of PSB. As set out above, there are ways through this such that there is no adverse effect on the ability of PSBs to deliver their remit as long as payments (or benefits in kinds, like last mile delivery) are allowed.

***Ofcom should consider taking a broader view of the circumstance in which payments by RTSS providers to DIPS might be appropriate to ensure the delivery of the PSB remit is not undermined.***

### **Cost recovery**

We agree with Ofcom's proposed approach, which broadly seeks to ensure both DIPS and RTSS providers bear their own costs in relation to the inclusion of services within platforms. We also agree that DIPS providers should not be expected to incur costs that arise from the actions or approach of RTSS providers which result in higher levels of cost than generally required in other implementations.

[X]

[X] Bespoke builds for new proprietary OSs will involve significantly higher cost than the averages to support existing implementations.

### **Reasonable period for providers to become compliant**

Ofcom is proposing that providers be given 12 months to come into alignment with the Code and Guidance. This seems disproportionately long considering the minimal changes that RTSS will for the most part need to make, and which they appear to be able to make very rapidly when marketing prominence as a paid-for proposition. Every month and year that is lost is value lost to PSB. We would expect any new agreement negotiated with RTSS providers after Ofcom publishes final guidance to comply with its requirements, and that existing contracts are either amended or replaced within six months. Any genuine technical impediments within the first 12 months might be reflected in agreements, by exception.