OFFICE OF COMMUNICATIONS

Review of the cross promotion rules

Consultation Document

Consultation

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Contents

Section 1

Summary

Introduction

1.1 Ofcom is reviewing the current cross-promotion rules that regulate the cross-promotional activities of all television Broadcasting Act licensees. Ofcom inherited the current rules from the Independent Television Commission ("ITC") and Ofcom has a duty to review them in order to ensure that they remain relevant and appropriate. This consultation document contains Ofcom's analysis of current cross-promotion activities and the competition and content issues that arise. It also sets out Ofcom's proposals for the future regulation of cross-promotion.

Cross-promotion by television broadcasters

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

1.3 Promotional airtime on television arises as a result of both the advertising rules that limit the amount of advertising that can be shown and pre-determined programme lengths[1]. Broadcasters are often left with remaining airtime between advertising and programmes, which they use for self-promotion (promotions for programmes on the same channel) and cross-promotion[2].

The current cross-promotion rules

1.4 In January 2002, the ITC issued rules regulating the promotion of programmes, channels and related services on commercial television ("the Current Rules")[3]. The Current Rules address both competition and content issues, such as the potential impact of excessive cross-promotion on competition between channels and digital retail TV services[4] and also on the viewer in terms of "clutter" (excessive quantity of logos, on-screen graphics and other messages).

Concerns that arise from cross-promotion

1.5 There are two main concerns that arise from current cross-promotion activities.

[1] For commissioned programmes, producers are typically asked to deliver a programme of a specified length but there will be a tolerance of, for example, 30 seconds either side of the specified length. Programmes which are imported are usually of a length suited to the maximum advertising requirements of the country in which they were made. For example, the USA allows more advertising than the UK and therefore programmes imported from the USA are generally of shorter length. Similarly, programmes which are made anticipating export or expected to be shown on secondary channels showing advertising will also be shaped to accommodate the appropriate regulations applying abroad or on the secondary channels.
[2] In the absence of advertising minutage rules, it is likely that broadcasters would still self- and cross-promote, although there may be a reduction in quantity and promotions may appear at a different place in the schedule.
[3] http://www.ofcom.org.uk/tv/ifi/guidance/rules_promo_prog/
[4] Digital retail TV services include free-to-view multi-channel TV (such as Freeview on DTT and Sky Freesat on digital satellite) and pay-TV services (such as Sky subscription services on satellite, ntl and Telewest subscription services on cable, Top-Up TV on DTT and Homechoice and Kingston over DSL).

1.6 The first concern is in relation to the subject matter of cross-promotions. Promotions for non-broadcasting related services outside of paid-for advertising airtime would not be consistent with the requirements of the Television Without Frontiers Directive regarding transparency, separation and advertising minutage.

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

Proposals

1.8 Ofcom has considered whether it remains appropriate to regulate cross-promotion on both a content and a competition basis. The preliminary conclusions of its analysis are that, with the exception of two specific areas, it is appropriate to de-regulate and remove the Current Rules.

1.9 Ofcom proposes the following two rules to apply to promotions outside programmes:

- **a requirement on all television broadcasting licensees[5] to limit the subject of cross-promotions to broadcasting-related services**
  This is necessary in order to protect consumers from promotions that provide no benefit to their viewing experience and might resemble advertising; and
- **a requirement on Channels 3, 4 and 5 to maintain neutrality between digital retail TV services and digital platforms**
  Discrimination by the main terrestrial broadcasters in favour of one particular digital retail TV service or digital platform has the potential to have a material impact on competition between digital retail TV services. This is of particular importance as analogue-only homes must make choices about digital TV services in the run up to digital switchover and consumers should have the ability to make informed choices. It is therefore appropriate, in these particular circumstances, for Ofcom to put in place this precautionary measure.

1.10 In addition, Ofcom proposes to remove the strict 30% shareholding requirement and replace it with more flexible guidance. The guidance is also set out in the new code.

1.11 Ofcom considers that it is unnecessary to retain the rule that promotions in centre breaks must not exceed 20 seconds, which is currently contained in the Rules on

[5] In the context of this consultation document, this includes S4C.

Amount and Distribution of Advertising ("RADA")[6], and therefore proposes that this is also removed.

Cross-promotion by the BBC

1.12 Ofcom has no powers to regulate the BBC's cross-promotional activities and therefore this review does not include proposals in respect of the BBC. However, Ofcom considers that the analysis and proposals for regulation set out in this document have equal application to the BBC as to the commercial terrestrial broadcasters. Ofcom has discussed its views with the Department of Culture, Media and Sport ("DCMS") which is currently in the process of its BBC Charter review. Ofcom considers it important that the White Paper should require the BBC to adhere to the same set of requirements as Ofcom proposes above in relation to the commercial terrestrial broadcasters.

Cross-promotion by radio broadcasters

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

Research

1.14 Ofcom has today also published two research reports that were undertaken for the purposes of this review. The report entitled *Television promotions – what the viewers think, a report of the key findings of a qualitative and quantitative study* and the report entitled *Analysis of current promotional activity on television, a report of the key findings of a content analysis study* can be found at http://www.ofcom.org.uk/research/tv/reports/promotion/. These reports are referred to in this document.

[6] http://www.ofcom.org.uk/tv/ifi/codes/advertising/rules/

Section 2

Background and introduction

Introduction

2.1 Ofcom is reviewing the Current Rules that regulate the cross-promotional activities of all television Broadcasting Act licensees. Ofcom inherited the Current Rules from the ITC and Ofcom has a duty to review them in order to ensure that they remain relevant and appropriate. This consultation document contains Ofcom's analysis of current cross-promotion activities and the competition and content issues that arise. It also sets out Ofcom's proposals for the future regulation of cross-promotion.

2.2 Ofcom's approach to cross-promotion on radio is explained in paragraph 2.14 below.

Cross-promotion by television broadcasters

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

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

The advertising rules

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

Programme lengths

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

Promotional airtime

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

The current cross-promotion rules

2.8 In January 2002, the ITC issued the Current Rules regulating the promotion of programmes, channels and related services on commercial television. The Current Rules are set out in full in Annex 1. The Current Rules address both competition and content issues, such as the potential impact of excessive cross-promotion on competition between channels and digital retail TV services[7] and also on the viewer in terms of "clutter" (excessive quantity of logos, on-screen graphics and other messages) and on the editorial integrity of programmes.

Competition rules

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

Content rules

2.10 The current content rules apply to all television Broadcasting Act licensees. They focus on what happens within programmes and are intended to ensure the separation of advertising from programme content as required under the TWF, which is discussed further in Section 3, and also to minimise viewer irritation. The Current Rules say that the primary place for cross-promotions and other promotions is within promotional airtime and not within programmes. Mentions in a programme of other programmes or services must provide information likely to be of value to the viewers of that programme and must not constitute advertising. The Current Rules state that

[7] Digital retail TV services include free-to-view multi-channel TV (such as Freeview on DTT and Sky Freesat on digital satellite) and pay-TV services (such as Sky subscription services on satellite, ntl and Telewest subscription services on cable, Top-Up TV on DTT and Homechoice and Kingston over DSL).

material allowed for under the Current Rules is not deemed to be in breach of the prohibition on undue prominence in the legacy Programme Code[8].

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

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

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

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

Cross-promotion by radio broadcasters

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

Cross-promotion by the BBC

2.15 Ofcom has no powers to regulate the BBC's cross-promotional activities and therefore this review does not include proposals in respect of the BBC. However, Ofcom considers that the analysis and proposals for regulation set out in this document have equal application to the BBC as to the commercial terrestrial broadcasters. Ofcom has discussed its views with the Department of Culture, Media and Sport ("DCMS") which is currently in the process of its BBC Charter review. Ofcom considers it important that the White Paper should require the BBC to adhere to the same set of requirements as Ofcom proposes above in relation to the commercial terrestrial broadcasters.

This document

2.16 The rest of this consultation document is set out as follows:

- Section 3 discusses the relationships that need to exist for cross-promotion to fall outside the definition of advertising and sets out Ofcom's proposals on this;
- Section 4 sets out Ofcom's competition analysis and proposals for competition regulation;

[8] The Programme Code, which was produced by the ITC and inherited by Ofcom, has now been replaced by the Broadcasting Code.

- Section 5 discusses the options for regulating the content aspects of both in-programme and outside programme cross-promotions and sets out Ofcom's proposals for deregulation. Section 5 also sets out Ofcom's proposal to limit the subject matter of cross-promotion to broadcasting related services; and
- Section 6 summarises Ofcom's proposals.

Research

2.17 Ofcom has today also published two research reports that were undertaken for the purposes of this review. The report entitled *Television promotions – what the viewers think, a report of the key findings of a qualitative and quantitative study* and the report entitled *Analysis of current promotional activity on television, a report of the key findings of a content analysis study* are referred to in this document.

Section 3

Regulating cross-promotion relationships

3.1 This section discusses the relationships that need to exist for cross-promotion on television to fall outside the definition of advertising and, therefore, to be excluded from the advertising limits set out by RADA. The section sets out the current 30% shareholding rule, the options for regulating these relationships going forward and Ofcom's proposed approach.

3.2 There are no advertising minutage rules for radio and therefore it is unnecessary to differentiate cross-promotion from advertising. In theory, there could be unlimited advertising on the radio, although in fact this is self limiting as listeners are likely to become irritated with excessive advertising and switch radio channels. There are no consequences for radio cross-promotions being considered advertising and therefore there is no reason to regulate radio cross-promotion relationships.

The current 30% shareholding rule

3.3 The Current Rules limit cross-promotional activities on television to where the promoting channel has a shareholding of at least 30% in the promoted channel or service.

3.4 Specifically, the Current Rules permit broadcasting licensees to promote channels or related services that they provide:

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

3.5 The Current Rules then define a provider of another channel or service:

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

When are promotions advertising?

3.6 RADA state:

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

3.7 The TWF defines television advertising as any form of announcement broadcast whether in return for payment or for similar consideration[9] or broadcast for self-promotional purposes. However, it specifically carves out self-promotion (and the promotion of ancillary products) from the advertising minutage rules while also noting that cross-promotion is a relatively new and unknown phenomenon which may be subject to review in future examinations of the TWF[10].

Options for regulating cross-promotion relationships

3.8 There are a number of options for regulating cross-promotion relationships going forward:

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

A: Regulate cross-promotion relationships on the basis of minimum ownership

3.9 This option would involve regulating cross-promotion on the basis of a minimum percentage shareholding. This approach would be similar to the current 30% shareholding rule but updated to reflect two-way ownership and corporate group structures.

3.10 The choice of a minimum percentage shareholding figure is difficult. The rationale for an approach based on a minimum shareholding is that, where that shareholding exists, there are likely to be sufficient incentives for the promoting channel to provide another channel or service with free airtime. If the shareholding figure is too low it is unlikely that sufficient incentives will exist and there is a risk that there will be additional payments or some other type of consideration or that broadcasters may trade in small amounts of equity shares in order to circumvent the advertising rules. In Ofcom's view, this is therefore likely to rule out shareholdings below 10% or 15%.

3.11 A very high shareholding figure runs the risk of being too restrictive, in that it may prevent cross-promotions which do not involve additional payments or consideration. In Ofcom's view, ownership thresholds above 50% may be too stringent, and legitimate and sufficient incentives to promote another channel may arise with a 40% shareholding.

3.12 The current threshold of 30% offers a reasonable balance between these two conflicting tensions and has the advantage of regulatory continuity and stability.

Benefits

3.13 This approach is transparent and would provide broadcasters with the most certainty about the relationships necessary for cross-promotional activity.

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

[10] The TWF is currently being reviewed and a draft Directive is expected at the end of the year. However, the adoption and implementation of this Directive is likely to be number of years away and therefore will not impact Ofcom's analysis set out in this document.

3.14 This option would also involve the least amount of regulatory change. There would be no increased regulatory burden for broadcasters, in terms of their compliance processes, and it would also ensure that broadcasters who had arranged their organisational structure with reference to the 30% shareholding rule would not need to revisit those legal and commercial arrangements.

Disadvantages

3.15 Minimum ownership is not an exact basis for determining whether sufficient incentives to cross-promote may exist, but only a filter, and there are difficulties ensuring that a correct shareholding figure is chosen. It is therefore less appropriate as the basis for a fixed and inflexible rule, as it may allow certain cross-promotions when they should not be i.e. the promoting company has a 30% shareholding in the promoted channel or service but does not have sufficient incentives to provide it with free airtime, in which case it would not promote it unless it was paid. In addition, it could also work the opposite way and not allow promotions which may be legitimate and rational; for example, sufficient incentives may exist but the minimum percentage shareholding is not satisfied because a broadcaster only has a 28% or 29% shareholding. It also overlooks the issue of the materiality of the interest, where a 20% stake in a large company is worth more than a 50% stake in a small company.

B: Do not regulate cross-promotion relationships and provide no guidance

3.16 Under this option, Ofcom would not regulate the relationships necessary for cross-promotion but would instead rely on the current advertising minutage rules to constrain what broadcasters are allowed to promote in the airtime between programmes and advertising.

3.17 Broadcasters would need to ensure that they comply with the advertising minutage rules and only use promotional airtime to promote programmes, channels or other services that would fall outside what would be considered advertising.

Benefits

3.18 This option is deregulatory. It also enables Ofcom to avoid regulating cross-promotion relationships in an inflexible and arbitrary way by determining from the outset the precise and fixed relationships that are necessary for cross-promotion to fall outside the advertising minutage rules. The relationships where sufficient incentives exist for a promoting channel to provide the promoted channel with free airtime are unlikely to be capable of conforming to a strict set of circumstances and therefore some flexibility is preferable.

Disadvantages

3.19 There would be a significant amount of uncertainty in the absence of a definition of cross-promotion. As stated above, broadcasters would have to decide themselves whether sufficient incentives exist and whether a promotion is therefore advertising or not, although it is likely that Ofcom would be asked to provide informal guidance on a particular case in any event. While this provides more flexibility, broadcasters may test boundaries and attempt to use this airtime for advertising type activities.

3.20 Further, there are likely to be monitoring difficulties as a result of the transitory nature of cross-promotion activities. Given that Ofcom would be relying to a large extent upon complaints from broadcasters and other parties, it may be difficult for legitimate complaints to be brought when it is unclear in what circumstances Ofcom is likely to consider there to be a problem.

3.21 This option is likely to lead to more complaints and an increased regulatory workload for both Ofcom and broadcasters, as well as concerns that Ofcom is being less than transparent.

C: Do not regulate cross-promotion relationships but provide guidance

3.22 Under this option, Ofcom would provide guidance on how it is likely to view relationships between promoting and promoted channels or services. As discussed under Option A above, where there is a 30% shareholding there are likely to be sufficient incentives for a promoting channel to provide another channel or service with free airtime. Therefore, where this relationship exists cross-promotions are unlikely to be considered advertising.

3.23 The guidance given by Ofcom could be on the following basis:

- 30% shareholdings between companies create a presumption that there are sufficient incentives for the promoting channel to provide another channel or service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not consider these promotions to be advertising. However, if there are payments or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules; and
- if there is less than a 30% shareholding, there may be insufficient incentives for a promoting channel to provide another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that cross-promotion is justified on the basis of other incentives.

Benefits

3.24 This option has the same benefits as Option B above in terms of being deregulatory, providing flexibility and allowing Ofcom to avoid regulating cross-promotion relationships in an inflexible and arbitrary way.

3.25 Option C also has the advantage of transparency. Guidance would avoid the disadvantages of Option B by providing a degree of certainty to broadcasters. Broadcasters would know the thresholds for when Ofcom is likely to take a complaint seriously and investigate. This is likely to have a deterrent effect and mean that more cross-promotion activity takes place where a 30% shareholding exists. In addition, it is likely to mean fewer and more focussed complaints than would arise in the absence of any guidance.

3.26 The choice of a 30% shareholding threshold also means that there would be no increased regulatory burden for broadcasters in terms of their current compliance processes. It would also ensure that broadcasters who had arranged their organisational structure with reference to the 30% shareholding rule would not need to revisit those legal and commercial arrangements.

Disadvantages

3.27 This option has some similar disadvantages to Option B. Where a 30% shareholding does not exist, there may be complaints and an increased regulatory workload for broadcasters and Ofcom. However, compared to Option B, these disadvantages will be reduced significantly as a result of the guidance that will provide more certainty to broadcasters.

D: Allow cross-promotion where there are relationships based on joint programming or licensing rights

3.28 This option would allow broadcasters who have co-commissioned or co-purchased programmes to cross-promote the programme across all the channels on which the programmes are shown irrespective of ownership. For example, Five would be allowed to promote old episodes of House Doctor shown on UKLiving and vice versa.

3.29 To take another hypothetical example, Channel 4 and Xfm could bid for the rights to the Glastonbury Festival on the basis that they are able to offer bi-media coverage and promote across media.

Benefits

3.30 This approach would give more flexibility and broaden the scope of cross-promotional activity. It would also give non-terrestrial broadcasters access to the terrestrial channels.

Disadvantages

3.31 Whether Ofcom would consider this to be advertising would need to be assessed on a case by case basis. Without some sort of common ownership, there may be payments or similar consideration passing between the parties. For example, Five may purchase House Doctor at a discounted price, and UKLiving may pay a higher price, on the basis that Five will cross-promote that programme on UKLiving. The discount given to Five would amount to consideration and therefore this activity would be advertising.

3.32 Similarly, in the second example, given the value of promotional airtime on television compared to promotional airtime on radio, there may be some additional benefit that would flow from Xfm to Channel 4. This benefit would amount to consideration and therefore this activity would be advertising.

3.33 Ofcom accepts that there may be genuine joint ventures that Ofcom would not consider advertising. However, Ofcom would need to look at these scenarios on an individual basis and therefore it would not be appropriate to have a rule that allowed all cross-promotion of this type.

Initial conclusions

3.34 Ofcom considers that it would be inappropriate to continue with the existing 30% shareholding rule and that this is an appropriate opportunity for Ofcom to deregulate.

3.35 However, in the absence of Ofcom setting out the relationships likely to be necessary for cross-promotion, broadcasters may try to use promotional airtime for more advertising type activities, in order to maximise their revenues i.e. promoting an unrelated channel or service in return for some sort of payment or consideration. Setting out the relationships between the parties where Ofcom may or may not consider cross-promotion to be advertising will make such activities easier to identify and therefore minimises the opportunities for broadcasters to use this airtime for additional advertising.

3.36 It is likely that some sort of relationship based on common ownership remains necessary for there to be sufficient incentives for the promoting channel to provide another channel or service with free airtime and for payment or consideration to be absent. However, there may be some genuine joint ventures or other scenarios where an ownership relationship does not exist but where cross-promotion will not be considered advertising. Therefore, Ofcom proposes providing guidance that still provides flexibility but also gives some certainty to broadcasters.

3.37 Ofcom proposes the following guidance:

- Certain shareholdings between companies create a presumption that there are sufficient incentives for the promoting channel to provide another channel or service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not, in the absence of evidence to the contrary, consider these promotions to be advertising. However, if there are payments or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules.
- The relevant shareholdings that create this presumption are as follows:
  - the promoting channel has a shareholding of 30% or more in a promoted channel;
  - the promoted channel has a shareholding of 30% or more in the promoting channel; or
  - the parent company has a shareholding of 30% or more in both the promoted channel and the promoting channel.
- If there is less than a 30% shareholding, there may be insufficient incentives for a promoting channel to provide another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that cross-promotion is justified on the basis of other incentives.

3.38 It is worth noting that, given this guidance, most mentions of digital retail TV services and platforms would only be acceptable alongside a promotion for a channel in which the promoting channel has a shareholding interest.

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

3.40 The guidance is set out in the draft code at Annex 6.

Questions

Question 1: Do you think that Ofcom should deregulate and remove the 30% shareholding rule?

Question 2: Do you agree that Ofcom should provide guidance around a 30% shareholding threshold?

Question 3: Do you agree that where there are other relationships, such as joint programming or licensing rights, these circumstances should be considered on a case by case basis?

Programme related material

3.41 There is an overlap between broadcasting related services and programme related material (DVDs, books, magazines, telephone helplines, websites etc), which is regulated by the Broadcasting Code. This is explained further in Section 5. It is not intended that the promotion of programme related material be constrained by the proposed guidance on cross-promotion relationships, as it is intended to allow listeners or viewers to benefit fully from or to interact with a particular programme.

Section 4

Competition regulation

Introduction

4.1 The following section sets out Ofcom's proposed approach to addressing the potential competition issues that arise in relation to promotional activity by television broadcasters. It begins by setting out the structure of broadcasting markets, the role of promotional activity and the competition concerns that have been raised by various stakeholders. The section then sets out Ofcom's analytical approach to considering these concerns and discusses the potential impact of promotional activity on competition. Finally, the options for regulation going forward are considered.

4.2 The market definition analysis and the assessment of the impact on competition are set out in more detail in Annexes 2 and 3.

The structure of broadcasting markets

4.3 The structure of broadcasting markets can be thought of as operating at a number of different levels, such as the transmission level, the retail TV services level and the channel level. Given the nature of the competition concerns set out below, Ofcom's analysis focuses on competition at the retail TV services level and at the channel level.

The retail TV service level

4.4 There are three broad types of retail TV services:

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

The channel level

4.5 There are four broad categories of channels:

- free-to-view PSB channels, such as BBC1, BBC2, ITV1, Channel 4 and Five;
- free-to-view digital channels, such as BBC3, BBC4, tele-shopping channels and news channels;
- basic subscription channels packaged into different "bundles" of channels by retail TV services providers for which a monthly subscription is paid; and
- premium subscription channels for which an additional subscription is required.

The role of promotional activity influencing consumer choice

4.6 Qualitative and quantitative research undertaken by Ofcom[11] indicates that viewers derive a benefit from the promotional activity carried out by broadcasters, for example, viewers use promotions extensively to help plan and shape their viewing choices and promotions stimulate choice between channels and programmes.

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

4.8 Given that cross-promotional activity could influence the choice between different television channels and the decision to take up digital TV, it has the potential to have an impact on competition between broadcasters for viewers and also on competition between different digital retail TV services. For instance, if all the terrestrial broadcasters chose to discriminate in favour of one particular digital TV service or platform and targeted their promotional activity on the service or platform, then there could be an effect on competition between digital retail TV services.

The timing of digital switchover

4.9 Close to 65% of UK households have already switched to digital television but that still leaves a significant minority that have still to make a decision. Furthermore, the current proposals are that the UK should be fully switched over to digital television by 2012, with the digital switchover process beginning in 2008. This means that those households which have yet to switch to digital TV will need to make a decision on the choice of digital retail TV services over the next few years in order to continue to receive television services. Households will also need to make decisions about converting second and third television sets.

4.10 The particular timing of the decision window has an important bearing on Ofcom's consideration of the potential competition issues around the promotional activity carried out by the terrestrial broadcasters and the impact that it might have on the incentives of these broadcasters.

Competition concerns

4.11 In the course of Ofcom's review of the Current Rules, the following three main competition concerns have been raised in relation to promotional activities[12]:

- competition between digital retail TV services;
- competition between digital channels; and

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

[12] A further concern has been expressed in relation to the ability of ITV plc to use cross-promotions to drive the cross-selling of advertising i.e. to bundle advertising airtime across ITV1-4. Under the terms of the Contract Rights Renewal Remedy (CRR) ITV is not permitted to make the sale of airtime on ITV1 conditional on an advertiser also taking airtime on the other ITV plc owned channels. However, ITV plc is permitted to sell a package of airtime if an advertiser chooses to purchase airtime across some or all of the ITV plc owned channels. Since these issues primarily relate to CRR, we do not propose to address this issue in this context.

- competition in other broadcasting markets.

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

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

4.14 In relation to competition between digital channels, the concern is that the main terrestrial broadcasters have an unfair advantage over other digital broadcasters in terms of cross-promoting their suite of channels, as a result of their higher audience reach and share. The five main terrestrial channels have higher viewing shares than other channels. For instance, ITV1's viewing share across all homes was just under 23% in 2004, although in itself this varies from around 30% in analogue-only homes to less than 20% in multi-channel homes. Similarly in 2004, Channel 4's viewing share across all homes was just under 10% and Five's just under 7%. In contrast none of the digital channels had a viewing share of over 3%.

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

4.16 The third competition issue is that, in the absence of regulation, broadcasters would promote services on other media altogether in a way that could distort competition in other broadcasting markets. An example could be the situation in which a Channel 3 licensee cross-promoted a radio station that operated in the Channel 3 licence area.

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

Market definition

4.18 The market definition analysis is set out in full in Annex 2.

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

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

Digital retail TV services market(s)

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

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

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

Channel markets

4.24 In relation to the relevant markets in which broadcasters compete for viewers, the key issues for market definition purposes centre on the extent to which the existing terrestrial channels face a significant competitive constraint from other digital channels i.e. channels operating in a wholly digital environment[13]. The available data, such as viewing share, audience reach, programme budgets and programme quality, suggest that it may be possible to maintain a distinction between competition between the existing terrestrial channels (i.e. BBC1, BBC2, ITV1, Channel 4 and Five) and competition between other channels. However, Ofcom again notes that the data indicates that the position of the digital channels is in a state of flux as the penetration of digital television increases and that this position is likely to change over time.

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

Legal framework – options for addressing competition issues

The Competition Act 1998

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

- the Competition Act is concerned with agreements between undertakings that may prevent, restrict or distort competition or the conduct of one or more undertakings which amounts to the abuse of a dominant position. In terms of the ability to take action, if Ofcom were to rely on the use of its concurrent competition law powers, this would involve an ex post enforcement approach i.e. Ofcom would respond to complaints or launch an own initiative investigation into whether particular courses of conduct infringe the Competition Act [14];
- currently, competition concerns around promotional activity are addressed by the Current Rules, which ensure that cross promotions do not prejudice fair and effective competition. As set out above, there is a specific timing issue about the transition to digital switchover which focuses particular attention on the decisions that consumers will have to make about choice of digital retail TV service. This

[13] Ofcom recognises that there may also be narrower channel markets, such as for unique premium content. However, it is unnecessary to consider these distinctions for the purposes of this analysis.
[14] There is, of course, an expectation that the sanctions available to Ofcom under the Competition Act would act as a deterrent to anti-competitive conduct.

could mean that moving away from the current ex ante approach and moving instead to an ex post enforcement approach would be less effective because of the difficulty in reversing any possible negative impact on competition if firms in the market did in fact act in an anti-competitive way; and

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

Sector specific competition powers

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

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

Prejudicial to fair and effective competition

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

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

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

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

Impact on competition and regulatory approach

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

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

Competition between digital retail TV services

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

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

4.37 Therefore, the fact that the incentives of all the terrestrial channels, including the BBC, would be aligned in this way means that there could be a material impact on competition. One or two terrestrial broadcasters, who might have an incentive to promote one digital retail TV service or platform over another, might not be sufficient to trigger a materiality concern but when all the terrestrial broadcasters, both commercial and non-commercial, have the same incentives, there is the potential for such behaviour to have an adverse impact on competition.

4.38 In addition, there is an important time dimension to this assessment as households which have yet to switch to digital TV must do so in the next few years as the UK switches from analogue to digital transmission.

4.39 It is these particular circumstances that lead Ofcom to consider that there is potential for the distortion of competition between digital retail TV services.

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

Ex post enforcement

4.41 As set out above Ofcom does not consider that the Competition Act is appropriate to address competition concerns arising from promotional activity. However, Ofcom could rely on the ex post enforcement of the fair and effective competition condition in broadcasting licences to address any distortion of competition between digital retail

TV services. Given the concerns set out above that there is potentially an important timing issue in relation to consumers having to choose between digital retail TV services in the run up to digital switchover, Ofcom considers that there would be a risk relying on the ex post enforcement of this condition. In particular, there would be a risk that, by the time evidence emerged of a significant detriment to competition between digital retail TV services, the damage to the competitive process would have already taken place and it would be difficult for the regulator to remedy that detriment.

Ex ante rule

4.42 The alternative approach is to put in place a code that requires the commercial terrestrial broadcasters, ITV1, Channel 4 and Five, to maintain neutrality in respect of digital retail TV services and platforms[15]. This would ensure that they are unable to promote Freeview or DTT to the detriment of competition between digital retail TV services.

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

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

4.45 In the case of considering whether it might be justified to extend the scope of the neutrality requirement to other digital channels, Sky is used as an example of a provider of a range of digital channels. By definition, Sky channels are only available in homes that have already connected at least one television set to a digital multi-channel platform, be it satellite, cable or indeed to a more limited extent DTT. Promotions by Sky could thus influence choices about connecting subsequent TV sets but the household has already been exposed to multi-channel television and may already be aware of the range of services available. Therefore, it is unlikely that promotions by Sky would be sufficient to trigger a materiality concern. On that basis, Ofcom considers that promotional activity by Sky would have less ability to distort competition between different digital retail TV services. Therefore, it would not seem appropriate to extend the scope of the rules to include Sky and by extension other digital channels such as UKTV, Viacom etc.

Competition between channels

4.46 In relation to competition in channel markets, the incentives of the main terrestrial broadcasters are not aligned. Broadcasters clearly have an incentive to promote their

[15] Ofcom notes that Freeview is often used interchangeably with the DTT platform. In order to be clear about the issue of neutrality between services, it is necessary to refer to neutrality between digital retail TV services and platforms.

own services in order to attract or retain viewers. It is also the case that viewers undoubtedly derive a benefit from promotional activity carried out by broadcasters. Without the same alignment of incentives across the commercial terrestrial broadcasters as is the case in relation to digital retail TV services, the materiality issue does not arise.

Ex post enforcement

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

Ex ante rule

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

Competition in other markets

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

Ex post enforcement

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

Ex ante rule

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

Proposals for addressing competition issues between digital retail TV services

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

4.53 Ofcom proposes that this requirement is only applied to promotions outside programmes. Ofcom considers that in particular circumstances, such as an editorial feature on Freeview boxes, the mention of a particular platform or digital retail TV service within a programme may be justified. However, the content rules as discussed in Section 5 below would apply within programmes as usual.

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

4.55 Ofcom considers that the requirement for neutrality will need to be implemented through a requirement on the main terrestrial broadcasters to deal with references to digital retail TV services and platforms on an equivalent basis whether in respect of branding, pricing information or other promotional messages.

4.56 Ofcom intends to review this rule within the next 3 years and as digital switchover approaches to ensure that it remains an appropriate requirement.

Question 4: Do you consider that the commercial terrestrial broadcasters – ITV plc, Channel 4 and Five – should be required to maintain neutrality in terms of the promotion of their services across all digital retail TV services and platforms?

Proposals for addressing competition issues between channels

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

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

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

Question 5: Do you agree that Ofcom should withdraw the Current Rules in relation to the cross-promotion of channels and rely on the ex post enforcement of the fair and effective competition condition to address any competition issues that may arise?

Proposals for addressing competition issues in other broadcasting markets

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

Question 6: Do you agree that Ofcom should withdraw the Current Rules in relation to the cross-promotion of services in other broadcasting markets and rely on the ex post enforcement of the fair and effective competition condition to address any competition issues that may arise?

Section 5

Content regulation

Introduction

5.1 This section considers the issues surrounding the content of self and cross-promotions and examines the relevant aspects of the Current Rules, with particular reference to the new Ofcom Broadcasting Code. Promotions within programmes and promotions outside programmes raise different issues, including the application of the undue prominence prohibition set out in the Broadcasting Code and the treatment of misleading content. Therefore, cross-promotion within programmes and cross-promotion outside programmes are considered separately in this section.

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

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

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

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

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

5.6 The Current Rules were introduced before the Act and pre-date the Broadcasting Code. In terms of content issues, the Current Rules applied in conjunction with the Programme Code, in particular Section 8, Commercial References in Programmes. The Programme Code, which was produced by the ITC and inherited by Ofcom, has now been replaced by the Broadcasting Code and it is therefore timely for Ofcom to review the current cross-promotion content rules.

5.7 In the interim, and as clarified in Section 10 of the Broadcasting Code itself, the Current Rules continue to apply.

Content aspects of the Current Rules

5.8 Insofar as the content of self- and cross-promotions is concerned, the Current Rules state that the possible benefits of promotional activities include the following:

- information to viewers about programmes and related services likely to be of interest to them; and
- increased understanding about digital television, and progress towards digital switchover.

5.9 The disbenefits could include:

- irritation among viewers about the amount and nature of promotions; and
- the impact on editorial integrity if informative promotions included within programmes become advertising.

5.10 The Current Rules go on to say:

> "In short, promotions should be designed to give viewers information about programmes and services likely to be of particular interest to those watching at the time and should not become advertisements.
>
> …Promotions outside advertising time should provide information of value to viewers and should avoid creating significant viewer annoyance.
>
> …The primary place for cross-promotions and other promotions is within promotional airtime and not programmes. In-programme promotions should not compromise the editorial integrity of the programmes within which they are placed by any means, or lead to advertising substituting for programme content."

The content legal framework

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

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

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

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

- determination of the law applicable to broadcasters;
- promotion of production and distribution of European works;

- public access to events of major importance;
- television advertising, teleshopping and sponsorship;
- protection of minors; and
- the right of reply.

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

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

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

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

- Rule 10.3: Products and services must not be promoted in programmes. This rule does not apply to programme related material.
- Rule 10.4: No undue prominence may be given in any programme to a product or service.

5.17 These rules are considered in further detail below.

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

5.19 It is also worth mentioning here that RADA require that the maximum duration of any centre break within a programme is three minutes fifty seconds, of which no more than three and a half minutes may be advertising and no more than 20 seconds may be programme promotion ("the 20 second rule"). This is re-iterated in the Current Rules. As discussed later in this section, Ofcom is proposing to remove the 20 second rule, amending this particular aspect of RADA appropriately. RADA do not specify a limit on the amount of programme promotion in end breaks.

Undue Prominence

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

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

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

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

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

5.23 The Current Rules were written before the Broadcasting Code, and refer to the Programme Code, which was created by the ITC and subsequently adopted by Ofcom. The Programme Code set out the editorial standards that audiences were entitled to expect from commercial television services. It did not apply to the BBC. Section 8 of the Programme Code dealt with commercial references within programmes.

5.24 The undue prominence prohibition in the Programme Code referred to 'commercial products'. However, Ofcom (and the ITC before it) interpreted this more widely. For example, it included charities and non-profit making organisations, as these were considered to operate within a commercial environment. The new Broadcasting Code refers simply to 'products or services'.

Promotion of products and services in programmes

5.25 Rule 10.3 of the Broadcasting Code says:

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

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

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

5.28 The Current Rules also confirm that in-programme promotions should:

- not compromise the editorial integrity of the programmes in which they are placed or lead to advertising substituting for programme content;
- provide information likely to be of value to viewers; and
- not constitute a call to make a specific purchase.

Programme related material

5.29 Rule 10.6 of the Broadcasting Code allows programme related material to be promoted (in the sense of a ‘sell’) within programmes provided that there is editorial justification. Broadcasters are also permitted to promote programme related material around the programme in question; this does not count towards their advertising minutage.

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

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

Outside programmes

5.32 The Current Rules say that promotions outside of paid-for advertising time should provide information of value to viewers and should avoid creating significant viewer annoyance. However, the specific rules on outside-programme promotions seem to focus on competition issues rather than content.

5.33 As stated above, special restrictions apply to Channel 3 licensees, Channel 4 and Five. These state, for example, that their promotions for other channels and services they provide must not give “excessive” airtime to any particular channel or service; that promotions outside advertising minutage may not include any information on prices or products; and that specific promotions for any particular platform service provider will not be permitted outside of paid-for minutage. Where the Current Rules do not apply, for example where a cable channel is promoting a particular platform, Ofcom has approached the issue by considering whether the reference breaches the undue prominence prohibition.

Misleading claims in promotions outside programmes

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

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

Audience research

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

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

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

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

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

5.40 These preferences and reservations have been taken into account in assessing possible options for regulation.

Options for regulation

In-programme

Option A1: Retain current cross-promotion content rules

5.41 Under this option, the substance of the content rules would remain the same. They would simply be updated to refer to Ofcom, rather than to the ITC, and to the Broadcasting Code, rather than the Programme Code.

Benefits

5.42 Of all the options, Option A1 would clearly involve the least amount of regulatory change. There would be no increased regulatory burden for broadcasters, in terms of their compliance processes (assuming that all broadcasters are already familiar with and comply with the Current Rules).

5.43 This option also seems consistent with the results of Ofcom's research. Participants in the focus groups were generally content with the current level of on-air promotions, but were not comfortable with the idea of increased promotional activity.

Disadvantages

5.44 One of the 'disbenefits' identified in the Current Rules was "irritation among viewers about the amount and nature of promotions". Having reviewed the Act and the TWF, it is not clear that Ofcom has any specific duties or responsibilities in this regard and it is therefore to some extent questionable whether 'viewer irritation' is in fact a sufficient basis upon which Ofcom may impose regulation. In any event, this problem should be self-limiting as broadcasters do not wish to lose audiences.

5.45 There also appears to be significant overlap between the Current Rules and matters that are covered elsewhere in the Broadcasting Code. For example, the rules state that in-programme mentions of other programmes or services "must not constitute a call to make a specific purchase"; and the Broadcasting Code contains a prohibition on products and services being promoted (in the sense of being advertised) within programmes.

5.46 This option therefore appears to be potentially confusing and also inconsistent with Ofcom's light-touch approach to regulation.

Option A2: No content regulation for self- or cross-promotion

5.47 Under Option A2, broadcasters would be able to self-promote and cross-promote in programmes without constraint (subject of course to the standards rules in the Broadcasting Code: protection of under 18s, harm and offence, no undue prominence of other types of products or services etc).

5.48 Under this option, the content aspects of the Current Rules would be discontinued. In addition, this option would require the rules in Section 10 of the Broadcasting Code that would otherwise be relevant (including the prohibition on undue prominence) to be disapplied in respect of self-promotions and cross-promotions.

Benefits

5.49 Broadcasters would benefit from a reduced regulatory burden. For example, they would no longer need to seek to ensure editorial linkage between the content of a programme and the promotions within it. The Current Rules require that promoted content is "of obvious interest" to viewers.

Disadvantages

5.50 It is not clear that it would be lawful to permit a special exception to the application of Section 10 of the Broadcasting Code for references to programmes, channels, digital retail TV services and other broadcasted-related services within programmes. It may possibly be in breach of the TWF, which prohibits surreptitious advertising. It may also be perceived as unfairly discriminatory, in favour of broadcasters, particularly as charities and good causes are considered to be services to which the rules in Section 10 of the Code apply.

5.51 It is also unclear that allowing cross-promotion within programmes without any editorial linkage whatsoever to the programme itself would be of value to the viewer. Although Ofcom considers that broadcasters would probably remain constrained by their desire to avoid alienating the audience or losing its interest and would not materially increase the amount of promotions, this outcome is not certain and Ofcom notes that, on the whole, participants in its research did not want increased levels of promotional activity.

Option A3: Rely on the Broadcasting Code, i.e. no separate content rules for cross-promotion

5.52 Under this option, there would be no separate content rules for cross-promotion and self-promotion. The Broadcasting Code, in particular Section 10 which contains rules relating to undue prominence and promotion of products and services within programmes, would apply in the normal way.

5.53 The undue prominence prohibition explains that undue prominence may arise *either* where there is no editorial justification for the reference *or* from the manner in which the reference is made, for example, excessive mentions (Rule 10.4 of the Broadcasting Code). If a reference is not editorially justified, it will not necessarily be considered unduly prominent: Ofcom would also consider the manner in which the reference was made.

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

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

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

5.57 The rule prohibiting promotion of products and services within programmes would ensure that price information about channels, platforms and other services is not provided in programmes (nor indeed in promotional, i.e. non-advertising, airtime between programmes). There would, however, be the usual exception for ‘programme related material’. This would allow references to relevant websites and information about prices and availability of factsheets, DVDs and other ‘programme related material’ (subject to the other provisions of Section 10 of the Code).

5.58 The existing product placement prohibition would apply as normal, for example, to prohibit a channel paying for an in-programme reference within a programme on another channel.

Benefits

5.59 This option seems to provide the neatest solution and would reduce the regulatory burden of compliance upon broadcasters as there would no longer be separate content rules on self- and cross-promotion. Also, as undue prominence is a more flexible concept than it was previously under the Programme Code, this option may give broadcasters more freedom to self-promote and cross-promote in programmes than has been the case. Further, Option A3 requires no change to the Broadcasting Code itself.

5.60 The Broadcasting Code would apply equally to all types of references, whether or not there was a relationship between the promoting and the promoted channel.

5.61 In Ofcom's research, the focus group participants were relaxed about the use of in-programme promotions, although not everyone had in fact experienced it. Although the omnibus research suggests that almost 40% of people object to the principle of in-programme promotions, none of the focus group participants, who were provided with more information and context about in-programme promotions, felt they had seen evidence of programme quality or integrity being compromised in practice.

Disadvantages

5.62 Option A3 raises the possibility of more in-programme cross-promotion than is currently the case, as this would not be constrained by whether there is a relationship between the promoting and the promoted channel. Also, as explained above, editorial justification may not always be required.

5.63 However, the amount of in-programme promotion is self-limiting as broadcasters would not wish to annoy or alienate their viewers.

Initial conclusion on options for in-programme cross-promotions

5.64 Ofcom favours Option A3. In terms of content, the Broadcasting Code already contains rules regarding references in programmes to products and services which seem entirely appropriate – and sufficiently flexible – to deal with references to broadcasting related services, such as other programmes. Option A3 is proportionate and non-discriminatory, and reduces the compliance burden upon broadcasters. This option is also consistent with Ofcom's bias towards light-touch regulation wherever possible.

> *Question 7: Do you consider that Option A3 - rely on the Broadcasting Code, i.e. no separate content rules for cross-promotion – is the most appropriate option for in-programme cross-promotions?*

Outside programmes

Option B1: Retain current cross-promotion content rules

5.65 Under this option, Ofcom would continue to apply the cross-promotion content rules. Ofcom would also continue to consider cross-promotions and self-promotions as programmes in their own right: all the provisions of the Broadcasting Code would apply in the normal way.

Benefits

5.66 This option involves no increase in the regulatory burden upon broadcasters.

Disadvantages

5.67 There is a degree of regulatory uncertainty where the situation is not one clearly addressed by the Current Rules and therefore needs to be considered with reference to the undue prominence prohibition in the Broadcasting Code. As previously discussed, undue prominence may result from the reference to a product or service where there is no editorial justification or from the manner in which a product or service is referred to. It is often conceptually difficult, in terms of context and editorial justification, to apply undue prominence to outside-programme promotions.

5.68 Moreover, the broadcasting environment has changed dramatically over the last few years and it is questionable whether it is still necessary or indeed appropriate to consider whether references to channels or digital retail TV services outside programmes are unduly prominent. These issues appear to be more appropriately addressed by competition-based regulation and have been considered in Section 4.

Option B2: No content regulation for cross-promotion

5.69 Under this option, the content aspects of the Current Rules would be discontinued outside programmes. Ofcom would provide guidance making clear that rules 10.3 and 10.4 of the Broadcasting Code would not be interpreted by Ofcom as prohibiting or constraining a licensee from self-promoting or cross-promoting in breaks. However, all the rules in Section 10 would apply in the normal way to references to other products or services within the item and the other sections of the Code would apply as appropriate, for example, the provisions regarding harmful or offensive content.

5.70 The TWF requires that advertising is readily identifiable and kept separate from programmes, and prohibits surreptitious advertising in programmes; these objectives would not appear to be compromised under Option B2.

Benefits

5.71 This is a light-touch approach, which would resolve the conceptual difficulties regarding the application of the rules in Section 10. It appears more appropriate for concerns about the level of promotions outside programmes to be addressed by competition-based regulation.

5.72 Promotions outside programmes would not be prevented by the Broadcasting Code from providing information about price and availability, or otherwise promoting (in the sense of a ‘sell’) programmes, channels and other broadcasting–related services.

Disadvantages

5.73 Under this option, there is a possibility of an increase in the level of self and cross-promotional activity outside programmes. However, as previously discussed, this is likely to be self-limiting.

Option B3: Rely on the Broadcasting Code, i.e. no separate rules

5.74 Under this option, there would be no separate content rules for cross-promotion and self-promotion. The Broadcasting Code, including all the rules in Section 10 which deals with commercial references within programmes, would apply in the normal way.

Benefits

5.75 This option appears consistent with Ofcom's preferred option for in-programme promotions.

Disadvantages

5.76 As previously discussed, there are conceptual difficulties with applying all the rules in Section 10 to self- and cross-promotions in breaks, for example, in considering context and editorial justification. It is also unclear whether it is still necessary or indeed appropriate to consider whether references to channels or platforms outside programmes are unduly prominent. If there are concerns about unfair discrimination, these would appear to be more appropriately considered on a competition basis.

Initial conclusion on options for outside programme cross-promotions

5.77 Ofcom favours Option B2. It is a light-touch approach, which recognises that there are different regulatory concerns in terms of content for self and cross-promotions in programmes and outside programmes. It is important that programmes are not distorted for commercial purposes, hence the application of the undue prominence rule, but clearly the very purpose of outside programme promotional activity, such as programme trailers, is to raise awareness of a particular product or service. Any concerns regarding the level of promotions outside programmes or their treatment (equal or otherwise) of platform providers would appear to be more appropriately considered in terms of competition issues rather than content.

> *Question 8: Do you consider that Option B2 - no content regulation for cross-promotion - is the most appropriate option for outside programme cross-promotions?*

Subject matter of promotional activity

5.78 The Current Rules refer to the promotion of programmes, channels and 'related services'. Going forward, Ofcom proposes using the term 'broadcasting-related services'; the policy, however, remains unchanged. Only broadcasting-related services may be cross-promoted in promotional airtime (as opposed to paid-for advertising) outside programmes. Such promotions should provide benefit, and be relevant, to viewers and not resemble advertising. Therefore, a broadcaster is not able to promote non broadcasting-related products and services, such as newspapers or supermarkets, in promotional airtime.

5.79 This is a common-sense approach. Permitting non-broadcasting related services to be promoted outside of paid-for advertising time would not be consistent with the requirements of the TWF regarding transparency, separation and advertising minutage.

5.80 Broadcasting-related services include radio services. Therefore, the commercial broadcasters are able to promote radio services on television in the same way as the BBC, provided that the promotion falls outside the definition of advertising as set out in Section 3.

5.81 This rule is set out in the draft code at Annex 6.

Question 9: Do you agree that cross-promotions should be limited to broadcasting-related services?

The 20 second rule

5.82 Section 5.6 (A)(b) of RADA, which applies to internal breaks on Channels 3, 4 and 5, states:

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

5.83 The 20 second rule is also referred to in the Current Rules, in the special restrictions for Channel 3 licensees, Channel 4 and Channel 5.

5.84 It applies to centre breaks only, and there is no such restriction on other licensees.

Option C1: remove 20 second rule

5.85 Under this option, there would no longer be a 20 second rule, either in any new rules on cross-promotion or in RADA. Section 5.6 (A)(b) of RADA would be amended to read:

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

Benefits

5.86 Bearing in mind that Ofcom is proposing that there is no longer a need for ex ante rules regarding the volume of cross-promotion in breaks (whether centre or end), for the purposes of promoting fair and effective competition or protecting consumers, it seems proportionate and consistent to remove the 20 second rule from any future rules on cross-promotion and RADA. Channel 3 licensees, Channel 4 and Five would then be able to increase the time in centre breaks dedicated to self and cross-promotion as appropriate, subject to the other requirements of RADA. This flexibility is likely to be welcomed by the broadcasters in question. They would however still not be able to have more than three and a half minutes of advertising in centre breaks and the maximum length of centre breaks would remain unaltered at three minutes and fifty seconds.

5.87 While RADA is not the subject of this consultation, it would not be logical to remove the 20 second rule from any cross-promotion rules without also amending the specific and discrete reference in RADA.

Disadvantages

5.88 This option would require an amendment to be made to RADA.

Option C2: retain the 20 second rule

5.89 Under this option, the 20 second rule would be retained in RADA, until such time as RADA is reviewed in its entirety. However, to avoid duplication, the 20 second rule would not be included in any new cross-promotion rules.

Benefits

5.90 Option C2 would mean no change to RADA, for the time being at least.

Disadvantages

5.91 Ofcom has made a number of deregulatory proposals in this consultation document paper and the analysis suggests that it is no longer necessary to continue with the 20 second rule. Therefore, it does not seem logical that broadcasters should continue to be constrained by the 20 second rule contained in RADA.

Initial conclusion on options for the 20 second rule

5.92 Ofcom considers that it is unnecessary to retain the 20 second rule and, for consistency, proposes that it is removed from RADA.

Question 10: Do you agree that it is unnecessary to retain the 20 second rule in RADA?

Radio

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

5.94 In view of the above differences between radio and television in this context, Ofcom does not propose changing the current approach to promotional activity on radio. The Broadcasting Code, and in particular the undue prominence prohibition, will therefore continue to apply in the normal way and there is no need for any additional regulation.

Question 11: Do you consider that the Broadcasting Code is sufficient to regulate radio cross-promotions and therefore there is no need for additional regulation?

Section 6

Summary of proposals and impact assessment

Summary of proposals

Deregulation

6.1 Ofcom is proposing to remove the current ITC code that regulates the promotion of programmes, channels and related services on commercial television. The following competition and content rules will be removed:

- promotions must not give an excessive amount of airtime to a particular channel, service, or suite of channels/services;
- promotions may not include any information on prices of products or services;
- promotions in centre breaks must not exceed 20 seconds per break;
- in-programme promotions should not compromise the editorial integrity of the programmes within which they are placed or lead to advertising substituting for programme content;
- in-programme promotions must provide information likely to be of value to the viewer;
- in-programme promotions must not constitute a call to make a specific purchase;
- digital channels which can be shown to have market power must provide a feed clean of interactive icons, if the interactive service is not available on the platform concerned[16].

6.2 Ofcom proposes to rely on the Broadcasting Code, and in particular Section 10 (Commercial references in programmes), to regulate promotions within programmes. Section 10 contains rules relating to undue prominence, the promotion of products and services within programmes and product placement. In relation to outside programme promotions, Ofcom proposes to disapply the rules on undue prominence and promotion of products and services in Section 10 of the Broadcasting Code.

6.3 Ofcom considers that it is unnecessary to retain the 20 second rule contained in RADA and therefore proposes that this is also removed.

The new rules

6.4 Given that it is more appropriate that the Broadcasting Code applies to promotions within programmes, the proposed rules only apply to promotions outside programmes. Ofcom proposes to issue a new code that requires the following:

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

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

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

6.5 Ofcom proposes to provide the following guidance:

- Certain shareholdings between companies create a presumption that there are sufficient incentives for the promoting channel to provide another channel or service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not, in the absence of evidence to the contrary, consider these promotions to be advertising. However, if there are payments or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules.
- The relevant shareholdings that create this presumption are as follows:
  - the promoting channel has a shareholding of 30% or more in a promoted channel;
  - the promoted channel has a shareholding of 30% or more in the promoting channel; or
  - the parent company has a shareholding of 30% or more in both the promoted channel and the promoting channel.
- If there is less than a 30% shareholding, there may be insufficient incentives for a promoting channel to provide another channel or service with free airtime and broadcasters will need to demonstrate that no consideration has passed between the parties and that cross-promotion is justified on the basis of other incentives.

6.6 The draft code and guidance are set out at Annex 6.

Impact assessment

6.7 The analysis presented in Sections 3 to 5, Annex 2 and Annex 3 of this document, along with the summary set out below, represents an impact assessment, as defined by section 7 of the Act. The following is in accordance with Ofcom's impact assessment guidelines[17]:

- Stage 1 – The competition issues are set out in Section 4 and the content issues are set out in Section 5.
- Stage 2 - The objective of reviewing the cross-promotion code is to ensure that it remains appropriate regulation by deregulating where necessary, furthering the interests of consumers in broadcasting markets by ensuring fair and effective competition and protecting the interests of consumers.
- Stage 3 – In relation to competition issues, Ofcom has the option of setting or not setting a code and relying on the ex post enforcement of the Competition Act or the fair and effective competition condition in Broadcasting Act licences. These options are set out in Section 4. In relation to content issues, Ofcom has the option of relying on the Broadcasting Code, retaining the current cross-promotion content rules or applying no content regulation at all. These options for both inside-programme and outside-programme cross-promotions are set out in Section 5.

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

- Stage 4 – There are potential impacts on citizens and consumers, television channel providers, digital retail TV services providers, platform providers and providers of services in other broadcasting markets.
- Stage 5 – Ofcom considers that there will be detriment to competition if a neutrality requirement in respect of digital retail TV services and platforms is not imposed. This is discussed further in Section 4 and Annex 3.
- Stage 6 – Ofcom has assessed the costs and benefits of each of the options and considers that the proposed approach is proportionate and deregulatory.

6.8 You should send any comments on this impact assessment by the closing date for this consultation and Ofcom will consider all comments before deciding whether to implement its proposals.

Annex 1

ITC rules on the promotion of programmes channels and related services on commercial television

Principles

The overall aims of the new rules on programme, channel and related service promotion are to reach a balanced outcome allowing benefits to be gained, while minimising the potential disbenefits. Benefits include:

- Information to viewers about programmes and related services likely to be of interest to them; and
- Increased understanding about digital television, and progress towards digital switchover.

The disbenefits could include:

- Irritation among viewers about the amount and nature of promotions;
- The impact on editorial integrity if informative promotions included within programmes become advertising; and
- Competition concerns, if promotions are used as advertising for channels or platform service providers in a way that might threaten competition.

In short, promotions should be designed to give viewers information about programmes and services likely to be of particular interest to those watching at the time and should not become advertisements, or threaten fair and effective competition in the provision of licensed services and services connected with them.

Rules

1. ITC licensees may, outside advertising time, and subject to the following rules,

- promote programmes, events and strands being shown by that licensee, and
- make reference to any other channel or related service (such as a website) that they provide.

2. Promotions outside advertising time should provide information of value to viewers and should avoid creating significant viewer annoyance. The amount of promotion on all ITC-licensed channels will be periodically reviewed by the ITC, such reviews being informed by surveys of viewer attitudes and an assessment of the extent to which such promotions might affect competition in the relevant television market.

3. To promote fair and effective competition while ensuring continuing informational benefits for viewers, there will be special restrictions for Channel 3 licensees, Channel 4 and Channel 5:

a) Promotions for other channels and related services provided by these licensees, such as websites, are permitted, but must not give an excessive amount of airtime to a particular channel, service, or suite of channels/services.

b) Specific promotions for any particular platform service provider, including ITV Digital, will not be permitted, outside of paid for advertising minutage, although generic promotions for digital television are allowed.

c) Short, factual, generic mentions of the platform on which a promoted channel or service can be found will be permitted (e.g., DTT, DSat, Cable).

d) If a programme or service is carried on <u>all</u> main platforms, platform service providers can be mentioned by name (e.g. Sky, ITV Digital, Telewest etc) providing such mentions are of a factual nature and are non-discriminatory (i.e. all main service providers carrying the programme or service must be mentioned).

e) Licensees may broadcast outside advertising minutage material promoting digital television generically, i.e. without favouring particular service operators.

f) Promotions outside advertising minutage may not include any information on prices of products or services.

g) These rules remain subject to the existing restriction for Channels 3, 4 and 5 that promotional material shown in centre breaks must not exceed 20 seconds per break.

4. Channel 3 licensees will be allowed to make non-financial arrangements for the promotion on the ITV network of 'ITV-branded' programmes, channels and related services in ITV regions where such services are available.

5. The primary place for cross-promotions and other promotions is within promotional airtime and not programmes. In-programme promotions should not compromise the editorial integrity of the programmes within which they are placed by any means, or lead to advertising substituting for programme content. In-programme mention of other programmes or services:

- must provide information likely to be of value to the viewers of the programme containing the promotion,

- must not constitute a call to make a specific purchase.

6. Where it is of general interest to viewers and consistent with the style of the programme, it will be acceptable for programmes to contain:

- Short factual references to forthcoming programmes/content of obvious interest on the same channel or other channels (e.g. it would be acceptable for one sport programme to be promoted on another).

- Mentions of and visual references to interactive features which might enhance viewer enjoyment of the <u>current</u> and <u>upcoming</u> programmes on the same or related channels.

- Editorial features about forthcoming programmes on the same or related channels, which are of value to viewers in their own right.

7. Additionally, certain multi-item programmes of more than one hour's duration (including sport, provided the action is not interrupted) may include taped material that is relevant to the subject matter of the programme.

NB Material allowed for in this section will not be deemed to be in breach of Section 8.4 of the ITC Programme Code.

8. Programme end-credits will not be defined as falling within the definition of in-programme time for the purposes of these rules.

Guidance

9. Special guidance for digital channels

Digital channels which can be shown to have market power in their relevant market will, if requested by a particular distribution platform, be expected to provide a feed clean of interactive icons referring to the interactive service, if that interactive service is not available on the platform concerned. It is not intended that this rule will supersede the existing BSkyB undertaking to the OFT on this subject.

Definitions

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

11. Since the public view and general industry opinion are the best indicators of whether or not levels of promotion are 'excessive', and since these tend to change over time, no further definition of this term is believed to be useful at the current time. The ITC will monitor and respond to feedback, surveys and complaints which indicate significant changes in these opinions.

January 2002

Annex 2

Market definition analysis

Introduction

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

Conceptual approach to market definition

A2.2 There are two dimensions to the definition of a relevant market: the relevant products to be included in the same market and the geographic extent of the market. Ofcom's approach to market definition follows that used by other UK competition authorities[18] and is in line with that used by European and US competition authorities.

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

A2.4 The concept of the "hypothetical monopolist test" is a useful tool to identify close demand-side and supply-side substitutes. A product (or group of products) is considered to constitute a separate market if a hypothetical monopoly supplier could impose a small but significant, non-transitory increase in price ("SSNIP") above the competitive level without losing sales to such an extent as to make this unprofitable[19]. If such a price rise would be unprofitable, because consumers would switch to other products, then the market definition should be expanded to include these substitute products. This process continues until a point is reached at which the SSNIP test becomes profitable. The initial focus of market definition is typically on examining the scope for demand-side substitution.

A2.5 Supply-side substitution possibilities are then assessed to consider whether they provide any additional constraints on the pricing behaviour of the hypothetical monopolist which have not been captured in the demand-side analysis. Supply-side substitution considers what competitive constraints might be imposed on the hypothetical monopolist from firms which are producing similar or closely related products and who would be attracted to enter the market in question in response to the hypothetical monopolist imposing a price rise. For supply-side substitution to be relevant, suppliers would need to be able to enter the market in a relatively short period of time and at low cost, by virtue of their existing position in the supply of other services[20].

[18] See Office of Fair Trading: *Market Definition Guideline*, OFT 403, March 1999 and the draft revised version of April 2004

[19] The OFT Guidelines suggest that a price increase is to be defined as an increase of 5-10% above the competitive level.

[20] The OFT Guidelines consider a relatively short period to be within a year.

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

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

Market definition issues in broadcasting markets

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

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

A2.10 As set out in Section 4, the potential competition concerns around promotional activity by broadcasters relate to the ability of broadcasters, in particular the terrestrial broadcasters, to leverage their position in respect of the audiences that they reach to affect competition in other markets, such as competition between digital retail TV services for subscribers and competition between channels for viewers (and thus advertising revenue). It is therefore appropriate to consider viewers' likely substitution patterns between different types of digital retail TV services and channels.

Digital retail TV services market(s)

A2.11 In considering issues around the definition of the relevant product market, Ofcom has relied on a number of sources of data. Ofcom has considered evidence relating to differences in functionality and price between the services in question and other potentially substitutable products; consumers' valuations of such functional differences; survey evidence relating to consumers' basis for choosing one retail TV service over another; and also some limited data on consumer switching behaviour.

Demand-side substitution

A2.12 For the purposes of this analysis, Ofcom has taken as its starting point the retailing of digital TV services by means of the DTT platform. Once a household has purchased a Freeview set-top box, it is then able to access a range of free-to-view digital channel services, including the existing terrestrial channels i.e. BBC1, BBC2, ITV1, Channel 4 and Five and also a range of radio services, without the need to pay any on-going subscription.

A2.13 The first step in the market definition process is to consider the extent to which other digital retail TV services could impose a competitive constraint on the Freeview service i.e. if there were to be a reduction in the quality of services available on Freeview, in terms of number of services or quality of reception, would viewers switch to another digital retail TV service.

Content packages

A2.14 The television services associated with the different digital retail TV services are set out in tables A4.1 to A4.6 at Annex 4. This data reflects the recent restructuring of cable packages in terms of both the composition of the entry level packages and also the pricing of those packages. Sky restructured its packages earlier in 2005.

A2.15 From the data available on channel packaging and taking into account the lack of an ongoing subscription charge, the closest offering to Freeview in terms of providing access to free-to-view services is the Sky Freesat service. With the Sky Freesat product, the user has access to a wide range of free-to-view digital channel services once they have invested in the purchase of the Sky reception equipment i.e. the satellite dish and the digital set top box ("STB"). The Sky Freesat service offers access to the unencrypted services, such as BBC1 and BBC2, plus services accessible through the Freesat card, such as ITV1, Channel 4 and Channel 5. Those with an existing Sky mini-dish and STB can purchase a Freesat viewing card for £20[21]. The Sky Freesat option provides access to some 120 channels in all (including shopping channels and foreign language channels) compared to the 30 plus channels available via Freeview. However, there is a clear overlap in terms of the channels accessible via Freeview and those accessible via Sky Freesat. Sky Freesat's coverage is also around 98% of households[22] compared to 75-80% for Freeview (although Freeview coverage will increase closer to digital switchover).

A2.16 The BBC and ITV have recently announced that they intend to launch a 'Freesat' proposition in the course of 2006. There are no specific details of the range of services that will be available via the BBC/ITV Freesat service or any indication of prices for the customer equipment. However, it is anticipated that this could provide another demand-side substitute.

A2.17 In addition to the overlap of services available via the Sky Freesat proposition, other retail TV services, such as pay-TV services, could also impose a constraint on the Freeview service. Subscribers to multi-channel services are not homogeneous and their preferences will differ considerably. Offering a range of bundled content packages to subscribers is one way in which pay-TV service providers seek to address this issue. This means that there are areas of overlap in terms of the bundles of television services that are available. The tables in Annex 4 indicate that the channel services

[21] Prior to Freesat, there were periods in which "Free-to-view" cards could be purchased in order to view encrypted content such as Channel 4 and Channel 5.
[22] In Ofcom's *Planning options for digital switchover* consultation document, recent newspaper adverts for BSkyB's Freesat service stated that Sky provides "98% coverage of the UK".

available via Freeview are also typically available via various content packages offered by other digital retail TV service providers . For example, there is a significant overlap between the entry level subscription TV packages offered by ntl, Telewest, Sky and Homechoice and the services available with Freeview and Sky Freesat. Further, the option of Freeview plus a Top-Up TV subscription is similar, not just in terms of channels offered but also in terms of pricing, to the entry level packages offered by the retail pay-TV service providers[23].

A2.18 This might suggest that there is at least a subset of the users of the Freeview platform for whom the entry level packages of pay-TV services might represent a sufficiently close demand-side substitute as to impose a competitive constraint.

A2.19 A comparison of the services available would suggest that Sky Freesat could be expected to be the closest demand-side substitute to Freeview. However, it is also the case that there are significant overlaps between the channel services on offer via Freeview/Sky Freesat and the basic entry level packages offered by ntl, Telewest, Sky and Homechoice. This would suggest that it might be possible to construct a chain of substitution argument linking the different retail TV services together. For instance, it could be possible to construct an argument that the cable companies and Sky face competition from Freeview/Sky Freesat for subscribers that are currently only subscribing to the basic subscription packages. They thus face the risk that subscribers taking only a limited number of channels might switch to the Freeview service instead. The recent restructuring and re-pricing of their access packages by ntl, Telewest and Sky might represent a strategic reaction to this in order to retain these subscribers.

Consumer research

A2.20 Consumer research carried out for Ofcom[24] examined the reasons given by customers for choosing particular retail TV services. This data is set out in more detail in Table A4.6 at Annex 4. The research was based on interviews with individuals identified by the retail TV service subscribed to rather than by any particular service or bundle of services. Therefore, care needs to be taken to ensure that the data is interpreted correctly in the context of considering options for substitution for customers wishing to alter their supplier of TV services.

A2.21 This data indicates that consumers' choices are shaped by a range of factors and the fact that the single largest response "don't know" perhaps reflects the fact that different factors are at play. That said, it is the case that consumers did appear to be aware of price; the "cheapest method" was the most commonly cited reason for cable, Freeview and DSL subscribers choosing a particular service. For BSkyB subscribers, this reason came second behind a "better quality than cable" reason. In relation to Freeview and Sky, "additional channels" was also an important reason for choosing their respective platforms, although given the range and nature of channels available via each, it is unlikely that these subscribers would regard one as a close demand-side substitute for the other across the board. For both cable and DSL subscribers the fact that TV services were bundled with telephony and Internet services was an important factor in their choice.

[23] Some retail TV service providers bundle their service with other products. For instance, the cable companies ntl and Telewest offer bundles comprising digital television, broadband Internet access and telephony services. A similar approach is adopted by operators providing services over DSL technology.
[24] ICM Research, September 2005.

A2.22 The fact that different reasons are important to subscribers of different digital retail TV services could suggest that the availability of other digital retail TV services might only be a weak competitive constraint on Freeview.

Evidence on switching behaviour

A2.23 The evidence on switching between digital retail TV services is limited. However, recent research carried out for Ofcom indicates that the levels of switching are typically very low. In the most recent survey data, the majority (88%) of multi-channel TV customers had never used another digital retail TV service provider while living at the same address. Of those that had switched to Sky, around 80% had switched from analogue or digital cable (although this result should be viewed only as indicative because the sample size involved was small) and the remainder had switched from Freeview.

A2.24 Ofcom's *Digital Television Update* (Q2 2005) sets out the available data on customer "churn" i.e. customers giving up their subscription to a particular digital retail TV service. A churn rate of 10.5% for pay digital satellite (Sky) against a subscriber base of 7.4m homes implies that just under 800,000 households churn off the pay-TV service each year[25]. Similarly, churn rates of 16.8% for ntl and 18.0% for Telewest would indicate that around 330,000 and 240,000 customers are ceasing their subscriptions respectively. Not all of these subscribers would necessarily be switching to another service and some of the churn might result from subscribers moving house to properties where reception is not possible or simply ceasing to subscribe to digital television altogether. However, such high rates of churn, over non-trivial numbers of consumers, suggests that even if switching costs are non-trivial, they do not represent a sufficient barrier to switching to prevent it from occurring at significant levels.

Supply-side substitution

A2.25 In terms of considering the scope for supply-side substitution, it is necessary to consider the scope for other broadcasters to switch the use of their existing assets to enter the market and offer a competing digital retail TV service. The main question to consider is whether, in response to a rise in prices from the competitive price (or reduction in quality), any such supply-side switching would occur within a short timescale.

A2.26 The scope for supply-side substitution might include the following;

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

A2.27 Sky does not control the Astra satellite platform on which it operates which means that, in the absence of capacity constraints, other broadcasters could acquire capacity to transmit programming into the UK via digital satellite. However, the key contribution of Sky is the provision of technical platform services such as regionalisation and EPG listing, via its conditional access technology (particularly the STB and the smart card). This means that another broadcaster would either have to establish their own distribution network of STBs or seek access to Sky's distribution network. ITV has recently announced that it will be looking to work with the BBC in developing an alternative "Freesat" proposition to that offered by Sky but there are no further details available. As set out above, Sky already offers both free to view and subscription

[25] It is estimated that of those who have churned off Sky pay-TV services, 347,000 still use their STBs to receive free to view public service channels (Ofcom *Digital Television Update* (Q2 2005)).

services and therefore this constraint has already been taken into account in considering demand-side substitution.

A2.28 As regards the provision of a TV platform over BT digital subscriber line ("DSL") services, BT Retail has recently announced[26] from late summer/autumn 2006 it will offer a TV over broadband service using IPTV. The BT service will offer access to a range of television services including digital terrestrial television services. The recent announcement of the acquisition of the broadband Internet provider Easynet by BSkyB could also signal that BSkyB might be interested in exploring the delivery of TV services over broadband.

A2.29 The recent announcements would suggest that any scope for supply-side substitution is already being exploited. In particular, both free-to-view and subscription services can be provided over digital satellite and DSL.

Geographic market

A2.30 Although the digital satellite platform is available to around 98% of the population, there are a number of geographic constraints on the availability of the other digital TV platforms. At present, coverage of DTT is around 73% of UK households although this is projected to rise to above 98.5% at the time of digital switchover.

A2.31 Cable television passes around 51% of all homes. ntl operates in London and South-East England, East Anglia, the East Midlands, North-West England, North-East England, the Glasgow area and Northern Ireland. Telewest has eight franchises: London & South East region, North East, Scotland, North West, Yorkshire, Birmingham & Midlands, South West and Eurobell SW. HomeChoice is available only in parts of London, although it does have plans to expand its geographical coverage and KIT is available in the area served by Kingston Communications.

A2.32 In practical terms, it seems highly unlikely that consumers would switch house in order to have access to a particular digital retail TV service, and very few would be influenced by this factor even at the time of moving house. Therefore, it would appear that ntl, Telewest or HomeChoice do not offer any significant direct competitive constraint on Sky for households that they are not currently able to supply.

A2.33 However, this narrow geographic approach to market definition could fail to capture adequately the competitive constraints operating on supply in a particular geographic area. Specifically, this approach takes no account of the geographic pricing constraints faced by specific firms in reality. Where firms choose, in practice, to adopt uniform pricing across local areas, local competitive pressures will have an impact only to the extent that they can affect that single uniform price. Moreover, to the extent that local factors do influence that price, the effect will be transmitted beyond the particular area where the competitive pressure originally arose.

A2.34 Sky has chosen to set a single national price for its service i.e. it does not price discriminate between cable and non-cabled areas. For this reason, we cannot, at this stage, rule out that the geographic market would be national in scope[27].

[26] BT Press Release: *BT takes another major step towards next generation TV*, October 26th 2005.
[27] For example, this was the conclusion drawn in European Commission Case No IV/36.539 — British Interactive Broadcasting (BiB), 4.13.iii: "It is true that all UK TV households do not have access to cable, whereas virtually all households can receive satellite. However, this does not provide a justification for distinguishing between cable and satellite markets, or drawing a distinction between different geographic markets. BSkyB sets a single national price for its satellite retail pay-TV service,

A2.35 In the case of the report into the ntl/CWC merger in 2000[28], the Competition Commission concluded that: "the main characteristics of the market are national … Despite operating within separate local franchises the cable companies operate a uniform pricing policy and the bulk of programmes they make available are also ones of a national rather than local interest".

A2.36 Furthermore, in the OFT's Competition Act investigation into BSkyB in 2002[29], it was concluded that "The narrowest potential market definition is a region of the UK. Although the coverage of UK distributors varies, any gaps are not large or predictable enough to yield localised pricing opportunities for individual platform operators. The national pricing strategies of cable companies indicate that they regard the relevant market as being broader than individual franchise areas, while both BSkyB and ITV Digital (prior to insolvency) also pursued national pricing policies".

A2.37 Taking these factors into consideration, Ofcom considers that the geographic market is likely to be national in scope, albeit it with local characteristics. It is possible that this too could change over time but the issue of the geographical scope of the relevant market does not appear to be germane to the competition analysis.

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

A2.38 Based on the consideration of the characteristics of the different digital retail TV services, the way in which channels are bundled together and the (absence of) pricing structures, it would seem that the Freeview and Sky Freesat offerings would be likely to be sufficiently close demand-side substitutes to form part of the same product market.

A2.39 Further, taking into account data on the way in which services are bundled and priced and data on switching etc, it might be possible to construct a chain of substitution argument that links together Sky and cable with Freeview and Sky Freesat into a single market for digital retail TV services. Although these different services do not compete head-on across the board, there could be sufficient overlaps across different groups of customers for them to be considered to be part of the same (albeit differentiated) product market. This is particularly the case with the entry-level subscription packages offered by the pay-TV service providers.

A2.40 Furthermore, on the supply-side, the recent announcements by BT and BBC/ITV indicate that there is scope for supply-side substitution over the different distribution platforms. In particular both free-to-view and pay services can be provided over digital satellite and DSL technology.

A2.41 On the other hand, it is possible that once further data is available it may demonstrate that there are breaks in the chain of substitution and it might be possible to define more narrow markets, such as digital retail free-to-view services and digital retail pay-TV services. Ofcom also recognises that the broadcasting sector is in a state of transition and market definitions are likely to evolve over time.

A2.42 Further, the evidence of consumer switching behaviour and consumer views on the characteristics of the different retail TV services suggests that the extent of switching

and in practice could not discriminate between cabled and non-cabled areas as avoidance by consumers would be easy. "

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

[29] Decision of the Director General of Fair Trading: *BSkyB Investigation: alleged infringement of the Chapter II prohibition*, 17 December 2002.

behaviour might be more limited (even though switching costs may not be a barrier to switching) and thus the relevant markets could be narrower in scope.

A2.43 At this stage, Ofcom does not believe it is in a position to define the relevant market(s) for the provision of digital retail TV services but potential candidate markets are considered in its assessment of the impact on competition.

Channel markets

Demand-side substitution

A2.44 As detailed above, in the standard linear[30] television environment, with the exception of premium services, a viewer does not typically pay for content on a per programme or per channel basis and therefore there is no price as such. Therefore, there is a need to consider other product attributes which a hypothetical monopolist could manipulate. In these circumstances, one approach would be to consider the effect of a reduction in programme quality by a small but significant increment as a proxy for an increase in price.

A2.45 In terms of considering the competitive constraints on different broadcasters, it is possible to start at the level of individual programmes and consider the extent to which different types of programming are substitutable. Given that the main terrestrial channels are general entertainment channels providing a broad range of programming, this would quickly lead to a multi-dimensional analysis in which different channels could be in competition with the main terrestrial channels at different times of the day[31]. However, given that programmes are arranged into channels and that the main metrics of aggregate viewer behaviour (share of audience, audience reach etc) are generally presented at a channel level, Ofcom is proposing to start its analysis at the channel level and to consider the competitive constraints on different channels rather than to sub-divide the analysis. More importantly, such distinctions would appear to be unnecessary in order to assess the competition concerns that have been raised.

A2.46 In order to consider the role of promotional activity, this analysis takes as its starting point competition between channels for viewers and starts by considering the competitive constraints on the main terrestrial channels i.e. BBC1, BBC2, ITV1, Channel 4 and Five. It may be that the competitive incentives between channels differ. Given the BBC's public service broadcasting remit, its rationale for competing for viewers may differ from the commercial rationale faced by ITV plc, but that should not change the analysis of the scope for demand-side substitution.

A2.47 In order to assess the particular competition concerns that have been raised in relation to channels, there appear to be two main types of candidate markets to consider:

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

[30] A distinction is made between "linear" television where the viewer is constrained to watching what is being broadcast at a point in time and "on-demand" television where the viewer selects the programming that they want to watch.
[31] For instance, the main terrestrial broadcasters all provide sports programming in their schedules. This would tend to suggest that at certain times, and depending on the type of sports programming, they could be in competition with programming provided by specialist sports channels, if the audiences for sports channels tended to be comprised of sports fans in general rather than fans of specific sports.

A2.48 It should be noted that for in order for two channels to be in competition with each other it is not necessary that 100% of viewers would switch between the two, only that a sufficient proportion of viewers would switch and render an attempt to reduce quality unprofitable.

Competition between terrestrial channels

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

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

A2.51 Table A2.1 sets out data on audience share measured across all homes over the period 1998-2004. The way in which the audience share data is presented is intended to provide an indication of what audiences are watching rather than pre-judging the definition of the relevant market. The “consumption” of television programming is not like other products where consumption of one product would tend to preclude consumption of a competing product. In the context of television services, viewers can and do watch programmes across a range of channels within a normal week’s viewing.

Table A2.1: Channel audience share – all homes: 1998-2004

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

Source: BARB/The Communications Market 2005, Ofcom

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

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

Table A2.2: Channel share of audience by platform, 2004

	BBC1	BBC2	ITV1	Channel4	Five	Other
Terrestrial Only	33.0%	15.1%	29.1%	13.5%	8.8%	0.4%
Digital Terrestrial only	27.8%	11.6%	23.0%	11.4%	8.9%	17.4%
Digital satellite only	17.3%	5.3%	17.2%	6.1%	3.6%	50.5%

Source: BARB/The Communications Market 2005, Ofcom

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

A2.54 Another measure of audience behaviour is audience reach data. This data sets out the proportion of the viewing population who watch at least fifteen minutes of each channel in an average week. It therefore gives an indication of the mix of viewing i.e. whether channels achieve a relatively wide audience or whether they are restricted to a more narrow range of viewers.

Table A2.3: 15-minute weekly channel reach, all homes 1998-2004

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

Source: BARB/The Communications Market 2005, Ofcom

A2.55 The audience reach data would tend to confirm the idea that many viewers do take advantage of a range of different television channels over the course of a week – it is not the case that viewing is limited to one channel. Furthermore, it suggests that a sizeable majority of viewers will watch four of the five main terrestrial channels over the course of a single week.

A2.56 The audience share data on its own could be taken to indicate that the closest competitor to ITV1 was BBC1. It is the case that the overall structure of their schedules is broadly similar i.e. in terms of being mass market, general entertainment services However, if we were to consider a hypothetical monopolist for ITV1 and BBC1 together, the audience reach data would also indicate that viewers do not limit their viewing just to these two channels. This would tend to suggest that, if a hypothetical monopolist attempted to reduce programme quality by a small but significant amount, then viewers could switch more of their viewing to BBC2 and Channel 4. In the first instance, this could be could be taken as an indication that the relevant market is broader than just ITV1 and BBC1 together i.e. the availability of programming on BBC2 and Channel 4 could impose a competitive constraint on ITV1 and BBC1. Again, because of Five's limited coverage it is not clear the extent to which Five might be a close demand-side substitute for ITV1 and BBC1 but it might offer a close demand-side substitute for programming on BBC2 and Channel 4, forming a chain of substitution. If that were the case it is possible that all the terrestrial channels could be regarded as being part of the same market. This conclusion is independent of whether they are broadcast in analogue or digital.

Competition from other digital channels

A2.57 If we consider the situation in which there is a hypothetical monopolist of all the main terrestrial television channels, the relevant consideration is the extent to which the availability of other digital channels imposes a competitive constraint on the hypothetical monopolist, if the monopolist chooses to reduce the quality of programming on the main terrestrial channels. Given that not all homes are subscribers to multi-channel television, this does mean that there is a potential issue in terms of the extent to which the less than universal availability of other digital channels would exercise a competitive constraint on the viewing of the main terrestrial services.

A2.58 In terms of the data available on viewer behaviour, data on audience shares across all homes indicates that although there has been a decline in the viewing share for the main terrestrial channels, they still account for the majority of viewing. Table A2.1 above indicates that, together, the five main terrestrial channels still account for just under 74% of all viewing.

A2.59 However, audience share data for all homes will be influenced by the fact that a sizeable proportion of households do not subscribe to digital TV. Therefore, there is a need to consider viewing shares according to platform. Table A2.2 set out audience share data by the different types of platforms. Even in homes which have access to digital satellite television (and therefore the greatest range of television channels), the combined viewing share of the main terrestrial channels still accounted for just under 50% of viewing in 2004. Table A2.2 above indicated that in 2004 the combined viewing share of the five main terrestrial channels is 82.6% in DTT homes, 53.1% in digital cable homes and 49.5% in digital satellite homes.

A2.60 The pattern of audience share data would tend to suggest that there has been some shift away from the main terrestrial channels to other digital channels over time which would in turn tend to suggest that other digital channels offer an alternative to the main terrestrial channels. This trend also might be expected to increase over time as digital penetration increases. However, what is not clear is the extent to which other digital channels are a sufficiently close demand-side substitute to exercise a competitive constraint, if there were to be a decrease in quality in the programming available on the main terrestrial channels.

A2.61 At the level of individual channels, the audience share data indicates that there remains a significant gap between the viewing shares of the five main channels and other digital channels. Table A2.4 below sets out audience share data for the top ten channels in multi-channel homes.

Table A2.4: Channel's audience share in all multi-channel homes, Oct-Dec. 2004 (those Channels with audience share >1.0%)

ITV1	19.59% }	
BBC 1	19.00% }	
BBC 2	6.52% }	Total terrestrial = 56.7%
Channel 4	6.51% }	
Five	5.04% }	
Sky Sports (Total – 3 channels)	3.19%}	Total Sky = 8.5%
Sky Movies (Total – X channels)	2.84%}	
Sky One	2.42%}	
ITV2	1.98%	
UKTV Gold	1.88%	
CBeebies	1.44%	
Living	1.19%	
TOTAL:	71.60%	

Source: BARB/The Communications Market 2005, Ofcom

A2.62 The data would tend to suggest that in spite of the increasing significance of non-terrestrial channels in viewers' watching habits, very few individual channels have broken through to account for a significant viewing share. Between October-December 2004, Sky One was the only single channel other than the five main channels to achieve more than a 2% audience share in a multi-channel home.

A2.63 With the audience share data indicating that the five main terrestrial channels on their own still account for around 50% of audience share even in homes with digital satellite and with so many other digital channels having very low audience shares, it is not possible to conclude that there is a continuous chain of substitution between the terrestrial channels and other digital channels. Therefore, it is necessary to consider other sources of information about viewer preference/viewer behaviour.

Audience reach

A2.64 In terms of considering the average reach across a portfolio of channels, Table A2.5 below sets out a comparison of the average weekly and monthly reach data for the first six months of 2005.

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

Channels	Average Weekly Reach (%)	Average Monthly Reach (%)
All BBC Channels	83.5%	95.6%
All ITV Channels	74.4%	91.9%
All Channel 4 Channels	59.9%	85.1%
All BSkyB Channels	45.7%	66.3%
Five	43.3%	72.7%
All UKTV Channels	30.1%	52.9%
All Discovery Channels	19.0%	34.8%
All Flextech Channels	23.1%	43.1%

Source: BARB

A2.65 Again this data tends to indicate the fact that over the course of a month there is a significant difference between the viewing of the main terrestrial broadcast channels and groups of other digital channels even in multi-channel homes.

Advertising markets

A2.66 In the context of the merger between Carlton Communications plc and Granada plc[32], the Competition Commission concluded that, for the purposes of the merger, there was a single market for television advertising. This would imply that the commercially funded terrestrial channels were in competition with the other digital channels for advertising revenue which could in turn suggest that these channels were also in competition for commercial impacts/viewers.

A2.67 If we consider the position of the main terrestrial broadcasters in terms of television net advertising revenue (NAR), the leading position of the main terrestrial broadcasters compared to multi-channel services is also a useful indicator. A measure of the overall premium a channel can command for its advertising airtime is the extent to which its share of advertising revenue exceeds its share of commercial impacts.

A2.68 In 2004, ITV accounted for just under 50% of all TV NAR with Channel 4 accounting for just over 20% and Five for around 5%. Other digital channels together accounted for just over 20% of total TV NAR, with Sky channels accounting for just over half of this[33]. For the other digital channels, this represented an increase in share of NAR of around 7% over 2003, which would indicate that advertising on multi-channel television is becoming more significant. However, ITV1's share of commercial impacts was just over 40% and Channel 4's was just over 16% for 2004.

A2.69 The difference between the share of NAR and the share of impacts indicates that ITV1 and Channel 4 are still able to command a premium within the market for

[32] Cm 5952 *Carlton Communications Plc/Granada plc: a report on the proposed merger* (2003)
[33] Source: The Communications Market 2005.

television advertising although the other data on advertising markets would tend to suggest that advertisers increasingly regard advertising on the other digital channels as a substitute for advertising on the commercial terrestrial channels.

Programming budgets

A2.70 Audience research consistently shows that viewers value UK-originated programming more highly than imported materials and repeats[34]. Digital channels provided more hours of original first-run programming than the five main channels in aggregate in 2004, although their proportion of total originations is significantly smaller than their proportion of total programming. The digital channels (excluding movies, music, shopping and games services) broadcast just under 80,000 hours of originations in 2004. Over the same period, the five main terrestrial channels broadcast around 21,000 hours of original network programming, the BBC digital channels accounted for a further 14,000 hours of programming and programmes for the nations and regions accounted for a further 15,000 hours[35].

A2.71 The main terrestrial channels tend to offer a broader range of programming than the other digital channels and even the general entertainment digital channels will tend to focus on a more limited range of programming than that offered by the main terrestrial channels.

A2.72 Despite broadcasting more original programming than the five main channels, the digital sector spends significantly less on its output. Total programme costs for UK broadcasters (excluding regional programming) reached £4.816bn in 2004. Of that total, the digital channels (excluding the BBC) accounted for £1.862bn (39% of the entire industry spend). However, two-thirds of that figure was spent by sports and film channels, reflecting the high cost of rights to those channels. Other digital channels spent significantly less in total (£658m) than either BBC1 (£858m) or ITV1 and GMTV1 (£842m), although this represents an increase in programme spend of 17% of digital channels' programme costs in 2003.

A2.73 This data indicates that the budgets for programming originated by the main terrestrial channels are significantly higher than that for other digital channels. This is likely to have implications for programme quality in terms of range, diversity of original content as well as possibly production values. The other digital channels tend to rely more heavily on acquired material and repeats compared to the main terrestrial channels. In addition, the main terrestrial broadcasters typically have specific regulatory requirements in terms of original production.

A2.74 To the extent to which there is a general correlation between programme budgets and the quality of programming on screen, the difference in programme budgets could be taken to indicate that the main terrestrial channels could be regarded as offering higher quality programming compared to other digital channels which in turn would tend to suggest that other digital channels may not be sufficiently close demand-side substitutes to exercise a significant competitive constraint on the main terrestrial channels.

Supply–side substitution

A2.75 In terms of considering the scope for supply-side substitution, the relevant consideration is whether a broadcaster in a nearby market would be prompted to enter

[34] Section 4.3.4, *The Communications Market 2005*
[35] Figure 4.17, *The Communications Market 2005*

the market in relation to a decrease in programme quality in order to compete for viewers (and therefore advertising revenue).

A2.76 In relation to the main terrestrial channels, spectrum scarcity imposes an absolute barrier to entry; a digital channel could not reposition itself as an analogue terrestrial broadcaster because there is no analogue spectrum available. In a digital environment there may be more scope in terms of obtaining access to spectrum, such as satellite capacity.

A2.77 As discussed briefly above, although other digital channels such as Sky One or UK Gold offer general entertainment services, their programme budgets are significantly less than those of the main terrestrial broadcasters and their schedules make greater use of acquired material and repeats.

A2.78 If a broadcaster were to move away from a programme schedule which was based heavily on acquired material and repeats to one which was based around UK-originated material, there would inevitably be a certain lag between commissioning new material and that material being ready for transmission, although the extent of the lag would vary from genre to genre. For instance, in the case of factual documentaries it could well be possible for other broadcasters to acquire this type of programming or to commission original programming to be broadcast relatively quickly. However, it would be more complex to commission original drama. In general there would be a need to acquire the staff with the relevant expertise in commissioning across a range of different genres. In addition, there would be the need to adjust the way in which advertising was sold on the channel. It would be easier to orchestrate such a move over several years which is outside the time horizon usually adopted for a consideration of supply-side substitution.

Geographic market

A2.79 Ofcom considers that the relevant market is likely to be national in scope.

Initial position on channel market(s)

A2.80 Channels compete for viewers in the context of the different retail TV services being used to access channels. That is, other digital channels can only compete for viewers where a viewer is accessing multi-channel television by means of a digital retail TV service. The data set out above indicates that the viewing shares of the main terrestrial channels have been declining over time and that as the penetration of digital television increases, this decline is likely to continue.

A2.81 The data available does suggest that where viewers have a choice of a range of channels, they are increasingly choosing to view programming on channels other than the main terrestrial channels. However, very few individual digital channels account for a significant share of viewing, with the result that even in multi-channel homes the five main terrestrial channels still account for around half of all viewing. Comparing programme budgets also indicates that the quality of programming available on the terrestrial channels is likely to be higher than that on other digital services in terms of having a greater proportion of original UK commissions, fewer repeats and less imported programming.

A2.82 Taking into account the data on both audience share and audience reach and the fact that the proportion of households with access to digital TV is around 65%, it is not clear as to the extent to which multi-channel services exercise a significant competitive constraint on the main terrestrial channels in terms of competition for viewers. The data does suggest that there may still be an important distinction between the main terrestrial channels and other digital channels. It is possible that there could be chains of substitution in place, which would mean that other digital channels exercise a sufficient constraint on terrestrial channels, but it is not clear from the available data whether any such chains of substitution are continuous or whether they might break down at any point. Although the increasing fragmentation of television audiences would tend to suggest that terrestrial channels are in competition with other digital channels, other relevant indicators do not necessarily point in the same direction and this prevents us from concluding definitively that all channels are in competition in the same market for viewers. It is also the case that not all the different types of digital channels are likely to be substitutes for each other, for example, shopping channels and news channels etc.

A2.83 It should be noted that the data does indicate that the position of the terrestrial channels is in a state of flux as the penetration of digital television increases. It is therefore possible to speculate that if Ofcom were to adopt a more forward-looking approach and consider the market in 3-4 years time once the transition to digital switchover had begun, it might be possible to define broader channel markets in which a range of channel types might be in competition for viewers.

A2.84 For the purposes of assessing the likely impact of promotional activity on competition, it does not appear that the definition of the relevant market is a key factor because the conclusions of Ofcom’s assessment of the impact of promotional activities are the same in the case of both wide and narrow market definitions. Therefore, it is not necessary for Ofcom to reach definative conclusions about the relevant channel markets.

Annex 3

Assessment of the impact on competition

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

The economic characteristics of promotional activity

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

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

Use of promotional airtime

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

A3.5 However, the actual cost of using airtime needs to be understood in the context of current restrictions governing the use of airtime. As set out in Section 2, RADA impose a maximum on the amount of advertising that can be shown in a given hour, and over the day[36]. In general, programme lengths combined with maximum advertising minutage typically do not fill an hour of airtime.

A3.6 Airtime used for promotions is generally not able to be used for anything else. Rather, promotional airtime is better seen as a flexible “buffer” which essentially amounts to the best use of “dead” airtime. However, Ofcom is not suggesting that promotional airtime is without any benefit to broadcasters. The important point to note is that such airtime would not generally be used in place of higher yielding advertising, and that

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

programme length is not adjusted with promotions in mind. Therefore, promotions can be seen as effectively having negligible opportunity cost; that is, the implicit price, is very low[37].

Promotions as a "tool" of competition

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

A3.8 The incentives on the BBC might differ from those of the commercial broadcasters in that they do not sell advertising airtime, but the BBC describes promotional activity as: building awareness of BBC services; guiding users through the complex world of media services; and driving the impact of BBC services[38]. There is general agreement that as part of its role as a publicly funded broadcaster, it needs to retain scale and viewer impact. One way in which it can do this is by the promotion of the range of services that it offers.

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

Evidence from market research

A3.10 Qualitative and quantitative research work carried out for Ofcom has indicated that promotional activity can have benefits for viewers[39]. Broadly speaking the research found that:

- Viewers use promotions extensively to help plan and shape their viewing choices.
- Promotions stimulate choice between channels and programmes.
- Programme specific promotions, for programmes up to seven days ahead were seen as the most useful.
- Cross-promotions between channels provoked mixed emotions. Multi-channel focus group respondents were particularly positive towards cross channel promotions.
- Digital-only content promotions led to frustration among terrestrial viewers.
- Nevertheless, there was evidence that this kind of promotion was encouraging digital switchover.

A3.11 In the qualitative research, everyone in the focus groups claimed that they had at some point changed channel (or wanted to) led by a promotion. Many viewers also described how promotions worked in tandem with listings to reinforce and illustrate

[37] Cross-promotions do, however, carry a direct cost in that the promotions need to be produced in the first place.
[38] BBC response to *A strong BBC, independent of government*
[39] *Television promotions – what the viewers think, a report of the key finding of a qualitative and quantative study*, 6 December 2005.

earmarked viewing. The quantitative research also reinforced this finding as 61% of all viewers claimed that they often or sometimes used promotions to help them decide what to watch on television. The quantitative research also found that promotions were more likely to influence viewing choices in digital homes, where use of weekly listings guides is lower.

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

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

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

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

The current level of promotional activity

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

- quantify the amount of promotional activity currently taking place across a selection of television channels;
- understand the split between self and cross-promotional activity; and
- understand in detail the type of self and cross-promotion taking place[40].

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

- The PSB channels aired fewer promotional spots than Sky One and Discovery. Within the PSB channels, BBC1 and BBC2 transmitted fewer spots than ITV1 and Channel 4.
- Promotional activity across all the channels in the sample accounted for an average of 3.7% of total output, with the terrestrial channels ranging from 2.2%(BBC2) to 3.2% (ITV1).

[40] *Analysis of current promotional activity on television, a report of the key findings of a content analysis study*, 6 December 2005

- 63% of all spots analysed were self-promotional sports and a third were cross-promotional. Within this total there were some stark differences. BBC, Sky and Discovery all aired more cross-promotional spots than ITV and Channel 4.
- Around a third of promotions on BBC1, BBC2, Sky One and Discovery were cross-promotional compared with 5% on ITV1 and 11% on Channel 4. In the case of ITV1, 90% of its promotional activity in the period analysed consisted of self-promotions.

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

Markets affected by promotions

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

Competition between digital retail TV services

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

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

A3.22 Given that promotional activity could influence the decision to take up digital TV, it could have an impact on competition between different digital retail TV services if the terrestrial broadcasters chose to discriminate in favour of one particular digital retail TV service and targeted their promotional activity on that particular service. In order to assess the extent to which promotional activity could have an adverse impact on competition, it is relevant to consider the incentives of broadcasters when it comes to promoting different services.

A3.23 As set out above, around 65% of UK households have switched to digital television but that still leaves a significant minority that have still to make a decision. Furthermore, the current proposals are that the UK should be fully switched over to digital television by 2012, with the transition to digital switchover beginning in 2008. This means that those households which have yet to switch to digital TV will need to decide on a digital retail TV service in the next few years. This means that there is an important time dimension to considering the role of cross-promotion.

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

A3.25 In addition, ITV plc and Channel 4 are partners in the Digital 3&4 joint venture which is the multiplex operator for DTT Multiplex 2 which has given them an interest in the success of the DTT platform[41]. More recently[42], ITV plc acquired SDN, the commercial multiplex operator for Multiplex A. Given that, going forward, the value of capacity on Multiplex A, will be determined by the take-up of Freeview services, then ITV plc now has a stronger commercial incentive to discriminate in favour of Freeview services and the DTT platform, in the absence of any restrictions about digital retail TV service/platform neutrality.

A3.26 Furthermore, the BBC, in order to maintain high viewing shares, as a shareholder in the Freeview consortium and as the multiplex operator for two of the six DTT multiplexes, also has incentives to promote Freeview and DTT over other digital retail TV services and platforms.

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

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

A3.29 In Annex 2, the issue of the definition of the relevant market(s) was left open. The potential for such promotional activity to have an adverse impact on competition is present whether there are narrow product markets, such as a digital retail free-to-view TV market and a digital retail pay-TV services market, or a broader market, such as a single digital retail TV services market. In light of the nature of the competition concerns which have been identified, Ofcom considers that it is appropriate to adopt a precautionary approach, which for the purposes of assessing leverage in this context means consideration of the impact on competition in the broad market i.e. a product market in which the all digital retail TV services are in competition with one another.

Competition between channels

A3.30 In terms of competition between channels, promotional activity with a very low opportunity cost is still present as a tool of competition. However, it is more difficult to characterise promotional activity which seeks to promote upcoming programmes on the same channel or another channel as having a material effect on competition.

A3.31 When faced with a particular level of promotional activity by a rival broadcaster, competing channels could choose to respond by either doing nothing or seeking to

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

respond to the promotional activity in some way[43]. To the extent that promotions are effective in inducing viewers to consume the promoted products at the expense of those of their rivals, then the first option is likely to result in the loss of audiences; that is, all else being equal, the rival channel might expect to lose more audience share than otherwise to the promoted channel.

A3.32 The second option for a firm faced with the promotion of a rival's product is to attempt to neutralise the adverse effect on its own business by engaging in offsetting promotional activity. All channels have the ability to promote programming on their own channel as a means of seeking to retain or attract audiences for upcoming programmes. Equally channels which are part of a group of channels also have the ability to cross-promote each other's services. However, unlike the concern in relation to digital retail TV services, the incentives of the broadcasters in relation to channel promotions are not aligned. Each channel or group of channels would be focused on directing viewers to their own services and competing with each other for viewers. In this situation the issue of whether promotional activity could be expected to have a material effect on competition is more complex to determine.

A3.33 While recognising that some channels do currently enjoy an advantage in terms of higher audience share that stems from their historical position, it is difficult to discern the level of promotional activity which might be expected to have an anti-competitive effect compared to the level of promotional activity which would be considered pro-competitive.

A3.34 Channels which are part of a portfolio of channels obviously have greater opportunities to cross-promote services from within that group of channels. This applies not just to the main terrestrial broadcasters, for example, ITV1 cross-promoting ITV2 and Channel 4 cross-promoting programming on E4, but also to groups of digital channels, such as Sky One cross-promoting programming on a Sky Sports channels or promotions within the UKTV suite of channels. That is not to say that channels such as Sky One have access to an equivalent size of audience to ITV1 and so there is parity in the ability to cross-promote but not necessarily in terms of audience impact. Nevertheless, it is the case that channels which are part of families of channels are able to offset the impact of channel promotions by the main terrestrial broadcasters.

A3.35 Individual channel share is not necessarily the only, or best, way of tracking broadcasters' relative presence in the multi-channel arena. The performance of individual channels becomes less important than the share of audience achieved by a broadcaster's suite of channels or its portfolio share.

A3.36 As digital penetration increases and a much wider range of channels is provided to an increasing number of viewers, the combined share of the public service broadcasters in all homes has declined. However, their digital channels have offset some of those declines and helped them to maintain their total share at a higher level than would have been possible with only one or two channels. In total, channels operated by the BBC, ITV, Channel 4 and Five together accounted for 77.7% of viewing in 2004, down from 79.6% in 2003 and 81.8% in 2001.

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

Table A3.2: Major Broadcasters' portfolio audience share in all homes (2001-2004)

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

Source: BARB/The Communications Market 2005.

A3.37 Since 2002, ITV1's share has declined steadily but ITV2's share has grown and ITV3 delivered 0.1% audience share in 2004 despite only launching in 2004. Overall, the audience share of ITV's channels combined has changed only slightly.

A3.38 Analysis by Ofcom would tend to suggest that the initial success of ITV3 can be attributed to factors such as the strength of its schedule, based as it was on Granada Productions' back catalogue, and its presence on the Freeview platform, rather than cross-promotion from the main ITV channel. This might suggest that cross-promotion from a "parent" terrestrial channel is not the unique factor in determining audience share and that other factors, such as branding, quality of programming and platform availability, could have at least as important a role to play in terms of attracting and retaining an audience.

A3.39 It is also the case that other digital channels are proficient at exploiting cross-promotional activities and marketing themselves. The Sky channels are the most watched of the non-terrestrial digital channels. Ofcom's analysis of the extent of current promotional activity showed that the Sky channels made considerable use of promotions with Sky One having the highest number of promotional spots of those channels surveyed and also the longest duration promotions. The Sky Sports channels in particular made considerable use of cross-promotions with 60-90% of all promotions in the sample period being classified as cross-promotional.

A3.40 As audience fragmentation continues and the audience share of the terrestrial channels declines, so the relative advantage that the main terrestrial broadcasters enjoy from being able to cross-promote their digital services from the main channel will be eroded, and going forward, as more homes switch to digital, the scale of the advantage will continue to decline further.

A3.41 In considering what might happen in the absence of regulation, one would assume that promotional activity would tend to be self-regulating in nature. Firstly, there is a cost to cross-promotion in the sense that a broadcaster could use that promotional airtime instead to self-promote. Secondly, if broadcasters engage in too great a level of promotional activity, there is a risk that viewers will get irritated by the promotions and churn away from the channels altogether, negating the primary purpose of the promotion.

A3.42 The data from Ofcom's content analysis study of promotional activity indicated that the proportion of cross-promotional activity carried out by ITV over the sample period in early 2005 was low compared to other broadcasters[44]. Although the Current Rules require ITV to maintain digital retail TV services/platform neutrality in respect of their promotional activity, ITV are not constrained from promoting their digital channels, except in terms of promoting their channels excessively. This would tend to indicate that the decision by ITV in respect of cross-promotional activity is one taken for commercial reasons rather than driven by regulation.

A3.43 In terms of considering the exclusionary effect of promotional activity, it is noted that with the move to digital television since 1998, there has been a proliferation of television channels. This could be taken as an indication that the ability of the main terrestrial channels to cross-promote their own digital services has not proved an absolute barrier to entry for other digital channels.

A3.44 The above discussion suggests that it is difficult to describe channel promotions as being per se anti-competitive, even when carried out by broadcasters which enjoy a first mover advantage in terms of access to audiences. The difference in the case of digital retail TV services, is that, while cross-promotion by a terrestrial broadcaster has the effect of raising rivals' costs, it is combined with an alignment of incentives across all the main terrestrial broadcasters to promote one service or platform over others. It is the alignment of incentives that creates the potential distortion of competition, which is absent in the case of channel promotions.

Competition in other broadcasting markets

A3.45 In this context, a concern has been expressed by the commercial broadcasters in relation to cross-promotion of radio services by the BBC on its television channels.

A3.46 The Act relaxed many of the media cross-ownership rules which had restricted the ability of a Channel 3 licensee to control commercial radio stations which broadcast in the areas served by that licensee. There is therefore the potential for a Channel 3 licensee to expand the range of services that it cross-promotes to include services on radio stations in which it has an ownership interest. In such a situation, the competition impact would be felt in, for example, the geographic market in which the radio station competed for listeners.

A3.47 In many respects the issue here is the same as that for competition between channels in that the central competition issue is one of leverage from one market to another. Again, a key issue is likely to be that of materiality and the absence of an alignment of incentives across all the main terrestrial broadcasters.

A3.48 As in the case of the impact of promotional activity on competition between channels, in considering what might happen in the absence of regulation, it is likely that there would be a strong element of self-regulation in respect of the amount of airtime given over to the promotion of other broadcasting-related products or services. Again, there would be the issue that this airtime could be used for self-promotion, and concerns about excessive promotion leading to viewer irritation in that excessive promotion would alienate viewers and lead to them switching away altogether.

A3.49 The above discussion suggests that it is difficult to describe promotions for services in other broadcasting markets as being per se anti-competitive. Again, the alignment of incentives is absent and therefore there is unlikely to be a material impact on competition from such promotions.

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

Annex 4

Supporting data for competition analysis

Structured Content Package Offerings

Table A4.1: DTT Packages

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

Table A4.2: Freesat Packages

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

Table A4.3: Basic Channel Packages offered by ntl/Telewest[45]

Package	Characteristics			£ pcm[46]
Telewest Starter	BBC NEWS 24 BBC1 BBC2 BBC THREE BBC FOUR BBC Parliament CBeebies CBBC Channel ITV1 ITV2	ITV3 ITV News Channel 4 Five UKTV Bright Ideas UKTV Gold UKTV History UKTV Style E4 Sky Sports News	Sky News Sky One CNN EuroNews LIVINGtv Challenge The Music Factory The Hits Attheraces[47]	5.50
ntl Select pack	37 Channels: Same as Telewest Starter Pack plus E4+1, Ideal World, Men and Motors, TMF, Sky One Mix, Channel ntl, Front Row. No Sky Sports News, Attheraces, UKTV Style.			5.50
Telewest Essential	75 Channels: Telewest starter + all UKTV channels, British Eurosport, British Eurosport 2, Discovery Channel, Discovery Realtime, Discovery Home & Health, Boomerang, Cartoon Network, CNBC, Nicktoons, Paramount Comedy Sci-Fi, The Box, Trouble, VH-1 Classic, Animal Planet, Bravo, Extreme Sports, Jetix, LIVINGtv +1, MTV Hits, Bravo +1, God channel, Trouble Reload.			10.50
ntl Base pack	57 Channels: compared to Telewest Essential - only 3 UKTV channels (vs 13 on Telewest), no Sky Sports News, no Discovery Realtime, Nicktoons, Paramount Comedy, Sci-Fi, Animal Planet, MTV Hits amongst others. n.a. on Telewest Essential - has Sky Travel, E4+1, Bloomberg, Ideal World, Men and Motors, TMF, Sky One Mix, Channel ntl, Front Row, MTV, Discovery travel & Living and a number of other channels[48].			11
	113 Channels: Telewest Essential plus UKTV Style Gardens, E4+1, Bloomberg, Toonami, Men and Motors, TCM, MTV, MTV 2, MTV Base, MTV Dance, National Geographic, Nick Junior,			15.50

[45] Advertised prices may vary slightly due to different treatment of payment methods in advertised prices i.e. we have attempted to eliminate discounts for paying by direct debit where possible.
[46] All prices not including compulsory line rental of an ntl or Telewest telephone line for 10.50 pcm.
[47] Plus: more 4, abc1, bid.tv, FTN, Price-drop.tv, QVC, Teachers TV, Community Channel, Hallmark Channel, TV Warehouse, Best Direct.
[48] Screenshop, Front Row Preview Channel, Stop & Shop, Thane Direct, Thomas Cook TV, TMC, TV Travel Shop, TV Travel Shop 2, vh1, Yes 661.

Telewest Supreme	Nick Replay, Nickelodeon, Paramount Comedy 2, History Channel, TV 5, Adventure One, Discovery Channel +1, Discovery Travel and Living, Discovery Civilisations, Discovery Kids, Discovery Science, Discovery Wings, Jetix +1, Smash Hits, Kerrang!, Kiss Magic, Deutsche Welle, Fashion TV, Leonardo, LIVINGtv 2, Performance, Cartoon Network +1 and a number of other channels[49].	
ntl Family pack	113 Channels: compared to Telewest Supreme - 7 UKTV Channels less, no Sky Sports news, EuroNews, Bravo +1, The Music Factory, Fashion TV, Cartoon Network +1, LIVINGtv 2 and others[50]. n.a. on Telewest Supreme - has Sky Travel, Front Row, National Geographic +1, The Biography Channel, The History Channel +1, Classic FM TV amongst others[51].	19.50

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

Table A4.4: Sky Packages

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

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

[49] VH1, Q, Reality TV, VH 1 Classic, VH-2.
[50] Leonardo, VH-2, Nick Replay, Performance, TV Warehouse, Best Direct, God channel, Trouble Reload, Deutsche Welle.
[51] Screenshop, Front Row Preview Channel, Stop & Shop, Thane Direct, Thomas Cook TV, TV Travel Shop, TV Travel Shop 2, Yes 661, Scuzz, The Amp, flaunt, FX 289.

Subscribers can choose different combinations of these packages:

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

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

Package name	**Price**
HomeChoice Base 34 channels, 1MB, Freetime telephony (Free UK evening and weekend calls)	£17.99
HomeChoice Base 34 channels, 2MB, Freetime telephony (Free UK evening and weekend calls)	£22.99
HomeChoice Base 34 channels, up to 8MB, Freetime telephony (Free UK evening and weekend calls)	£29.99
HomeChoice Big 55 channels, 1MB, Freetime telephony (Free UK evening and weekend calls)	£27.99
HomeChoice Big 55 channels, 2MB, Freetime telephony (Free UK evening and weekend calls)	£32.99
HomeChoice Big 55 channels, up to 8MB, Freetime telephony (Free UK evening and weekend calls)	£39.99
HomeChoice Max 78 channels, 1MB, Freetime telephony (Free UK evening and weekend calls)	£37.99
HomeChoice Max 78 channels, 2MB, Freetime telephony (Free UK evening and weekend calls)	£42.99
HomeChoice Max 78 channels, up to 8MB, Freetime telephony (Free UK evening and weekend calls)	£49.99

Take-up of digital TV

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

Table 4.6: Reasons for platform choice[52]

Satellite/BSkyB (Base: 780)	Digital cable (Base: 306)	Analogue cable (Base: 96*)	Freeview (Base: 503)	Via broadband/ DSL (Base: 88*)
Better quality than cable (13%)	Cheapest method (14%)	Cheapest method (20%)	Cheapest method (21%)	Cheapest method (10%)
Cheapest method (11%)	Bundled with phone/internet (12%)	Bundled with phone/internet (5%)	Given Freeview box (12%)	Was what I wanted[53] (7%)
Additional channels (10%)	Already in home (8%)		Extra channels (10%)	Bundled with phone/internet (7%)
Only method in area (10%)	Only method in area (5%)		Cheaper than sky/cable on all TVs (9%)	
Already in home (7%)	Better than analogue cable (5%)		Better quality than cable (5%)	
For sports channels (5%)				
**Other (13%)	**Other (23%)	**Other (33%)	**Other (14%)	**Other (22%)
Don't know (35%)	Don't know (36%)	Don't know (43%)	Don't know (31%)	Don't know (57%)

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

[52] 2110 UK adults with landline, ICM Research, 23-24 September 2005
[53] Responses such as 'because we wanted it', 'it was perfect', 'my husband likes it'

Annex 5

Competition legal framework

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

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

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

Fair and effective competition condition

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

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

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

Code under the fair and effective competition condition

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

Annex 6

Draft Ofcom Cross-promotion code

Introduction

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

However, subject to this code, television broadcasters are able to promote programmes, channels and related services without such promotions being considered advertising and included in the calculation of advertising minutage.

This code replaces the rules regulating the promotion of programmes, channels and related services on commercial television issued by the ITC in January 2002.

The code only applies to promotions outside programmes.

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

The Ofcom Broadcasting Code, in particular Section 10 (Commercial References), applies in the usual way, unless otherwise stated in the corresponding Broadcasting Code guidance.

Legislative background to the code

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

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

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

Principles

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

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

Rules

Meanings

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

"Cross-promotions" are promotions by a channel of Broadcasting Related Services that are not Self-promotions.

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

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

Broadcasting related services

1.1 All licensees shall ensure that Cross-promotions are limited to Broadcasting Related Services.

Platform neutrality

2.1 The following rule shall apply to Channel 3, Channel 4 and Channel 5 licensees ("the Designated Licensees").

2.2 The Designated Licensees shall ensure that Promotions for Broadcasting Related Services that mention a digital retail television service and/or digital television broadcasting platform treat all digital retail television services and/or digital platforms in an equal and impartial manner. In particular:

(a) promotions that refer to a digital retail television service, such as Freeview or Sky, must also name all other digital retail television services on which the Broadcasting Related Service is available;

(b) promotions that refer to a particular digital platform, such as digital terrestrial television (DTT) or cable, must refer to all other digital platforms on which the Broadcasting Related Service is available. Generic promotions for digital television are permitted if they do not specifically mention any particular platform; and

(c) promotions must treat digital retail television services and/or digital platforms equally in respect of all aspects mentioned, such as pricing, brand names, availability and packages.

Guidance

This guidance is non-binding.

Cross promotion relationships

Certain shareholdings between companies create a presumption that there are sufficient incentives for the promoting channel to provide another channel or broadcasting-related service with free airtime without the need for additional consideration. In these specific circumstances Ofcom would not consider Cross-promotions to be advertising. However, if there is payment or some other consideration which passes between the parties, these types of arrangements could be investigated under the advertising minutage rules set out in RADA.

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

- the promoting channel has a shareholding of 30% or more in a promoted channel;
- the promoted channel has a shareholding of 30% or more in the promoting channel; or
- the parent company has a shareholding of 30% or more in both the promoted channel and the promoting channel.

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

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

General guidance on this code

It is the responsibility of the broadcaster to comply with this code.

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

Annex 7

Responding to this consultation

How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 24 February 2006 (deadline extended 15 February 2006)**

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 2), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first selina.chadha.@ofcom.org.uk.

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

Selina Chadha
Floor 4
Competition and Markets
Riverside House
2A Southwark Bridge Road
London SE1 9HA

Fax: 020 7981 3333

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 3. It would also help if you can explain why you hold your views, and how Ofcom's proposals would impact on you.

Further information

If you have any want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Selina Chadha on 020 7783 4147.

Confidentiality

Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents confirm on their response cover sheer that this is acceptable).

All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex, so that non-confidential parts may be published along with the respondent's identity.

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer.

Next steps

Following the end of the consultation period, Ofcom intends to publish a statement around the end of April.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at http://www.ofcom.org.uk/static/subscribe/select_list.htm.

Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 8) which it seeks to follow, including on the length of consultations.

If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom (Scotland)
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW
Tel: 0141 229 7401
Fax: 0141 229 7433
E-mail: vicki.nash@ofcom.org.uk

Annex 8

Ofcom's consultation principles

A8.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A8.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A8.3 We will be clear about who we are consulting, why, on what questions and for how long.

A8.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A8.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A8.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A8.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A8.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 9

Consultation response cover sheet

A9.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.

A9.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.

A9.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.

A9.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.

A9.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	☐	Name/contact details/job title	☐
Whole response	☐	Organisation	☐
Part of the response	☐	If there is no separate annex, which parts?	

If you want part of your response, your name or your organisation to be confidential, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here. ☐

Name Signed (if hard copy)

Annex 10

Consultation questions

Question 1: Do you think that Ofcom should deregulate and remove the 30% shareholding rule?

Question 3: Do you agree that Ofcom should provide guidance around a 30% shareholding threshold?

Question 3: Do you agree that where there are other relationships, such as joint programming or licensing rights, these circumstances should be considered on a case by case basis?

Question 4: Do you consider that the commercial terrestrial broadcasters – ITV plc, Channel 4 and Five – should be required to maintain neutrality in terms of the promotion of their services across all digital retail TV services and digital TV platforms?

Question 5: Do you agree that Ofcom should withdraw the Current Rules in relation to the cross-promotion of channels and rely on the ex post enforcement of the fair and effective competition condition to address any competition issues that may arise?

Question 6: Do you agree that Ofcom should withdraw the Current Rules in relation to the cross-promotion of other services and rely on the ex post enforcement of the fair and effective competition condition to address any competition issues that may arise?

Question 7: Do you consider that Option A3 - rely on the Broadcasting Code, i.e. no separate content rules for cross-promotion – is the most appropriate option for in-programme cross-promotions?

Question 8: Do you consider that Option B2 - no content regulation for cross-promotion - is the most appropriate option for outside programme cross-promotions?

Question 9: Do you agree that cross-promotions should be limited to broadcasting-related services?

Question 10: Do you agree that it is unnecessary to retain the 20 second rule in RADA?

Question 11: Do you consider that the additional regulation of radio cross-promotions is unnecessary?