

The regulation of Electronic Programme Guides

This document seeks your comments on both a draft Code on Provision of Television Access Services that Ofcom proposes to publish under section 319 of the Communications Act and on proposed access-related condition to be imposed on BSkyB under section 74 of the Act. The deadline for comments is 25 March 2004.

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Executive Summary

1. This document seeks the views of interested parties on the future regulation of Electronic Programme Guides (EPGs). EPGs are screen-based menus of channels and/or programmes which allow viewers of multi-channel television services to click through to the channel of their choice using their remote control.

2. Ofcom is empowered by the Communications Act 2003 ('the Act') to require EPG providers to offer listings on the EPG (otherwise known as 'access') to any channel seeking them, on terms that are fair and reasonable and not unduly discriminatory. However, the Act does not permit Ofcom to impose access regulation unless this is appropriate to secure particular objectives, and unless the regulation complies with particular tests. These objectives and tests are explained in the consultation document. Having considered these, Ofcom believes that access regulation is appropriate in the case of the EPG provided by British Sky Broadcasting Limited (BSkyB) for satellite services, but not in other cases for the time being. The consultation paper sets out Ofcom's reasoning, as well as the access conditions it is proposed to apply to BskyB.

3. Ofcom is required by the Act to devise a code of practice for EPG providers dealing with how prominently public service channels (the BBC, ITV 1, Channel 4, and S4CFive) are to be displayed on EPGs, and what features the EPG should provide to assist viewers and listeners with hearing and/or visual impairments to use the EPG. The Act also empowers Ofcom to require licensed EPGs to comply with a code intended to secure fair and effective competition in the provision of EPGs. Ofcom is seeking the views of interested parties on a draft EPG code that deals with each of these issues.

4. The potential of EPGs is likely to evolve over time as technology improves, particularly if competing providers emerge. Possible developments include EPGs that can respond to voice commands and provide spoken information (of particular use to people with sight disabilities, but also of more general application), EPGs with more programme-related information (e.g. labelling about the suitability of programmes for different age-ranges), and EPGs linked to content providers other than television services. For all these reasons, Ofcom considers it likely that EPG regulation will need to change over time, and that it will be necessary to review periodically the extent to which regulation is appropriate, and if so, how that regulation should change. This document sets out Ofcom's current proposals. The consultation period closes on 25 March 2004. Views and comments on any of the proposals in this document are welcome. Please call, e-mail or write to:

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Section 2: Background

What is an EPG?

5. EPGs are by far the easiest way for people with access to multi-channel television services to choose the television they watch. As the number of people with access to multi-channel services grows, EPGs are likely to become increasingly significant tools. They are screen-based menus of channels and/or programmes which allow viewers and listeners to click through to the channel of their choice using their remote control. They comprise both a broadcast or transmitted stream of programme data (“datastream”), and software in set top boxes which determines how the programme information is presented, and (to a large extent) what the functionality of the EPG will be. Simple listings which do not provide a ‘click through’ facility fall outside the Act’s definition of EPGs.

6. EPGs are available for all multi-channel services, including digital terrestrial, cable and satellite services. They range from basic ‘now and next’ programme guides (e.g. the Freeview EPG) to more sophisticated guides (such as that offered by BSkyB), which allow audiences to access a range of information about programmes, and to group them by genre or channel. Work is underway to extend the information provided by the Freeview EPG, and there are also plans for other EPGs – one company (4TV) has already taken out a licence. As EPGs evolve, in the light of technology, competition and consumer expectations, Ofcom expects to review EPG regulation periodically, to examine the extent to which regulation remains appropriate, and if so, how that regulation should change.

Statutory provisions

7. The Communications Act 2003 (‘the Act’):

- (a) permits Ofcom to impose an access condition upon EPG providers requiring them to list channels wishing to be included in the EPG, and to do so on a fair, reasonable and non-discriminatory basis (Section 74);
- (b) defines EPGs that are broadcast or transmitted as Television Licensable Content Services (TLCS) (Section 232). In consequence, EPGs are subject to the same codes on programme standards as other licensed television services;
- (c) requires Ofcom to draw up and apply a code of practice to EPGs containing guidance on such matters as appropriate prominence for public television service broadcasters (PSBs) and the features EPGs should have to facilitate their use by disabled people. This code is to apply, as appropriate, both to EPGs confined to radio or television listings, and to those offering both (Sections 310 – 311); and

permits Ofcom to require compliance by EPG providers with codes intended to prevent arrangements or practices that Ofcom considers would be prejudicial to fair and effective competition in the provision of licensed services or connected services, provided that Ofcom considers this to be a more appropriate way of proceeding than under the Competition Act 1998 (Sections 316 and 317).

Section 3: Access regulation

Statutory provisions

8. Section 45(5) of the Act allows Ofcom to set those access conditions that are permitted under Section 73 (including those under Section 74(2)) of the Act. In particular, Section 74(2) of the Act would allow Ofcom to impose conditions on EPG providers if Ofcom considers that they are necessary for securing that:

- (a) people can have access to such programme services provided in digital form as Ofcom may determine; and
- (b) the facility for using EPGs is provided on fair and reasonable and terms, without undue discrimination.

9. Before setting conditions, Ofcom must also consider which of its duties are relevant - in particular its general duties in Section 3 of the Act, and those required to meet European Union obligations in Section 4.

10. Ofcom must also consider whether proposed conditions are:

- (a) objectively justifiable in relation to the networks, services or facilities, apparatus or directories to which they relate;
- (b) not unduly discriminatory; and
- (c) proportionate and transparent in relation to what they are intended to achieve (section 47).

Current regulation

11. Until a few months ago, BskyB (amongst others) was subject to a number of licence conditions (issued under section 7 of the Telecommunications Act 1984) essentially requiring it to provide listings to any channel that wished it on terms that were fair and reasonable, and not unduly discriminatory. In July 2003, the Communications Act gave effect to new European Union Directives that removed the need for such a licence. However, the Directives allowed national regulators to impose specific conditions on providers including in relation to EPGs and so as to avoid a regulatory gap until any new EPG conditions could be put in place, the Director General of Telecommunications issued a Notice continuing parts of the license conditions, requiring BskyB to continue offering access on the same terms. In the event that it confirms its proposals and imposes access conditions under the Act, Ofcom proposes to discontinue this notice, and is publishing a draft Discontinuation Notice (Annex B).

Proposed approach

12. Ofcom wishes to ensure that people are able to secure access to any channel licensed in the UK, any EU member State or a state which is a party to the European Convention on Transfrontier Television, if they so choose. Given that EPGs are by far the easiest way for consumers to gain access to multi-channel services, Ofcom believes that the ability of any channel receivable in the UK (whether free to air or subject to conditional access) to secure listings on EPGs is necessary to facilitate access to those channels by consumers. In this connection, Ofcom notes that consumers may not be aware of channels not listed on EPGs,

and that, even if they are, the process of tuning into those channels without an EPG listing is comparatively complex.

13. Ofcom therefore considers that, as a starting point, it is appropriate in terms of section 74(2) to impose conditions on EPG providers requiring them to provide access to channels seeking listings. This is particularly relevant in the case of ‘open access’ platforms, that is, those platforms on which channel providers can secure independent carriage. Unless those channels can also secure listings on relevant EPGs, it will be difficult for consumers to find them, and consequently for the channels to compete against other channels which do have listings on the EPG. Moreover, an EPG provider linked to one or more television services on that platform may be incentivised to discriminate against other television services, and either refuse listings, or only offer them on terms which are unfair.

14. Ofcom believes that operators of ‘closed access’ platforms, such as the cable networks, are sufficiently incentivised to ensure that channels they have chosen to carry on those networks have access to the EPGs for those networks, and that it would be disproportionate to impose access regulation on those EPGs. Ofcom considers that this distinction between open and closed access networks is objectively justifiable, and is not unduly discriminatory.

15. As regards the digital terrestrial and satellite platforms, Ofcom considers that both are, in principle, open access. However, Ofcom does not consider that, currently, it would be either proportionate or necessary to impose access regulation on the digital terrestrial platform. The reasons for that are two fold: first, that there is little spare capacity on the platform, so it is not effectively an open access platform, though this may change; second, that each multiplex operator is obliged under its licence to transmit programme data for services on their own multiplex as well as for services on other multiplexes. However, Ofcom proposes to keep the situation under review to see if changing circumstances warrant the imposition of access conditions on digital terrestrial EPGs. Ofcom’s proposals for EPGs on satellite platforms are set out below.

Proposed access conditions

16. Access-related conditions need to be applied to specific persons. At present, most subscribers to satellite television in the UK have access to only one EPG – that provided by BSkyB. For the reasons outlined above, Ofcom proposes only to apply access regulation to BSkyB for the time being. BSkyB is the corporate entity operating in the market for EPG services on the digital satellite platform and is therefore the appropriate named provider for this regulation.

17. Ofcom considers it appropriate to prevent a person to whom a condition is applied which is part of a group of companies from exploiting the principle of corporate separation, that is, using another member of its group to carry out activities so as to avoid having to comply with conditions. Accordingly, Ofcom considers it appropriate that the draft obligations summarised below, and set out in Annex A, should apply to BSkyB and any related companies (as defined in the Conditions set out in Annex A).

18. On the basis of the considerations summarised in paragraphs 20 to 24 below, Ofcom proposes to apply the Conditions set out in Annex A and summarised below:

- (a) Condition 1: requirement to provide EPG services on fair and reasonable terms. This condition is proposed under section 74(2)(a)

and 74(2)(b)(i) of the Act and would require BSkyB to provide EPG services to broadcasters on fair and reasonable terms where a broadcaster reasonably requests such services in writing. Under condition 1, Ofcom also has the power to make a direction, a power which may be used to deal with specific issues, such as whether a request is a reasonable one;

- (b) Condition 2: requirement to provide separate accounts. This condition is proposed under section 74(2)(b)(ii) of the Act and would require BSkyB to establish and maintain the ability to provide separated accounts to the regulator, when directed by Ofcom from time to time, for example, in the event of a complaint about EPG pricing;
- (c) Condition 3: requirement to not discriminate unduly. This condition is proposed under section 74(2)(b)(ii) of the Act and would require BSkyB to not unduly discriminate when providing EPG services to broadcasters; and
- (d) Condition 4: requirement to publish charges, terms and conditions. This condition is proposed under section 74(2)(b)(ii) of the Act and would require BSkyB to publish its charges, terms and conditions for offering EPG listings to broadcasters.

19. In interpreting the requirement to supply on terms that are fair, reasonable and not unduly discriminatory, Ofcom will have regard to relevant parts of the conditional access guidelines (which incorporate guidelines on EPG access regulation) published by Oftel, until such time as they are revised¹.

Relevant considerations

20. Ofcom has considered whether the proposed conditions are appropriate to secure objectives permitted by Section 74(2) of the Act, whether they are consistent with Ofcom's duties, and whether they meet the tests prescribed in Section 47 of the Act.

21. Ofcom considers that the conditions are appropriate for securing the purposes set out in Section 74(2) of the Act because without such conditions there would be a risk that:

- (a) the ability of persons to have access to the wide range of programme services receivable in the UK would be undermined; and
- (b) broadcasters seeking a listing on the EPG might not be offered fair and reasonable terms that were not unduly discriminatory. This would reduce their ability to compete efficiently.

22. Ofcom has considered all of its duties and believes that those of particular relevance are:

¹ Terms of supply of conditional access: Oftel guidelines, October 2002.
<http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/cagu1002.htm>

- (a) its duty to further the interests of consumers in relevant markets, where appropriate by promoting competition (Section 3(1)(b));
- (b) its duty to secure the availability throughout the United Kingdom of a wide range of television and radio services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (Section 3(2)(c));
- (c) the requirement to promote competition in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks and services (Section 4(3)); and
- (d) the requirement to encourage the provision of network access and service interoperability, to the extent Ofcom considers appropriate to secure efficiency and sustainable competition, and the maximum benefit for consumers and providers of communications facilities (Section 4(7) and (8)).

23. Ofcom believes that the proposed conditions are consistent with each of these duties, and are not inconsistent with any of its other duties.

24. In relation to the tests prescribed by Section 47 of the Act, and summarised in paragraph 10 above, Ofcom considers that the conditions:

- a. are objectively justifiable in relation to the EPG made available by BSkyB for the reasons set out in paragraphs 12 to 15 above;
- b. do not discriminate unduly against BSkyB for the reasons set out in paragraphs 12 to 15 above, and do not discriminate between different classes of broadcaster as all broadcasters would be entitled to benefit from the requirement upon the provider to offer terms that were fair and reasonable, and not unduly discriminatory;
- c. are proportionate to what they are intended to achieve, since:
 - i. they have been applied only to the EPG provider operating on an open access platform (for the reasons summarised in paragraphs 12 to 15 above);
 - ii. the provider may still negotiate and implement differential pricing to the extent that is objectively justifiable;
 - iii. section 310 of the Act clearly contemplates that PSB channels should be included in EPG listings, but without a right of access to EPGs, this could not be guaranteed;
 - iv. to limit the benefits of access to PSBs would run counter to Ofcom's objective of facilitating access to the widest range of television services available in the UK; and
 - v. the requirement that BSkyB keep separated accounts is proportionate as it does not require BSkyB to constantly have available fully prepared and separated accounts, but rather to maintain the systems from which separated account information may be drawn and assessed by an independent regulatory auditor. Ofcom would only be likely to call on this information when there is a clear reason to do so, such as a complaint about EPG pricing. If BSkyB

did not maintain such accounts, it would be difficult for it to demonstrate compliance with the regulation; and

- (d) in relation to what they are intended to achieve, are transparent, as the purposes of the conditions, the reasons for imposing them, and the expected outcomes have been made public in this document. The proposed conditions (Annex A) are set out in a transparent form and it is clear what they are intended to achieve. They offer comfort for broadcasters that they can get an EPG listing on reasonable request, but offer BSkyB the ability to consider the reasonableness of such a request and to offer differential pricing where it may be objectively justifiable. The conditions also provide broadcasters with assurance that BSkyB, as a vertically integrated operator, may not treat its own suite of channels more favourably than the channels of other broadcasters. The requirement that BSkyB maintain the capability to provide separated accounts seeks to ensure that any investigations into BSkyB's management of its EPG business are conducted using information which it prepares itself, having agreed with Ofcom how this will be approached.

Section 4: Proposed provisions of the code

Background

25. Until recently, EPG providers who were licensed by the Independent Television Commission (ITC) or who carried listings for services licensed by the ITC were required to comply with its 'Code of Conduct on Electronic Programme Guides'. The code provided, amongst other things, that EPG providers should:

- (a) refrain from engaging in any practice or entering into any arrangement which is prejudicial to fair and effective competition in the provision of EPGs; and
- (b) give due prominence to any PSB channels included on the EPG. Access to such channels should not be more difficult for viewers than access to any other services included on the EPG.

26. The Act requires Ofcom to draw up and consult upon a code giving guidance on the practices to be followed by EPG providers, and provides a statutory basis for regulation of both the issues dealt with by the former ITC code. It also requires that the EPG code should provide guidance on what assistance should be provided to persons with hearing or visual impairments (or both) to enable them to use the EPG for all the same purpose as persons without such impairments, to the extent practicable. Ofcom's proposed guidance on these matters, which is set out in Annex C, is explained below.

27. In addition, sections 316 and 317 permit Ofcom to require licensed EPG providers to comply with a code intended to secure fair and effective competition in the provision of EPG.

Appropriate prominence

Statutory provisions

28. Section 310(2) of the Act requires that Ofcom's code oblige EPG providers to give the degree of prominence that Ofcom considers appropriate to the listing and promotion of the programmes in public service channels, for members of the intended audience. The Secretary of State may add to, or subtract from, the list of relevant public service channels, which comprises the digital versions of BBC services, as well as the digital services of Channels 3, 4 and 5, and S4C Digital. The code is also to ensure that members of the intended audience for services provided for a particular area or locality are able to use the EPG to select the programmes included in that service.

General principles

29. Ofcom considers that 'appropriate prominence' permits a measure of discrimination in favour of PSB channels. However, it does not propose to be prescriptive about what appropriate prominence means, as there are many possible ways in which EPGs could display information about programmes included in PSB services. Ofcom proposes that licensees should be required to comply with the following general principles:

- (a) licensees should ensure that the approach they adopt to the requirement for appropriate prominence is objectively justifiable;
- (b) Ofcom will have regard to the interests of citizens and the expectations of consumers in considering whether a particular approach to listings public service channels constitutes appropriate prominence; and
- (c) in giving appropriate prominence to PSB channels, EPGs should enable viewers in a region to select the appropriate regional versions of those channels through the primary listings for those channels.

30. These principles would have broad application. For example, they would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than 'one click' from the home page. They might also justify giving public service channels first refusal on vacant listings higher in the category that they were placed.

Assistance to disabled people

Statutory provisions

31. Section 310(3) requires that Ofcom's code oblige EPG providers to incorporate such features in their EPGs as are appropriate to enable, so far as practicable, people with impairments affecting their sight or hearing ('disabled people') to use the EPGs for the same purposes as people without such impairments. EPGs are also to provide information about assistance in relation to programmes (e.g. television access services such as subtitling, signing and audio description), as well as facilities for making use of that assistance. This section sets out the requirements that EPG providers should meet in order to comply with the draft code.

General principles

32. Ofcom proposes that EPG providers should be required to:

- (a) make such adjustments to their EPGs as are reasonable to secure that they can be used by disabled people for all the same purposes as they are used by other people; and
- (b) promote awareness of the scope of EPGs to provide information about programmes with access services, in conjunction with broadcasters and representatives of disabled people.

33. Ofcom expects EPG providers to consult disability groups about the way they meet their obligations under the code, which are set out below.

Adjustments to EPGs to facilitate their use by disabled people

34. At present, there is limited scope to reconfigure EPGs so as to facilitate their use by disabled people. In particular, much of the functionality of EPGs is dependent upon set top box hardware and software, as well as the data made available by broadcasters. However, Ofcom expects the needs of disabled people to be an integral part of planning for the future development of EPGs. To this end, the draft code sets out Ofcom's expectation that EPG providers should work with disability groups, broadcasters and set top box manufacturers on ways of improving usability.

35. While recognising that this will be a long term process, Ofcom would like EPG providers to set out their plans for improving usability. To this end, the draft code proposes that EPG providers should be required to produce by 30 September 2004, and thereafter annually, a statement of the steps they plan to take to facilitate the use of their EPGs by disabled people. Ofcom would assess the adequacy of these statements in the light of the particular circumstances of each EPG, and will also have regard to the obligations of EPG providers under the Disability Discrimination Act 1995 to make reasonable adjustments in the provision of facilities and the delivery of services so as to make these accessible to disabled people.

Provision of information

36. The draft code would require EPG providers to ensure that information included in relation to programmes indicates which programmes are accompanied by television access services. A corresponding provision has been included in the draft Code on Television Access Services (published for consultation on Ofcom's website on 22 December 2003) requiring broadcasters to make such information available to EPG providers.

37. Ofcom considers that, where practicable, the primary programme listing should indicate by means of standard symbols or wording the nature of the access service provided. Ofcom expects EPG providers to work with disability groups, broadcasters and set top box manufacturers to devise and use standard symbols or wording that meet the needs of disabled people. The draft code provides that, if this is not done by 30 September 2004, Ofcom may determine appropriate symbols and wording, and require them to be used by all EPG providers.

Promotion of awareness

38. Ofcom understands that awareness about television access services amongst disabled people is not high. Ofcom believes that this needs to be tackled in a

number of different ways. In particular, it considers that EPG providers should provide, on an easily accessible part of their EPG, information for people with impairments on:

- (a) how to use the EPG;
- (b) how to use the access services accompanying the programmes;
- (c) what options exist for customising the appearance of the EPG to make it easier to use; and
- (d) what additional sources of help and information are available in other places (e.g. on a website, or from telephone helplines), whether from the EPG operator, or television service providers.

39. Ofcom also proposes that EPG providers should be required to work with broadcasters, platform operators and disability groups to publicise the information and facilities available on EPGs to assist disabled people. This should include information targeted at publications used by disabled people, and periodic publicity featured prominently on EPGs.

Fair, reasonable and non-discriminatory treatment

Statutory provisions

40. Almost all Broadcasting Act licences include a condition requiring licensees to ensure fair and effective competition (imposed under section 316 of the Act). The condition requires licensees (amongst other things) to abide by any code published by Ofcom for the purposes of the condition. Ofcom proposes that the EPG code should include rules made under this condition that would require licensed EPG providers to deal with television channels included on the EPG in a fair, reasonable and non-discriminatory (FRND) way. The reason for this is that discriminatory treatment of a channel in terms of listings or presentation would constrain its ability to compete effectively with other channels for audience share and advertising revenue, and would thus be prejudicial to fair and effective competition.

41. Before deciding whether *ex ante* regulation is required and where Ofcom is exercising its Broadcasting Act powers for a competition purpose, Ofcom is obliged by section 317 of the Act to consider whether it would be more appropriate to deal with any unfair, unreasonable or discriminatory treatment that did arise under the Competition Act 1998.

Proposed approach

42. In relation to the proposed fair and effective competition part of the code (entitled 'Fair, reasonable and non-discriminatory competition' at paragraphs 14 to 16 of the code) Ofcom is proposing to exercise its Broadcasting Act power set out in section 317(1)(b) of the Act, to give an approval to a code for the purposes of the licence condition made under section 316 (referred to in paragraph 40 above).

43. Ofcom is proposing to exercise its Broadcasting Act powers for a competition purpose in that the only or main reason for proposing the fair, reasonable and non-discriminatory competition part of the code is to secure that licensees do not enter into or maintain arrangements or engage in a practice which Ofcom would

consider to be prejudicial to fair and effective competition in the provision of EPGs.

44. Having considered whether it would be more appropriate to deal with any unfair, unreasonable or discriminatory treatment that did arise under the Competition Act 1998, Ofcom believes that *ex ante rules* would be more appropriate, for the following reasons:

- (a) the code would provide continuity, given the ITC's EPG code (applying to most EPGs before 29 December 2003). This is consistent with the policy objectives made clear to Parliament, that Ofcom should have the same flexibility to ensure fair and effective competition as its predecessors;
- (b) the code would provide clarity both to EPG providers and channels of the practices to be followed, in the absence of a body of precedents in competition law in the broadcasting sector. This is a significant point given the likely entry of new EPG providers on the digital terrestrial platform;
- (c) the code would allow Ofcom to issue directions to cease behaviour that would be prejudicial to fair and effective competition without the necessity to demonstrate abuse of a dominant position. By contrast, reliance upon *ex post* Competition Act powers would require Ofcom to demonstrate abuse of a dominant position before it could seek remedies; and
- (d) licensees would retain the right of appeal to the Competition Appeals Tribunal against a decision made by Ofcom under those rules relating to fair and effective competition.

45. If Ofcom decides to exercise its Broadcasting Act powers for a competition purpose it is required by section 317(4), to notify EPG providers of its decision. Ofcom wishes to use this consultation to notify them of its proposals, and to draw attention to their right to appeal to the Competition Appeal Tribunal against any such final decision by Ofcom to exercise its Broadcasting Act powers for a competition purpose.

General Principles

46. Ofcom proposes that the code should require all EPG providers:

- (a) to have an objectively justifiable method of allocating listings. This does not preclude different methods – for example, objectively justifiable methods could include 'first come, first served' listings, alphabetical listings, and those based on audience shares;
- (b) to refrain from giving undue prominence in any listing or display to a channel to which they are connected except where required by the appropriate prominence provisions contained in the code;
- (c) to ensure that viewers are able to access all television and radio services included in the EPG service on the same basis, provided

that the viewers are equipped to use the EPG service and to receive the relevant programme services;

- (d) which are channel providers or are connected to a channel provider to ensure that access to and from all television services included in the EPG service is easily available to all viewers equipped to use the EPG service and to receive the relevant programme services;
- (e) to ensure that free-to-air services are at least as accessible as pay TV services, and do not require additional equipment or commercial agreements over and above those required for the acquisition of the receiving equipment; and
- (f) to refrain from disadvantaging any particular service or services by imposing any condition in an agreement for EPG services between an EPG operator and a channel provider specifying exclusivity to one EPG for any service or feature, including the ability to brand services and access to interactivity.

Code review

47. Ofcom intends to review the code at intervals of no more than two years, or more frequently if circumstances warrant it. As part of the review, it will consult stakeholders, including EPG providers, broadcasters, and disability groups. It will consider whether:

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

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

Section 5: Questions for stakeholders

Access regulation

49. Ofcom would welcome stakeholders' views on the following questions concerning the regulation of access to EPGs:

- (a) do you agree with Ofcom's proposals to impose the access conditions set out in Annex A to this document?

- (b) do you agree that the conditions proposed are objectively justifiable, do not unduly discriminate, are proportionate and transparent?
- (c) are there any other issues that Ofcom should take into account that bear on the regulation of access to EPG services?
- (d) do you agree that the Continuation Notice issued by the Director General of Telecommunications on 23 July 2003 should be revoked to the extent set out in the proposed Discontinuation Notice (Annex B)?

Appropriate prominence

50. As regards appropriate prominence for public service channels, Ofcom would welcome views on the following issues:

- (a) the general proposition in the draft code at Annex C that the requirement for appropriate prominence should permit due discrimination between public service and other television channels, but should not mandate one particular approach over another;
- (b) whether the requirement for appropriate prominence should permit due discrimination between public service and other television channels, but not mandate one particular approach over another;
- (c) whether Ofcom should have regard to the interests of citizens and the expectations of consumers in considering whether a particular approach to listings public service channels constitutes appropriate prominence; and
- (d) whether, in giving appropriate prominence to PSB channels, whether EPGs should enable viewers in particular regions to select the appropriate regional versions of those channels through the primary listings for those channels

Assistance to disabled people

51. In relation to the code's provisions on assistance to people with impairments affecting their hearing or sight, Ofcom would welcome views on:

- (a) whether EPG providers should be required to produce an annual statement of the steps they plan to take to facilitate the use of their EPGs by disabled people;
- (b) the nature of the information which should be provided in relation to programmes with assistance, and how that information should be presented; and

- (c) how EPG providers should be required to publicise the availability of information and functions on the EPG intended to facilitate their use by disabled people.

Fair, reasonable and non-discriminatory treatment

52. In relation to the proposal that EPG providers should accord fair and non-discriminatory treatment for the purpose of ensuring fair and effective competition, Ofcom would welcome views:

- (a) on whether it is appropriate to set *ex ante* rules requiring EPG providers to give fair, reasonable and non-discriminatory treatment to channels featured on their EPGs; and
- (b) if so, whether the proposed rules are appropriate.

Other issues

53. Ofcom has set out its assessments of the regulatory impact of the proposals in Section 7 below. However, stakeholders are welcome to offer their own views of the impact, where these differ from the assessment.

54. Ofcom will also consider any other issues that consultees consider may be relevant to the regulation of EPGs.

Section 6: Next steps

55. Unless consultees request otherwise, Ofcom will publish any responses (or a summary of them, as it deems appropriate) on its website. If consultees do wish to make a confidential submission, they are asked to provide a non-confidential summary for inclusion on the website. Ofcom will consider the responses carefully, and decide whether to make any changes to the draft access conditions or code as a result. Ofcom expects to impose access conditions on BSkyB and publish the code applying to all EPG providers at the end of May.

Section 7: Regulatory impact assessment

56. Under section 7 of the Communications Act, Ofcom is required to carry out and publish a regulatory impact assessment of any action it is taking in connection with its functions, and to allow members of the public and affected persons an opportunity to make representations. In this section, we look at the costs and benefits of refraining from any regulation of EPGs, and those associated with the proposals set out in this consultation document.

Option 1: no code and no access regulation

57. To establish a base case for the purposes of comparison we have looked at the option in which there is no code, even though this option is not open to Ofcom, which has a statutory duty to publish those parts of the code required under section 310 of the Act. We have also looked at the option of not imposing access regulation on BSkyB.

58. In the absence of a code, EPG providers would be free to decide for themselves whether to include information on their EPGs about programmes with television access services, and if they chose to do so, whether and how to publicise those services. Several EPG providers already choose to include information about subtitling in their services, and would presumably continue to do so. If they were not required to publicise the provision of this information (for example, through announcements in their EPGs, on their websites, and in specialist press), EPG providers could save several thousand pounds a year.

59. In the absence of a requirement to give appropriate prominence to public service channels, it might be possible for EPG providers to raise revenue by selling preferred slots to the highest bidder. However, it is far from clear that this would make commercial sense. Even before the ITC introduced its EPG code requiring due prominence, EPG providers chose to give public service channels prominent listings that reflected viewer expectations. Ofcom therefore considers that the impact of this requirement should be negligible.

60. If there was no requirement for EPG providers to offer treatment that was fair, reasonable and not unduly discriminatory to programme service providers, it is possible that some EPG providers would seek to exploit this position by charging some programme services on a different basis, by offering discriminatory positioning on the EPG, or by denying them access to certain types of service. This might enable the EPG provider to raise additional revenue, but would lead to a corresponding disbenefit to its customers and would be prejudicial to fair and effective competition. To the extent that the arrangements offered by EPG providers failed to maximise the information and services available to consumers, they would also suffer disbenefits.

Given that the existing requirements upon licensed EPG providers to offer FRND treatment do not appear to have disadvantaged them, Ofcom considers that the balance of advantage lies in retaining the FRND requirements.

61. In the absence of access regulation, BSkyB would be free to refuse listings to channels, or to impose terms on television services requiring a listing on their EPG on a basis that were not fair, reasonable, and non-discriminatory. This might enable BSkyB to raise additional revenue, although it is not possible to make a realistic estimate of what this would be. However, this benefit to BSkyB would be offset by disbenefits both to television service providers, and to consumers using the BSkyB EPG who would be unable to easily access services that had been declined listings by BSkyB.

Option 2: proposed code and access condition

62. If the proposed code is introduced, EPG providers would incur some costs in making adjustments to their EPGs to facilitate use by people with hearing and / or visual impairments. But these costs would be relatively modest, given that current technological constraints would prevent adjustments beyond the inclusion of additional information. EPG providers would also be required to pay for additional publicity, and we estimate that the costs of this might amount to several thousand pounds over a year. While it is impossible to estimate the size of the benefit to visually/hearing impaired consumers, the requirements would involve an increase in welfare for an important subsection of the population for a relatively small expense for EPG providers, so Ofcom regards it as justifiable from a welfare point of view.

63. As explained in paragraph 59 above, we do not consider that the impact of requiring EPG providers to give appropriate prominence to public service channels would be significant. BSkyB would incur additional costs to enable regional versions of public service channels to appear at the appropriate place in both the EPG bundled with its subscription service, and the free-to-air version of the EPG. However, it could expect to recoup these costs from the public service broadcasters.

64. Ofcom does not consider that the requirement to offer channels EPG's listings on terms that are fair, reasonable and non-discriminatory will result in any additional costs to EPG providers, though as explained in paragraph 60 above, it is possible that it might result in some revenue foregone.

65. Ofcom does not consider that the access conditions proposed for BSkyB would have a significant impact upon the company. BSkyB has already been subject to similar requirements for several years. On the other hand, retention of access regulation would protect the ability of programme services to acquire listings on the BSkyB EPG, and therefore to compete more effectively. It would also protect the ability of consumers to access the maximum number of satellite channels through the BSkyB EPG.

66. In sum, Ofcom considers that the benefits to consumers and to television service providers outweigh the costs to EPG providers, which in any case, are unlikely to be significant. However, stakeholders are welcome to offer their own views on the regulatory impact of the proposals, should these differ from the assessment above.

Annex A

Notification of proposals under section(2) of the Communications Act 2003

Proposal for setting access-related conditions under section 45(5) of the Communications Act 2003 as authorised by section 74(2) of the Communications Act 2003

1. Ofcom in accordance with section 48(2) of the Communications Act 2003 (the 'Act') hereby makes the following proposals for setting access-related conditions to apply to the Provider as defined in the Schedule to this Notification who provides an Electronic Programme Guide Service as set out in the Schedule to this Notification.
2. Ofcom is proposing to set access-related conditions under section 45(5) of the Act 2003, as authorised by section 74(2) of the Act.
3. The effect of the Conditions would be to impose provisions on the Provider as defined in the Schedule to this Notification who provides an Electronic Programme Guide Service as permitted by section 74(2) of the Act.
4. Further details of the effect of, and Ofcom's reasons for making, the proposals to set the Conditions are set out in the consultation document accompanying this Notification.
5. In considering whether to make the proposals set out in this Notification, Ofcom has complied with all relevant requirements set out in sections 45 to 50 and section 74 of the Act.
6. In making the proposals referred to in paragraph 1 of this Notification Ofcom has considered and acted in accordance with the six Community requirements in section 4 of the Act.
7. Representations may be made to Ofcom about any of the proposals set out in this Notification and the accompanying consultation document by 25 March 2004.
8. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State in accordance with section 50(1)(a) and the European Commission and the regulatory authorities of every other member state in accordance with section 50(3) of the Act.
9. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act.

Graham Howell
Secretary to the Corporation

15 January 2004

Schedule

Proposed conditions applicable to providers of an electronic programme guide service

Part 1: Definitions and Interpretation Relating to the Conditions in this Schedule

Definitions

In this Schedule, except in so far as the context otherwise requires:

“Accounting Documents” means together the Regulatory Accounting Principles, the Attribution Methods, the Transfer Charge System Methodology, the Accounting Policies, the Detailed Attribution Methods and the Detailed Valuation Methodologies;

“Accounting Policies” means the manner in which the requirements of the Companies Act 1985 as amended by the Companies Act 1989, the accounting standards and the accounting policies whenever not superseded by the Regulatory Accounting Principles, that would be applied in the preparation of each of the Financial Statements, as produced and delivered to Ofcom by 30 September 2004 and as amended from time to time in accordance with Condition 2 as the case may be;

“Accounting Separation Activities” means services, facilities or arrangements used directly or indirectly in the course of providing Electronic Programme Guide Services, that are individually identified by the Provider and agreed between the Provider and Ofcom and/or as directed by Ofcom from time to time;

“Accounting Separation Attribution” means, in relation to Electronic Programme Guide Services, the totality of all apparatus, data, procedures and

activities in the Provider uses or holds for use to determine the costs, revenues, assets and liabilities to be attributed to Electronic Programme Guide Services and activities related to Electronic Programme Guide Services, either based upon data recorded by an Accounting Separation Measuring System or otherwise;

“Accounting Separation Measuring System” means the totality of all apparatus, systems, data, procedures and activities in the Provider uses or holds for use to determine the extent to **which** costs, revenues, assets and liabilities are to be attributed to Electronic Programme Guide Services and activities related to Electronic Programme Guide Services;

“Accounting Separation System” means the Accounting Separation Attribution and Accounting Separation Measuring System taken together;

"Act" means the Communications Act 2003;

“Attribution Methods” means the practices used to attribute revenue, costs, assets and liabilities to Electronic Programme Guide Services, or activities related to Electronic Programme Guide Services, as produced and delivered to Ofcom by 30 September 2004 and as amended from time to time in accordance with Condition 2 as the case may be;

“Auditing Standards” means United Kingdom auditing standards and guidelines issued from time to time by the Auditing Practices Board or its predecessor body the Auditing Standards Body, or by its successor(s);

“Auditor” means any auditor which could be appointed as the Provider’s auditor in accordance with the requirements of the Companies Act 1985 as amended by the Companies Act 1989;

“Broadcaster” Includes:

- a) the British Broadcasting Corporation;
- b) any person to whom a licence has been granted to provide, deliver or diffuse television services under one or more of the Wireless Telegraphy Act 1949, Cable and Broadcasting Act 1984 (as

continued in force by the Broadcasting Act 1990), Broadcasting Act 1990, Broadcasting Act 1996

- c) Any person who is authorised to provide, deliver or diffuse television services in any Member State; or
- d) or any person who is authorised to provide, deliver or diffuse television services in a state which is a contracting party to the European Convention on Transfrontier Television (as amended);

or any person acting on behalf of such a person;

“Detailed Attribution Methods” means the document with that title (along with the Detailed Valuation Methodology') containing details of the systems and processes for deriving or calculating the costs, revenues, assets and liabilities which are used by the Provider to prepare the Financial Statements;

“Detailed Valuation Methodology” means the document with that title (along with the Detailed Attribution Methods) containing details of the systems and processes for deriving or calculating the costs, revenues, assets and liabilities;

“Electronic Programme Guide Service” means a service which consists of:

- (a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes led in any one or more programme services; and
- (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide.

“Financial Statement” means any Financial Statement that is required under Condition 2.11;

“Process” means the series or inter-related activities or actions to obtain, record or hold data or information or to carry out any operation or set of operations on the data or information, including:

- (i) organisation, storage, adaptation, or alteration of the data or information;
- (ii) retrieval, consultation, computation or use of the data or information;
- (iii) disclosure of the data or information by transmission, dissemination, or otherwise making available; or
- (iv) alignment, combination, blocking, erasing or destruction of the data or information;

“Provider” means British Sky Broadcasting Limited, whose registered company number is 02906991 and any British Sky Broadcasting Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

“Regulatory Accounting Principles” means the high level general principles and rules to be followed in meeting the reporting requirements of Condition 2 as produced and delivered to Ofcom by 30 September 2004 and as amended from time to time in accordance with Condition 2 as the case may be;

“Regulatory Auditor” means the Auditor for the time being appointed by the Provider in accordance with Condition 2 as the case may be;

“Standard Audit Opinion” means an audit opinion in accordance with Condition 2.15 as the case may be;

“Transfer Charge System Methodology” means methodologies used in deriving and accounting for transfer charges from and to the Provider’s activities as a provider of an Electronic Programme Guide Service as produced and delivered to Ofcom by 30 September 2004.

1. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them otherwise any word or expression shall have the same meaning as it has in the Act

2. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.

3. For the purpose of interpreting the Conditions set out in Part 2 the headings and titles shall be disregarded.

PART 2: The Conditions

Condition 1 - Requirement to provide an Electronic Programme Guide Service

1.1. Where a Broadcaster reasonably requests in writing an Electronic Programme Guide Service in respect of decoders administered by the Provider, the Provider shall provide that Service to that Broadcaster. The Provider shall also provide such an Electronic Programme Guide Service in respect of decoders administered by the Provider as Ofcom may from time to time direct.

1.2. The provision of an Electronic Programme Guide Service in accordance with Condition 1.1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.

1.3. The Provider shall comply with any direction Ofcom may make from time to time under this Condition.

Condition 2 - Obligation To Keep Separate Financial Accounts

2.1. Except in so far as Ofcom may consent otherwise in writing, the Provider shall keep separate financial accounts regarding its activities as a provider of Electronic Programme Guide Services in the manner set out below.

2.2. Ofcom may from time to time make such directions as it considers appropriate with respect to the Provider's obligations to maintain a separation for accounting purposes under this Condition.

2.3. The Provider shall comply with any direction Ofcom may make from time to time under this Condition.

2.4. The Provider shall prepare Accounting Documents for the purpose of this Condition and produce and deliver them to Ofcom as soon as reasonably practicable but not later than 30 September 2004.

2.5. The Provider shall comply with Conditions 2.6 to 2.19 from 30 September 2004 as appropriate.

2.6. The Provider shall ensure that its accounting and reporting arrangements (including Accounting Separation Systems) are sufficient to enable the Provider, at all times, to be capable of preparing in relation to any period a financial statement in accordance with the Accounting Documents. These accounting and reporting arrangements shall be, in the opinion of Ofcom, suitable to demonstrate at any time and in relation to any period that its charges for Electronic Programme Guide Services are transparent, non discriminatory, fair and reasonable.

2.7. The Provider shall maintain a separation for accounting purposes of Accounting Separation Activities from other activities, so as to:

- (a) identify all elements of revenue, cost, assets and liabilities, with the basis of their calculation and the Detailed Attribution Methods used, related to the Accounting Separation Activities including an itemised breakdown of fixed assets; and
- (b) ensure that Accounting Separation Activities are identified and are recorded at an appropriate amount in accordance with the Accounting Documents.

2.8. The Provider shall maintain accounting records in a form which, on a historic cost basis and on a current cost basis:

- (a) enables each of the Accounting Separation Activities to be separately identified and the revenues, costs, assets and liabilities of the Accounting Separation Activities to be separately attributable; and
- (b) which shows and explains the transactions of each of the Accounting Separation Activities.

2.9. The accounting records referred to in paragraph 2.8 shall be kept in a form which enables the Provider to prepare Financial Statements both on a historic cost basis and on a current cost basis.

2.10. The accounting records referred to in paragraph 2.8 and all associated documentation shall be:

- (a) maintained in accordance with the Accounting Documents;
- (b) maintained in order to ensure compliance with this Condition;
- (c) sufficient to enable the Financial Statements to have expressed upon them a Standard Audit Opinion; and
- (d) sufficient to ensure that charges for Electronic Programme Guide Services can be shown to be fair and reasonable and not to be unduly discriminatory.

2.11. The Provider shall,

- (a) prepare in accordance with the Accounting Documents, which shall be identified in the Financial Statements by reference to their date, the Financial Statements identified in any direction Ofcom may make from time to time;
- (b) secure, in accordance with paragraph 2.15 (or, if Ofcom so consents, paragraph 2.16) the expression of an audit opinion upon the Financial Statements as identified in any direction Ofcom may make from time to time;
- (c) deliver to Ofcom the Financial Statements and any corresponding audit opinion identified for delivery in any direction Ofcom may make from time to time;
- (d) publish the Financial Statements and any corresponding audit opinion identified for publication in any direction Ofcom may make from time to time;
- (e) ensure that any Financial Statements and any corresponding audit opinion are fit for such purpose, or purposes, if any, as notified by Ofcom in writing; and

- (f) deliver to Ofcom a report detailing any changes in the Accounting Documents, any Process and any other methodology which caused any figure presented on any one of the Financial Statements to change by more than 5% from the figure that would have been presented had such a change not been made. Any such report shall include details sufficient to render transparent such changes in accordance with any direction Ofcom may make from time to time.

2.12. The Provider shall publish and deliver to Ofcom copies of Financial Statements and any corresponding audit opinion each and all of which shall be in the form in which they are ultimately to be published, as directed by Ofcom. The Provider shall publish with the Financial Statements a written statement made by Ofcom and provided to the Provider commenting on the data in, the notes to or the presentation of any or all of the Financial Statements and/or the Accounting Documents.

2.13. The Provider shall make such amendments to the form and content of the Financial Statements as are necessary to give effect fully to the requirements of this Condition. The Provider shall provide to Ofcom particulars of any such amendment, the reasons for it and its effect, when it delivers the Financial Statements to Ofcom.

2.14. Where Ofcom has reasonable grounds to believe that any or all of the Financial Statements and/or Accounting Documents are deficient and/or where the Provider has been found to be in breach of one of its Conditions, the Provider shall, where directed by Ofcom:

- (a) amend the Accounting Documents in order to remedy the deficiencies identified by Ofcom;
- (b) restate the Financial Statements identified by Ofcom as requiring restatement in accordance with the Accounting Documents which have, where necessary, been amended pursuant to paragraph 2.14(a);

(c) secure in accordance with paragraph 2.15 (or where Ofcom so consents, 2.16) the expression of an audit opinion on the restated Accounting Separation Financial Statements;

(d) deliver to Ofcom the restated Financial Statements and corresponding audit opinion.

2.15. The Provider shall secure in respect of each Financial Statement an expression of an audit opinion by the Regulatory Auditor, which shall conform to Auditing Standards and to the requirements as directed by Ofcom from time to time for this Standard Audit Opinion.

2.16. To the extent Ofcom is satisfied that the requirement to secure an audit opinion on a specific Financial Statement is not proportionate, the Provider shall secure an audit opinion by the Regulatory Auditor which shall conform to Auditing Standards and to the requirements as directed by Ofcom from time to time for this lesser audit opinion.

2.17. The Provider shall use its best endeavours to obtain from the Regulatory Auditor any further explanation and clarification of the reports required under Condition 2.15 and/or 2.16 and any other information in respect of the matters which are the subject of those reports as Ofcom shall reasonably require.

2.18. The Regulatory Auditor that the Provider from time to time appoints shall at all times be satisfactory to Ofcom having regard to such reasonable matters as Ofcom considers appropriate. The Provider shall notify Ofcom in writing of the Auditor appointed to secure compliance with this Condition before the Auditor carries out any work for that purpose. The Provider shall notify Ofcom of any proposed change of Regulatory Auditor 28 days before effect is given to that change.

2.19. The Provider's letter of engagement appointing the Regulatory Auditor shall:

(a) include an express obligation on the Regulatory Auditor that, in forming and/or expressing any audit opinion pursuant to this Condition, the Regulatory Auditor shall owe a duty of care to Ofcom

(but not directly or indirectly to any other third party) subject only to such qualifications or limitations as are set out by the Regulatory Auditor to Ofcom in writing and acknowledged by him in writing prior to the expression of any audit opinion pursuant to this Condition; and

- (b) shall give effect to such duty of care by expressly acknowledging Ofcom's interest pursuant to the Contracts (Rights of Third Parties) Act 1999 and dis-applying any provision, term or condition of the Provider's letter of engagement that could otherwise exclude his interest.

2.20. The Provider shall secure that sufficient checks, controls and reconciliations are performed between figures contained in the Financial Statements and the accounting records to enable the Financial Statements to be audited and an audit opinion expressed upon them in accordance with paragraphs 2.15 (or where Ofcom so consents, 2.16).

Condition 3 - Requirement not to unduly discriminate

3.1. The Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with the provision of an Electronic Programme Guide Service.

3.2. In this Condition, the Provider shall be unduly discriminating where the discrimination has a material adverse effect on competition and has no objective justification.

Condition 4 - Publication of Charges, Terms And Conditions

4.1. The Provider shall except in so far as Ofcom may otherwise consent in writing:

- (a) publish in the manner and at all times specified in paragraph 4.2 a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and condition on which it offers to provide an Electronic Programme Guide Service, or package of such services; and
- (b) where it offers to provide an Electronic Programme Guide Service, or package of such services, do those things at the charges and on the other terms and conditions so published.

4.2. Publication of the notice shall be effected in the following way:

- (a) where the Provider is providing an Electronic Programme Guide Service on the date that this Condition comes into force, by sending a copy thereof to Ofcom not later than one month after the date this Condition comes into force; or
- (b) where the Provider provides an Electronic Programme Guide Service after the date that this Condition comes into force, by sending a copy thereof to Ofcom not than later than 28 days after the Provider first provides an Electronic Programme Guide Service; and
- (c) thereafter, 90 days before the date on which any proposal to amend any charge, term or conditions or the method of determining the same is to become effective

and, in any and all of these circumstances, by:

- (d) placing a copy of the said notice on any relevant website operated or controlled by the Provider; and

- (e) sending a copy thereof to any person who may request such a copy at that person's written request (or such parts which have been requested).

Introduction

1. This Code sets out the practices to be followed by EPG providers:

- a. to give appropriate prominence for public service channels;
- b. to provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
- c. to secure fair and effective competition.

Appropriate prominence

2. Section 310(2) requires that Ofcom's EPG code obliges EPG providers to give the degree of prominence that Ofcom considers appropriate to the listing and promotion of public service channels, for members of the intended audience. The Secretary of State may add to, or subtract from, the list of relevant public service channels, which comprises the digital versions of BBC and ITV services, as well as the digital services of Channels 3, 4 and 5, and S4C Digital. The Code is also to ensure that members of the intended audience for services provided for a particular area or locality are able use the EPG to select the programmes included in that service.

3. Ofcom considers that 'appropriate prominence' permits a measure of discrimination in favour of PSB channels. However, it does not propose to be prescriptive about what appropriate prominence means, as there are many possible ways in which EPGs could display information about programmes included in PSB services. Accordingly, EPG providers are required to comply with the following general principles:

- a. EPG providers should ensure that the approach they adopt to the requirement for appropriate prominence is objectively justifiable;
- b. Ofcom will have regard to the interests of citizens and the expectations of consumers in considering whether a particular approach to listings public service channels constitutes appropriate prominence; and
- c. in giving appropriate prominence to PSB channels, EPGs should enable viewers in a regions to select the appropriate regional versions of those channels through the primary listings for those channels.

4. These principles would have broad application. For example, they would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than 'one click' from the home page. They might also justify giving public service channels first refusal on vacant listings higher in the category that they were placed.

Assistance to people with disabilities

5. Section 310(3) requires that Ofcom's EPG code obliges EPG providers to incorporate such features in their EPGs as are appropriate to enable, so far as practicable, people with disabilities affecting their sight or hearing ('disabled people') to use the EPGs for the same purposes as people without such disabilities. EPGs are also to provide information about assistance in relation to programmes (e.g. television access services such as subtitling, signing and audio description), as well as facilities for making use of that assistance. This section sets out the requirements that EPG providers should meet in order to comply with the Code.

General principles

6. EPG providers are required to:

- a. make such adjustments to their EPGs as are practicable to secure that they can be used by disabled people for all the same purposes as they are used by other people; and
- b. promote awareness of the scope of EPGs to provide information about programmes with access services, in conjunction with broadcasters and representatives of disabled people.

7. Ofcom expects EPG providers to consult disability groups about the way they meet their obligations under the code, which are set out below.

Adjustments to EPGs to facilitate their use by disabled people

8. At present, there is limited scope to reconfigure EPGs so as to facilitate their use by disabled people. In particular, much of the functionality of EPGs is dependent upon set top box hardware and software, as well as the data made available by broadcasters. However, Ofcom expects the needs of disabled people to be an integral part of planning for the future development of EPGs. To this end, Ofcom expects EPG providers to work with disability groups, broadcasters and set top box manufacturers on ways of improving usability.

9. EPG providers are required to produce by 30 September 2004, and thereafter annually a statement of the steps they plan to take to facilitate the use of their EPGs by disabled people. Ofcom will assess the adequacy of these statements in the light of the particular circumstances of each EPG, and will also expect EPG providers to have regard to the obligations of EPG providers under the Disability Discrimination Act 1995 to make reasonable adjustments in the provision of facilities and the delivery of services so as to make these accessible to disabled people.

Provision of information

10. EPG providers will be required to ensure that information included in relation to programmes indicates which programmes are accompanied by television access services. It is proposed to include a corresponding provision in the Code on Television Access Services (published by Ofcom in draft for consultation on 22 December 2003) requiring broadcasters to make such information available to EPG providers.

11. Where practicable, the primary programme listing should indicate by means of standard symbols or wording the nature of the access service provided. Ofcom expects EPG providers to work with disability groups, broadcasters and set top box manufacturers to devise and use standard symbols or wording that meet the needs of disabled people. If this is not done by 30 September 2004, Ofcom may determine appropriate symbols and wording, and require them to be used by all EPG providers.

12. EPG providers should provide, on an easily accessible part of their EPG, information for people with disabilities on:

- a. how to use the EPG;
- b. how to use the access services accompanying the programmes;
- c. what options exist for customising the appearance of the EPG to make it easier to use; and
- d. what additional sources of help and information are available in other places (e.g. on website, or from telephone helplines), whether from the EPG operator, or television service providers.

Promotion of awareness

13. EPG providers are required to work with broadcasters, platform providers and disability groups to publicise the information and facilities available on EPGs to assist disabled people. This should include information targeted at publications used by disabled people, and periodic publicity featured prominently on EPGs.

Fair, reasonable and non-discriminatory treatment

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

15. In particular, EPG licensees are required:

- a. to have an objectively justifiable method of allocating listings. This does not preclude different methods – for example, objectively justifiable methods could include ‘first come, first served’, alphabetical listings, and those based on audience shares;
- b. to refrain from giving undue prominence in any listing or display to a channel to which they are connected, except as required by the appropriate prominence provisions set out at paragraphs 2 to 4 above;
- c. to ensure that viewers are able to access all television and radio services included in the EPG service on the same basis, provided that the viewers are equipped to use the EPG service and to receive the relevant programme services;
- d. to ensure that free-to-air services are at least as accessible as pay TV services, and that reception does not require additional equipment or

commercial agreements over and above those required for the acquisition of the receiving equipment; and

- e. to refrain from imposing any condition in an agreement for EPG services between an EPG operator and a channel provider specifying exclusivity to one EPG for any service or feature, including the ability to brand services and access to interactivity.

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

Code review

17. Ofcom intends to review the Code at intervals of no more than two years, or more frequently if circumstances warrant it. As part of the review, it will consult stakeholders, including EPG providers, broadcasters, and disability groups. The issues it will consider may include:

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

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

Ofcom
[Draft - January 2004]

Annex B

Draft for consultation

Notice to a class of person defined as the licensee for the purposes of the provision of an electronic programme guide service under paragraph 9 of schedule 18 to the Communications Act 2003

Notice that the continued provisions set out in the continuation notice given to a class of person defined as the licensee for the purposes of the provision of an Electronic Programme Guide Service on 23 July 2003 will cease to have effect from [.....] 2004

1. The Office of Communications (Ofcom), in accordance with Paragraph 9(9) of Schedule 18 to the Communications Act 2003 ('the Act') hereby gives notice to a class of person defined as the licensee for the purposes of the provision of an Electronic Programme Guide Service ('the Licensee') that all of the continued provisions contained in Schedule 1 to the continuation notice given to the Licensee on 23 July 2003, which had effect from 25 July 2003, ('the Continuation Notice'), will cease to have effect from [.....] 2004 ('the Discontinued Provisions').
2. In giving this notice, Ofcom has, in accordance with Paragraph 9 (11) of Schedule 18 to the Act, taken all steps necessary for enabling it to decide whether or not to set a condition under Chapter 1 of Part 2 of the Act for the purpose of replacing the continued provisions and whether or not to exercise its power to set a condition under that Chapter for that purpose.
3. All directions, determinations, consents and other provisions which were continued under the Continuation Notice by virtue of Paragraph 9(8) of Schedule 18 to the Act will also cease to have effect from [.....] to the extent that they were given or made for the purposes of the Discontinued Provisions.
5. Ofcom consulted on its proposals to discontinue the Discontinued Provisions on 15 January 2004 in the consultation document entitled 'The regulation of Electronic Programme Guides' and requested comments by 25 March 2004. Ofcom has taken into account the comments it received during that consultation.
6. In this notice, except as otherwise provided or unless the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act. For the purposes of interpreting this notice, headings and titles shall be disregarded.

Graham Howell
Secretary to the Corporation

Annex C

DRAFT FOR CONSULTATION

Code of Practice on Electronic Programme Guides (the 'Code')

Introduction

1. This Code sets out the practices to be followed by EPG providers:
 - a. to give appropriate prominence for public service channels;
 - b. to provide the features and information needed to enable EPGs to be used by people with disabilities affecting their sight or hearing or both; and
 - c. to secure fair and effective competition.

Appropriate prominence

2. Section 310(2) requires that Ofcom's EPG code obliges EPG providers to give the degree of prominence that Ofcom considers appropriate to the listing and promotion of public service channels, for members of the intended audience. The Secretary of State may add to, or subtract from, the list of relevant public service channels, which comprises the digital versions of BBC and ITV services, as well as the digital services of Channels 3, 4 and 5, and S4C Digital. The Code is also to ensure that members of the intended audience for services provided for a particular area or locality are able use the EPG to select the programmes included in that service.

3. Ofcom considers that 'appropriate prominence' permits a measure of discrimination in favour of PSB channels. However, it does not propose to be prescriptive about what appropriate prominence means, as there are many possible ways in which EPGs could display information about programmes included in PSB services. Accordingly, EPG providers are required to comply with the following general principles:

- a. EPG providers should ensure that the approach they adopt to the requirement for appropriate prominence is objectively justifiable;
 - b. Ofcom will have regard to the interests of citizens and the expectations of consumers in considering whether a particular approach to listings public service channels constitutes appropriate prominence; and
 - c. in giving appropriate prominence to PSB channels, EPGs should enable viewers in a regions to select the appropriate regional versions of those channels through the primary listings for those channels.
4. These principles would have broad application. For example, they would justify a decision by an EPG operator using a menu-based approach to position public service channels no more than 'one click' from the home page. They might also justify giving public service channels first refusal on vacant listings higher in the category that they were placed.

Assistance to people with disabilities

5. Section 310(3) requires that Ofcom's EPG code obliges EPG providers to incorporate such features in their EPGs as are appropriate to enable, so far as practicable, people with disabilities affecting their sight or hearing ('disabled people') to use the EPGs for the same purposes as people without such disabilities. EPGs are also to provide information about assistance in relation to programmes (e.g. television access services such as subtitling, signing and audio description), as well as facilities for making use of that assistance. This section sets out the requirements that EPG providers should meet in order to comply with the Code.

General principles

6. EPG providers are required to:

- c. make such adjustments to their EPGs as are practicable to secure that they can be used by disabled people for all the same purposes as they are used by other people; and
- d. promote awareness of the scope of EPGs to provide information about programmes with access services, in conjunction with broadcasters and representatives of disabled people.

7. Ofcom expects EPG providers to consult disability groups about the way they meet their obligations under the code, which are set out below.

Adjustments to EPGs to facilitate their use by disabled people

8. At present, there is limited scope to reconfigure EPGs so as to facilitate their use by disabled people. In particular, much of the functionality of EPGs is dependent upon set top box hardware and software, as well as the data made available by broadcasters. However, Ofcom expects the needs of disabled people to be an integral part of planning for the future development of EPGs. To this end, Ofcom expects EPG providers to work with disability groups, broadcasters and set top box manufacturers on ways of improving usability.

9. EPG providers are required to produce by 30 September 2004, and thereafter annually a statement of the steps they plan to take to facilitate the use of their EPGs by disabled people. Ofcom will assess the adequacy of these statements in the light of the particular circumstances of each EPG, and will also expect EPG providers to have regard to the obligations of EPG providers under the Disability Discrimination Act 1995 to make reasonable adjustments in the provision of facilities and the delivery of services so as to make these accessible to disabled people.

Provision of information

10. EPG providers will be required to ensure that information included in relation to programmes indicates which programmes are accompanied by television access services. It is proposed to include a corresponding provision in the Code on Television Access Services (published by Ofcom in draft for consultation on 22 December 2003) requiring broadcasters to make such information available to EPG providers.

11. Where practicable, the primary programme listing should indicate by means of standard symbols or wording the nature of the access service provided. Ofcom

expects EPG providers to work with disability groups, broadcasters and set top box manufacturers to devise and use standard symbols or wording that meet the needs of disabled people. If this is not done by 30 September 2004, Ofcom may determine appropriate symbols and wording, and require them to be used by all EPG providers.

12. EPG providers should provide, on an easily accessible part of their EPG, information for people with disabilities on:

- a. how to use the EPG;
- b. how to use the access services accompanying the programmes;
- c. what options exist for customising the appearance of the EPG to make it easier to use; and
- d. what additional sources of help and information are available in other places (e.g. on website, or from telephone helplines), whether from the EPG operator, or television service providers.

Promotion of awareness

13. EPG providers are required to work with broadcasters, platform providers and disability groups to publicise the information and facilities available on EPGs to assist disabled people. This should include information targeted at publications used by disabled people, and periodic publicity featured prominently on EPGs.

Fair, reasonable and non-discriminatory treatment

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

15. In particular, EPG licensees are required:

- a. to have an objectively justifiable method of allocating listings. This does not preclude different methods – for example, objectively justifiable methods could include ‘first come, first served’, alphabetical listings, and those based on audience shares;
- b. to refrain from giving undue prominence in any listing or display to a channel to which they are connected, except as required by the appropriate prominence provisions set out at paragraphs 2 to 4 above;
- c. to ensure that viewers are able to access all television and radio services included in the EPG service on the same basis, provided that the viewers are equipped to use the EPG service and to receive the relevant programme services;
- d. to ensure that free-to-air services are at least as accessible as pay TV services, and that reception does not require additional equipment or commercial agreements over and above those required for the acquisition of the receiving equipment; and

- e. to refrain from imposing any condition in an agreement for EPG services between an EPG operator and a channel provider specifying exclusivity to one EPG for any service or feature, including the ability to brand services and access to interactivity.

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

Code review

17. Ofcom intends to review the Code at intervals of no more than two years, or more frequently if circumstances warrant it. As part of the review, it will consult stakeholders, including EPG providers, broadcasters, and disability groups. The issues it will consider may include:

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

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

Ofcom
[Draft - January 2004]

Annex D

Ofcom's seven consultation test

When it conducts a written consultation, Ofcom will:

1. Hold discussions with stakeholders before issuing a major consultation document – so that Ofcom's thinking is subject to an early sense-test. If this is not possible, an open meeting to explain the proposals will be held soon after publication.

We discussed our proposals with EPG providers, broadcasters and disability groups, and refined our proposals in the light of those discussions and further consideration within Ofcom.

2. Be clear about who is being consulted, why, on what questions and for how long.

We are conducting a public consultation, so anyone interested can respond. However, the consultation will be of particular relevance to disability groups, broadcasters and television access service providers.

3. Make the document as simple and concise as possible – with a summary of no more than 2 pages - and make it easy to respond to. This may involve issuing a shorter version aimed at hard-to-reach groups, like SMEs.

We are providing a short summary of the consultation paper.

4. Allow 10 weeks for responses, other than on dispute resolution.

We are allowing ten weeks for responses.

5. Analyse responses with care and an open mind. This involves giving reasons for subsequent decisions, and an account of the views expressed.

Unless consultees specifically request confidentiality, we shall publish all responses, or a summary of them, as appropriate, on our website. Ofcom will also publish its response to the points raised when publishing the final version of the guidelines, and will post both on its website.

6. Monitor and evaluate consultations, and designate a consultation champion – an evangelist within Ofcom for better consultation and reach out, and a contact point for comments on our process.

In the first instance, consultees with any comments on the consultation process are invited to contact Peter Bourton (contact details in the Executive Summary). However, if you do not get a satisfactory response, or would like to make points applying generally to the way in which Ofcom carries out consultations, please contact Phil Rutnam, Partner, Competition and Strategic Resources, by e-mail at phillip.rutnam@ofcom.org.uk, or by phone on 020 7306 3585.

Explain why Ofcom is departing from any of these tests if it has to – for example, because of urgency or confidentiality. If a shorter period is required, Ofcom will draw this to the attention of stakeholders, as a red flag item.

We are complying with all of the consultation tests.