

# Agenda – Culture, Welsh Language and Communications Committee

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Meeting Venue:

Committee Room 4 – Tŷ Hywel

Meeting date: 10 January 2019

Meeting time: 09.30

For further information contact:

Steve George

Committee Clerk

0300 200 6565

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- 1 Introductions, apologies, substitutions and declarations of interest**
  
- 2 Scrutiny of the Deputy Minister for Culture, Sport and Tourism – National Broadcast Archive**  
(09:30 – 10:30) (Pages 1 – 25)  
Dafydd Elis-Thomas AM, Deputy Minister for Culture, Sport and Tourism  
Peter Owen, Head of Museums Archives Libraries Division  
Jason Thomas, Director, Culture, Sport and Tourism
  
- 3 Supporting and promoting the Welsh language: An inquiry into the legislative, policy and wider context: Evidence session 8**  
(10:30 – 11:15) (Pages 26 – 45)  
Teresa Owen, Executive Director of Public Health, Betsi Cadwaladr University Health Board  
Sue Ball, Assistant Director of Organisational Development, Aneurin Bevan University Health Board
  
- 4 Supporting and promoting the Welsh language: An inquiry into the legislative, policy and wider context: Evidence session 9**  
(11:15 – 12:30) (Pages 46 – 54)  
Professor Robert Dunbar, Chair of Celtic Languages, Literature, History and Antiquities, University of Edinburgh



Rónán Ó Domhnaill, Irish Language Commissioner

Diarmait Mac Giolla Christ, Professor, School of Welsh, Cardiff University

## **5 Paper(s) to note**

### **5.1 ITV Cymru Wales consultation response to Ofcom on Electronic Programme Guides**

(Pages 55 – 94)

## **6 Motion under Standing Order 17.42(vi) to resolve to exclude the public from the meeting for the following business:**

## **7 Private debrief**

(12:30 – 13:00)

Document is Restricted

By virtue of paragraph(s) iv of Standing Order 17.42

Document is Restricted



Eich cyf/Your ref  
Ein cyf/Our ref DET/00018/18

Rhodri Glyn Thomas  
Llywydd  
Llyfrgell Genedlaethol Cymru  
Penglais  
Aberystwyth  
Ceredigion  
SY23 3BU

llywydd@llgc.org.uk

Ionawr 2018

Annwyl Rhodri

Thank you for your letter of 10 January 2018 regarding the National Library's plans to develop a National Broadcast Archive which will bring together, and provide access to, the archives of major broadcasters in Wales, including the BBC. I welcome the project and the ambition of the National Library to create this resource.

I understand the Library has already received Stage 1 development funding from the Heritage Lottery Fund, and is due to submit a Stage 2 funding bid and detailed business case in spring 2018. I note that you are seeking £1 million capital funding from the Welsh Government, to support your bid for £4.9 million investment from HLF. A substantial amount of match-funding and in-kind support will also be provided by the National Library, alongside a fundraising campaign to raise c.£0.5 million.

To enable me to consider this request formally, I would be grateful if the Library could provide the following details to my officials.

- The latest versions of the Library's Stage 2 funding bid and detailed business case for HLF
- Confirmation of what proportion of the BBC's archival material will be made available digitally to National Library and digital hub users

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Rydym yn croesawu derbyn gohebiaeth yn Gymraeg. Byddwn yn ateb gohebiaeth a dderbynnir yn Gymraeg yn Gymraeg ac ni fydd gohebu yn Gymraeg yn arwain at oedi.

We welcome receiving correspondence in Welsh. Any correspondence received in Welsh will be answered in Welsh and corresponding in Welsh will not lead to a delay in responding.

- A copy of the completed condition survey for the BBC archive material and an estimation of the costs of any conservation work that might be required for the collection
- A justification of the proposal that the BBC will not provide any ongoing support or revenue funding for the management and maintenance of the archive
- Details of any formal MoUs or partnership agreements with proposed digital hub venues, a summary of what users will be offered and able to access at each hub location, and any estimations of expected levels of use
- An update on the Library's progress with fundraising activity for this project, and confirmation of any funds (from non-National Library sources) which have been secured.

Although you state in your letter that no additional revenue funding will be required from the Welsh Government following the end of project funding, I am concerned about the ongoing financial and staffing commitments which will be incurred by the Library. Once accepted the collections will need to be preserved and maintained in perpetuity and this will inevitably have an impact on the future allocation of resources and activities by the Library.

I would be grateful if you could provide a clear breakdown of the ongoing revenue costs relating to the Broadcast Archive. This should include the costs for maintaining and staffing the digital hubs; digitising for access and/or preservation purposes, cataloguing, and providing metadata to enable online search and discovery; storage and collections care requirements.

I would like to be clear on the impact this commitment will have on existing Library activities and how, for example, the withdrawal of any services as a consequence of the development of the National Broadcast Archive will be managed.

I look forward to receiving a detailed briefing from my officials, and finding out more about the Library's plans for this work once you have provided this information.

Yn gywir,

**7 line gap starts here**

**Yr Arglwydd Elis-Thomas AC/AM**

Y Gweinidog Diwylliant, Twristiaeth a Chwaraeon  
Minister for Culture, Tourism and Sport



Ein cyf/Our ref: DET/00574/18

Rhodri Glyn Thomas  
President  
National Library of Wales  
Penglais  
Aberystwyth  
SY23 3BU

19 July 2018

Dear Rhodri

Thank you for your letter of 5 June and the information you supplied on the Broadcast Archive Project. I would like to re-iterate my support for the ambition of the National Library to make the BBC Wales archive publicly available. I am fully aware that making this archive collection accessible would greatly enhance the resources already available to researchers at the National Library. It would also provide the Library with a great opportunity to engage with new audiences.

My officials have now had the opportunity to review this additional information in some detail. On this basis, I have to tell you that I am not at the moment able to commit the funds that you have requested as match funding for the Heritage Lottery Fund bid. In fact, I have serious reservations about the advisability of the Library submitting a bid to the Heritage Lottery Fund for this project in the immediate future. I am very concerned that if the current bid was successful, in the longer term it would expose both the Library, and the Welsh Government as the Library's main funder, to a level of financial risk which I do not believe is justifiable or acceptable.

In my view, the current bid needs to be thoroughly reviewed and, where necessary, reshaped with financial considerations, risk, and sustainability considered alongside the plans for access and engagement.

I understand this means the Library will be unable to meet the current planned submission date to the Heritage Lottery Fund. However, with a project of this significance I am sure you will agree it is crucial that it starts from a sound and solid basis. This requires much greater assurance that the potential benefits of the project, of which I am fully conscious, are not outweighed by the risks.

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I am sure you will wish to consider this letter, and discuss the contents with the Librarian. When you have had the opportunity to do this, Linda Tomos is welcome to arrange a meeting with my officials in MALD to discuss this matter further. I hope it will then be possible for the Library to move this project forward positively.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Elis-Thomas'.

**Yr Arglwydd Elis-Thomas AC/AM**  
Y Gweinidog Diwylliant, Twristiaeth a Chwaraeon  
Minister for Culture, Tourism and Sport



Translation of letter to Rhodri Glyn Thomas

President

National Library of Wales

13/08/2018

### **National Broadcast Archive**

Annwyl Rhodri

I am writing to you further to my letter of 19 July regarding the National Broadcast Archive (NBA).

As I am sure you are aware, my officials have met with the Librarian and senior staff to discuss the project. My officials also requested further information, including a detailed analysis of the financial impact on the National Library of the National Broadcast Archive from 2024. All of this information has been carefully reviewed.

On this basis, I have to tell you that I am not able to commit the £1 million capital funding you have requested as match funding for the Heritage Lottery Fund bid. I reiterate the point I made in my previous letter, which is that in the longer term I believe the Broadcast Archive as currently envisaged could expose both the National Library, and the Welsh Government as the Library's main funder, to an unacceptable level of financial risk.

I wish to emphasise that I am supportive of the principle of the development of a National Broadcast Archive for Wales, nevertheless my view that the current proposal needs to be thoroughly reviewed and, where necessary, reshaped with financial considerations, risk, and sustainability considered alongside the plans for access and engagement is unchanged.

I am concerned about the condition of the collection. I understand that the Archive is currently stored in conditions which have, in the main, been unsuitable for the long-term conservation of a major national archive; and that the BBC has not undertaken any remedial or preservation activity on the archive prior to digitisation due to time and budgetary constraints - although there is evidence of deterioration in elements of the collection. While the HLF funding will provide the collection with an appropriate storage facility, it appears that the work required to preserve the collection, including any remedial work required in the future, will be the responsibility of the National Library, without any funding commitment from the BBC. These costs could be considerable.

I would also like further consideration to be given to the access arrangements and the viability and sustainability of the Clip Centres. We know that users have an increasing expectation of being able to access information at a time and place which is convenient to them. Could consideration be given to developing a model based

around on-line access, rather than one which is based on access at a limited number of physical sites? I think this aspect of the project needs further consideration.

I remain very concerned about the impact which this project would have on the future financial stability of the Library when the funding support from the Heritage Lottery Fund would come to an end in 2023. The projections supplied indicate that based on existing activity, and assumptions of flat line revenue grant-in-aid funding, and pay bill increases of 1% per annum, revenue reserves will go into deficit by the end of the 2019-20 financial year (by £19k), and this deficit will increase to £3.242m by the end of the 2023-24 financial year. The annual projected deficit in 2023-24 is £0.986m. The revenue costs of the National Broadcast Archive from 1 January 2024, when the project would come to an end, are estimated at £0.408m per annum, which would be in addition to the annual deficit figure of £0.986m.

I know that this is not the response that you were hoping for from me but I regret that I cannot support your bid in its current form for the reasons outline above.

Yours sincerely



Ein cyf/Our ref: MA-P/DET/4056/18

Rhodri Glyn Thomas  
President  
National Library for Wales

20 November 2018

Annwyl Rhodri

### **National Broadcast Archive**

I am grateful to the Library for the additional documents that were provided to my officials on 12 November regarding the National Broadcast Archive.

I understand that the Board of Trustees will be discussing and taking the final decision on whether or not to submit the application to establish the National Broadcast Archive to the Heritage Lottery Fund on 23 November. I am writing to you now so that you, the Trustees, and the National Librarian are clear on my views regarding this matter and so that this letter can be circulated to Board members prior to the meeting.

My position on the National Broadcast Archive is unchanged. Based on the project design and the financial projections, I remain unwilling to commit the £1 million capital funding requested, or to provide strategic support for the National Broadcast Archive in its current form.

I stated in my letter of 13 August that in my view the project required a thorough review and reshaping, and steps taken to ensure that the National Broadcast Archive would not risk the financial stability of the National Library in the future. Such a review has not been undertaken. I am aware that efforts have been made to address the longer term sustainability of the National Broadcast Archive through discussions with BBC Cymru Wales and with the other project partners. I am disappointed that this and other work on forward financial planning has been carried out so late in the process.

Based on the information you have provided, it is clear that during the period of the HLF funded work, some existing activities of the Library are likely to be affected negatively. It is not apparent to me that sufficient consideration has been given to managing established activities while the National Broadcast Archive is being developed. Furthermore, I am not reassured by the information that has been provided on the longer term sustainability of the National Broadcast Archive. I appreciate that there is good will towards the project from both BBC Cymru Wales and the CLIP Centre partners but, I remain concerned about the project methodology and the impact the National Broadcast Archive will have on the financial position and activities of the Library when the Heritage Lottery Funding ends.

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I have always welcomed the ambition of the Library to provide access to the BBC Cymru Archive and to establish the National Broadcast Archive but, this must be managed in the overall context of the Library's financial position and other roles and functions. The Library must continue to deliver its core functions, particularly that of the sole Legal Deposit Library in Wales. It is my wish to see the Library develop and to provide access to new collections using innovative methods of delivery. However, proposals for major developments such as the creation of a National Broadcast Archive must in future be more carefully planned and managed.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. Elis-Thomas'.

**Yr Arglwydd Elis-Thomas AC/AM**  
Y Gweinidog Diwylliant, Twristiaeth a Chwaraeon  
Minister for Culture, Tourism and Sport

## **Culture, Welsh Language and Communications Committee**

Thursday, 10 January 2019 09.00

### **National Broadcast Archive**

1. The Committee is already aware that the Welsh Government has consistently expressed support for the ambition of the National Library to establish a National Broadcast Archive (NBA). As Deputy Minister for Culture however, it is my responsibility to ensure this major development is supported by robust business and financial planning so that from 2024, when the funding requested from the Heritage Lottery Fund to establish the NBA is due to cease, the NBA can be incorporated into the day to day activities of the National Library.
2. The NBA must be planned and established, and then maintained from 2024 onwards without having a detrimental impact on the existing functions and financial position of the National Library. It would be irresponsible not to ensure that the risks associated with such a significant development have been identified. It is reasonable to expect the National Library to have made plans to mitigate and manage these risks in what will still be a testing financial climate, and for these plans to have been scrutinised and agreed by the Board of Trustees, and communicated to the Welsh Government as the Library's main funder.
3. Ultimately, the National Library must have a credible exit strategy and forward financial plan which provides sufficient assurance that the NBA will be sustainable when the project funding ceases.
4. I have been in correspondence with the President of the National Library on this issue for the last twelve months, and copies of my correspondence are appended for your information.
5. The President of the National Library initially wrote to me requesting a £1 million contribution to the project on 31 January 2018; and with regard to the on-going maintenance of the NBA after 2023. His letter stated that *'The Library is planning*

*to meet these costs from within its own resources and does not envisage that additional revenue funding will be required from the Welsh Government'.*

6. In my reply of 31 January, I requested a clear breakdown of the on-going revenue costs relating to the Broadcast Archive, and clarity on the impact this commitment would have on existing library activities. I raised the issue of the maintenance of the BBC Cymru Wales Archive and the proposed Clip centres (then referred to as digital hubs) specifically, as these are the aspects of the project associated with the majority of the revenue costs from 2024. It is important to understand that the BBC Cymru Wales archive has already been digitised. Public access will be provided via the digital archive and there will be no public access to the physical collection.
7. Over 4 months later, on 5 June, the response from the President indicated that the projected on-going revenue costs of the NBA from 2024 would be in the region of £450k per annum.
8. **The Library is already projecting an annual deficit of £986k at that time and this cost would be in addition to that amount.** Adding an additional financial burden to that is not something which can be done lightly, and it was not clear that a plan was being developed to manage the additional cost of the NBA, or what the impact of integrating the NBA would be.
9. On this basis, I therefore responded on 19 July declining to offer support for the project in its current form and requesting a review of the project proposal to take into account financial considerations, risk, and sustainability alongside the plans for access and engagement.
10. My officials met with the BBC in September, and expressed our concern that the BBC was not making an ongoing financial contribution to the project when the HLF funding came to an end.
11. Following further correspondence over the summer, I wrote to the President on 20 November declining to provide support for the NBA due to my concern that the

project could still add significantly to the risks regarding the sustainability of the National Library. On 23 November, the Board of Trustees of the National Library decided not to go ahead and submit the application to the Heritage Lottery Fund to meet the 4 December deadline.

12. There should have been a greater emphasis on the financial and longer term planning at a much earlier stage of the project development, but discussions are on-going between the National Library and the project partners, and the Heritage Lottery Fund has indicated that it can allow some additional time to enable a bid to be submitted.
13. The **latest proposals** received from the National Library indicate that it can contain the **additional revenue costs** from 2024-25 onwards to **£256k** per annum. The BBC has now offered an amount of £20k per annum for a three year period from 2024, therefore the net additional costs are £236k per annum. The Library is now in the process of considering how it can reduce its expenditure in order to fund these additional costs. However it does not yet have plans that are sufficiently developed to identify the specific areas. These will be examined during 2019.
14. If the Library fails to achieve the cost savings, it would mean that the Library may need to approach the Welsh Government to finance the £236K running costs, or a proportion of it depending on the level of savings that have been achieved. Alternatively, the Library could reduce the project to a minimal level at an estimated cost of £100k per annum.
15. The cost of storing the physical broadcast archive (from which digital copies to provide access have been created) represents £55k of this cost. As set out above, BBC Cymru Wales has indicated that it will contribute £20k per annum towards maintenance of the archive for a period of three years from 2024 onwards.
16. The BBC will also provide an in-kind contribution of £40k per annum over the same period to assist with the clearance of contributor rights, which I hope will

allow the amount of content available on-line to be increased incrementally from the 1,000 clips which will be made available on the Library's web site during the project.

17. The National Librarian has requested a meeting with my officials in January including the BBC, and I would like further discussion to take place to examine any additional support BBC Cymru Wales may be able to provide.

18. The National Library is also in discussion with the Clip Centre partners regarding the future of these facilities from 2024. The Heritage Lottery Fund has indicated that it would be content for a review to be undertaken, prior to the time when the project funding is due to end. The review would evaluate the impact and effectiveness of the Clip Centres, based on the experience gained during the project, and inform the development of a future delivery model and funding arrangement, if the centres are proved to have been successful. The Clip Centre partners have indicated that in principle they are willing to consider a partnership funding arrangement with the National Library from 2024.

19. As these discussions progress, I have asked my officials to provide me with further advice. I am due to meet with the President and National Librarian in February when they will have the opportunity to present the outcome of the current work to address the sustainability of the NBA.



# Agenda Item 3

By virtue of paragraph(s) iv of Standing Order 17.42

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	The Welsh NHS Confederation response to the Culture, Welsh Language and Communications Committee inquiry into ‘Supporting and promoting the the Welsh Language: The legislative, policy and wider context’.
<b>Contact:</b>	Callum Hughes, Policy and Research Officer, Welsh NHS Confederation. <a href="mailto:callum.hughes@welshconfed.org">callum.hughes@welshconfed.org</a> Tel: 02920 349850
<b>Date created:</b>	20 <sup>th</sup> September 2018

### Introduction

1. The Welsh NHS Confederation welcomes the opportunity to respond to the Culture, Welsh Language and Communications Committee inquiry into ‘Supporting and promoting the Welsh Language: The legislative, policy and wider context’.
2. The Welsh NHS Confederation represents the seven Local Health Boards and three NHS Trusts in Wales. We support our members to improve health and wellbeing by working with them to deliver high standards of care for patients and best value for taxpayers’ money. We act as a driving force for positive change through strong representation and our policy, influencing and engagement work.

### Overview

3. The delivery of bilingual NHS services is crucial to the provision of person-centred care. Delivering care and treatment in a patient’s preferred language allows NHS bodies to establish a closer relationship with patients, means that they are better positioned to place the needs of the patient at the heart of the treatment process, and allows the patient to engage more positively with their care by increasing their understanding of the treatment they receive. Health Boards and NHS Trusts have made significant progress in providing bilingual services in recent years and are committed to delivering a truly bilingual NHS for the people of Wales.
4. Throughout Wales, the Welsh language is used across a range of communication platforms. Examples include face to face consultations and providing care across the whole system (acute, primary and community); online and social media platforms; and administrative support, including Executive Board papers and minutes. Our members are using the Welsh language in all parts of their respective organisations. The most recent draft of the Welsh Language Standards, which the Culture, Welsh Language and Communications Committee considered in March 2018 and the Welsh NHS Confederation responded to, will increase each organisations’ understanding of the patients who want Welsh language services, plan for services now and in future, and improve their capacity to provide services in Welsh.
5. We welcome the progress that has been achieved over the past 18 months and the greater degree of clarity afforded by the Welsh Language Standards (No.7) Regulations

2018 (the Standards), but significant challenges remain. The Standards, and the Welsh Language Measure, must be considered against the challenging backdrop that the NHS is working in, including rising demand, workforce recruitment challenges, finances and the fact that the NHS is a 24/7 service. Health Boards experience different challenges, and in more Welsh-speaking population areas it will be easier for those Health Boards to attract and train Welsh-speaking workers in lower banded posts than in areas where less people speak Welsh. This is true both in relation to attracting the workforce but also the need for Welsh speaking services in areas where the population of Welsh speakers is low. That said, recruitment problems and shortages are the same across all Health Boards when it comes to nurses and specialist areas.

6. While there are some challenges, we must emphasise that not all challenges are relevant to all Health Boards and Trusts. Across Wales, due to local demographics, some Health Boards have already implemented schemes that address some of the issues that will face other Health Boards going forward.

### **Achieving a bilingual healthcare system**

7. The Welsh NHS Confederation and our members recognise the importance of providing Welsh language services to patients. The Welsh NHS Confederation Policy Forum briefing, *'One Workforce: Ten actions to support the health and social care workforce in Wales'*,<sup>i</sup> highlights the importance of investing in Welsh language provision across the health and social care workforce to ensure that patients and their families receive individual, person-centred care in their chosen language.
8. Under the arrangements set out in the NHS Wales Planning Framework and the NHS Finance (Wales) Act 2014, Health Boards and NHS Trusts are under a duty to prepare Integrated Medium-Term Plans (IMTPs). Within current IMTPs, the NHS is required to demonstrate *"that services are planned and delivered in line with the strategic framework for health and social care in Wales 'More than just Words...' and the Welsh Government's response to the Welsh Language Commissioner's Primary Care Inquiry Report"*. In addition, Health Boards and Trusts' commitment to the Welsh language is further outlined by the responsibilities to the *'More than just Words...'* framework and the Well-being of Future Generations (Wales) Act 2015.
9. Our members welcome the growing recognition of the importance of meeting language needs and the impact this can have on the delivery of safe, high quality care and a positive patient experience. In particular, our members support the concept of the 'active offer' in relation to Welsh services and agree that the move from Welsh Language schemes to a workable set of Welsh Language Standards has the potential to bring about the positive change required. Moreover, our members believe that the introduction of the Welsh Language Standards should provide greater clarity for both organisations and members of the public on what provision they can expect to be provided in Welsh upon the Standards coming into force over time.

## Terms of Reference

### a. Post legislative scrutiny of the Welsh Language (Wales) Measure 2011 - to assess the perceived successes and limitations of the legislation, and the impact and effectiveness of Welsh Language Standards in improving and increasing access to Welsh language services;

10. Our members fully support the aim of enhancing the use of the Welsh Language across the NHS and wider public sector. NHS Wales organisations are currently preparing their responses to the Welsh Language Commissioner's consultation on the draft Welsh Language Standards Compliance Notice. This activity is helping to raise awareness of the new requirements that will apply to NHS Wales organisations and the new ways of working that the Standards will entail.
11. The introduction of the Welsh Language schemes did not ensure the level of consistency between sectors or organisations that had originally been anticipated. Our members feel that new legislation that goes further than what was set out by the schemes under the Welsh Language Act 1993 has been required for some time. The Committee's recent inquiry into the Welsh Language Standards (No. 7) Regulations therefore has been welcomed. This is especially true following the Welsh Government's Cymraeg 2050 Strategy, which aims to achieve one million Welsh speakers by the year 2050.
12. The Welsh Language (Wales) Measure 2011 has provided a stronger base for organisations to build on, something that may have been lacking in the 1993 legislation. The Standards have also raised greater awareness of the need to provide services in a patient's preferred language and emphasised the significance of designing and delivering services around the patient. Also, the Standards have provided service users with an opportunity to ensure that health services have a greater understanding of their language needs.
13. Moreover, the '*More than Just Words...*' strategy and its structure (i.e. the *More than Just Words* awards) has been an effective means of raising the profile of the Welsh language. In particular, it has supported organisations to gather, highlight and share good practice across Wales and has encouraged organisations to work collaboratively on specific areas, particularly building links and partnerships between health and social care which is key following the Social Services and Well-being Act 2014 and the recently published Welsh Government long-term plan for health and social care '*A Healthier Wales*'.<sup>ii</sup> Our members feel that this has been made possible thanks to the fact that the strategy was tailored specifically for health and social care organisations and considered the related challenges and opportunities.
14. However, one of the key aims of the Welsh Language (Wales) Measure 2011 was that it would provide greater clarity and assurance to members of the public in terms of what their rights would be around language choice across the public sector. However, owing to the fact that what may be required from one body in one part of Wales may be different to what is required from another body in another part of Wales, the 2011 Measure has fallen short of achieving the level of consistency that had been anticipated across all organisations. In other words, our members do not feel that the Measure has clarified this issue. Legislation should ensure that an individual is able to receive the same level and

quality of service regardless of whereabouts in Wales they live, especially due to the cross boundary nature of healthcare services with a number of patients receiving care from more than one Health Board or Trust (for example a person diagnosed with cancer in Hywel Dda University Health Board may receive treatment from the Health Board they are living in as well as Abertawe Bro Morgannwg UHB and Velindre University NHS Trust).

15. There is also a concern that the necessary restructuring of existing systems could lead to major changes in the ways that Health Boards and Trusts engage with their service users. It is felt that many of the objectives of new policy frameworks could be achieved organically in conjunction with supportive staff through improvements in framework and culture. This would lead to greater integration and mainstreaming of the Welsh language across the system rather than having inconsistent/patchy engagement.
16. A framework is also required to ensure plans and procedures are put in place to allow for robust governance and accountability which should, in turn, provide assurance to NHS organisations and enable them to achieve the wider Welsh language goals within Cymraeg 2050.
17. Our members do acknowledge however that such a level of investment would be difficult against an increasingly challenging financial backdrop. As highlighted in our response to the Committee's inquiry into the Welsh Language Standards (No. 7) Regulations, our members are concerned that the time given to comply with each Standard may be unachievable and impractical given the complex nature of services and the number of Welsh speakers or learners able to provide that service. The Welsh language capabilities of frontline staff currently employed by NHS Wales would need focused and continuous investment over a number of years – that is to say, a 'one-off' period of training and investment would not be sufficient to achieve full compliance across NHS organisations.

**b. To assess whether the legislative framework supports or limits Welsh language promotion and its use;**

12. NHS organisations have been implementing a Welsh Language Scheme since 2010, and the Welsh Government's Strategic Framework for Welsh Language Services in Health, Social Services and Social Care since 2012. Our members do not consider these frameworks to be a limit on the use or the promotion of the Welsh language. Evidence from our members indicates that access to Welsh language services has improved over the past eight years as a direct result of the legislative and policy requirements.
13. However, while promotion of the Welsh Language is crucial, there needs to be a reasonable level of enforcement to fully integrate services and achieve a stronger focus for this agenda. A reasonable level of enforcement gives the Welsh language a platform for discussion that is stronger than had previously been the case under the 1993 Act. It opens up discussions that would not necessarily take place should there not be a legal framework in place to support it. A reasonable level of enforcement, therefore, supports the use and promotion of the language and does not limit its use.

14. Our members recognise that more work needs to be done to provide improved access to Welsh language services. The existing Welsh language frameworks and enforcement measures have expanded organically in recent years, and it is felt that the existing frameworks are providing NHS organisations with the impetus to improve services further.
15. As we pointed out in our response to the Committee’s inquiry in March 2018, our members are broadly supportive of the introduction of the Standards as they mean that Health Boards and Trusts will be required to take a more proactive and strategic approach to mainstreaming the Welsh language and promoting the active offer. The Standards will also ensure a patient’s language choice is made clear to staff, thus increasing opportunities between patients and (Welsh-speaking) staff to interact in Welsh and for the active offer to be realised in practice. However, it must be borne in mind that not all patient administration systems within and across the NHS currently have the required facilities to record language choice and issues around engagement, cultural acceptance and limited resources will continue to be key challenges.
16. Similarly, while our members support the general principle that telephone conversations and correspondence be bilingual across NHS Wales, it would be difficult to implement and enforce such a policy adequately because some data systems within Health Boards and Trusts are not compatible with each other. Some departments/clinics also record their data exclusively via paper systems, which would make language choice difficult to transfer with the current systems.
17. In addition, the Data Protection Act 1998, and the new GDPR provisions, prohibits some individuals accessing some systems. This could be problematic for issues like complaints, which are recorded on a Datix system, because not all NHS Wales staff have access to this system. Despite the fact that a patient’s preferred language can be recorded on Datix it is unlikely that this choice will be communicated quickly within and across organisations without sufficient restructuring of existing systems.

**c. An international perspective - gathering evidence on legislation to protect and promote minority language planning in other countries;**

15. As part of the first ‘*More Than Just Words...*’ framework, the Welsh Government conducted an in-depth analysis of language planning and legislative support for language development within the context of health and social service provision.
16. This analysis was based on data and research conducted in French-speaking parts of Canada, where some communities were campaigning for services to be provided in French. It played an active role in providing information for the European Charter for Regional and Minority Languages (ECRML) - the origin of the ‘active offer’ concept - which is now embedded in the Welsh Language Standards.
17. Strategies were introduced in these parts of Canada, but key challenges around access were persistent due to a lack of effective enforcement measures<sup>iii</sup>. Some of the comments received by French-speaking patients across the region included “*We know*

*there is a law, but we don't take it seriously because all francophones speak English" and "Too often, we are not given choice. Service is provided spontaneously in English". It is encouraging that the Welsh Government, by noting this case study, has recognised the importance of effective enforcement measures to support the use and promotion of the language.*

18. Public Health Wales NHS Trust (PHW) has an International Health Division within its Policy, Research and International Development directorate. It focuses on maximising applied learning from international policy, practice and research to support public health innovation in Wales. PHW work closely with key international partners, developing synergies and promoting opportunities. The value and influence of international data and research informing language planning legislation, policy and practice in Wales is therefore well-recognised. The promotion and subsequent support for minority language provision can only be strengthened by ensuring it sits within legislation as this gives it the strength and platform it requires to grow.

### **Other comments**

- 20 Our members have highlighted the willingness and ability of the existing workforce and labour market to provide Welsh language services at the levels envisaged in the future. However, the NHS in Wales faces many recruitment and retention challenges, including the recruitment and retention of Welsh language professionals, clinicians and administrative staff (e.g. receptionists, HR, communication professionals such as media and digital etc). The solutions to these challenges often go beyond the remit of Health Boards and Trusts, with the importance of having a truly bilingual education system at the core of the issue.
19. Our members also point out that increasing the number of Welsh-speaking staff within their specific Health Board or Trust is not solely an organisational or recruitment challenge – making the ability to correspond in Welsh an essential job requirement, for example, will have little or no effect if there is not a sufficiently sizeable Welsh-speaking population within the relevant geographical area in the first place. Achieving this involves sustained, targeted and multi-disciplinary Welsh Government approaches that extend far beyond the remit of Health Boards and Trusts and have at their core a truly bilingual education system in Wales. This in itself represents an altogether new policy debate beyond the mandate of our members.

### **Conclusion**

- 21 On behalf of our members, the Welsh NHS Confederation welcomes the growing recognition of the importance of meeting language need in the Welsh NHS and the impact this can have on the provision of services and patient experience. We support the importance of meeting language need and the 'active offer'. We also agree that it is appropriate and timely to move away from the existing Welsh Language schemes and look to further promote the Welsh language through other policy initiatives.

22 Finally, we would encourage the Culture, Welsh Language and Communications Committee to note the significant progress that has been made in recent years by our members towards providing services in a patient's chosen language. In terms of access and the delivery of services, the picture is one of sustained, albeit steady, improvement across Wales. We will continue to work closely with our members to support these positive developments in the future.

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<sup>i</sup> Welsh NHS Confederation Policy Forum, September 2016. 'One workforce: Ten actions to support the health and social care workforce in Wales'.

<sup>ii</sup> Welsh Government, July 2018. 'A Healthier Wales: Our Plan for Health and Social Care'.

<sup>iii</sup> Health Canada and the Public Health Agency of Canada, March 2017. 'Evaluation of the Official Languages Health Contribution Program 2012-2103 to 2014-2015'.



**Betsi Cadwaladr University Health Board's response to the  
Culture, Welsh Language and Communications Committee's inquiry into  
'Supporting and promoting the Welsh Language: The legislative, policy and  
wider context'.**

Betsi Cadwaladr University Health Board (the Health Board) welcomes the opportunity to comment on the Culture, Welsh Language and Communications Committee's inquiry into 'Supporting and promoting the Welsh Language: The legislative, policy and wider context'.

Health Boards in Wales are currently consulting on the Welsh Language Standards draft compliance notices placed on them by the Welsh Language Commissioner. As such, other organisations who have gone through the process of being issued with Standards are perhaps in a better position to address all the elements of the terms of reference of this inquiry, however, we are happy to comment on our own experience and position in terms of the current legislation in relation to Welsh language.

The Health Board has welcomed the introduction of the new legislative framework, the Welsh Language (Wales) Measure 2011 and has been working towards achieving compliance with the proposed Welsh Language Standards. The legislative framework has allowed for a robust planning and preparation process to achieve new compliance requirements.

As part of its commitment to providing the best possible patient centred-care, the Health Board has invested significantly in Welsh language services to address the increased demand. A Welsh Language Standards Compliance Officer has been appointed to focus specifically on the implementation and facilitation of the Welsh language Standards. A Welsh Language Tutor was also appointed to address demand for training provision to increase the Health Board's capacity to deliver bilingual services by focusing on workforce planning and staff development. A significant increase in translation demand has also seen an investment in the form of a Senior Translator and an additional Translator.

The Health Board has developed a Welsh Language Strategic Plan setting out its long-term goals and objectives for 2016-2019. This strategic plan provides a vision for promoting and advancing Welsh language provision, outlining a key focus to delivering on the Welsh Government's Strategic Framework for Welsh Language Services in Health, Social Services, and Social Care, 'More than just words', ensuring an "Active Offer" approach to service planning and delivery.

In order to aid planning, requirements have been considered in line with three dimensions that will form a baseline to build upon.

- **Strategic Intervention** sets the vision for the Health Board going forward, ensuring we are working towards the same goal. The Health Board will ensure clarity in terms of the commitment and engagement required at senior leadership level ensuring Welsh language is rooted in operational planning and service delivery.
- **Behavioural Change** ensures that the Health Board creates a context that encourages staff to use their language skills. Cultural change is required at all levels within the organisation to create an environment where Welsh language awareness is paramount
- **Performance and Monitoring** ensures that the Strategic Plan remains a live work in progress through a continuous cycle of monitoring.

Based on the Strategic Plan, an operational Welsh Language Standards Work Programme has been developed also incorporating objectives outlined within 'More than Just Words'.

To ensure its implementation, a Project Management Group has been established to support the Board in delivering its responsibilities in line with the Welsh Language Standards to improve service user experience through the provision of bilingual care. The Group's responsibilities will include taking ownership of the successful delivery of the Standards across the Health Board as well as acting as strategic leads and points of contact within service areas.

In preparation for the Welsh Language Standards, the Health Board has been liaising and working with partners from other public sector bodies who are already implementing a set of Welsh Language Standards. In particular, the Health Board has had a keen interest in the activity within its neighbouring Local Authorities, and has participated in numerous organised meetings, conferences and workshops led by the Welsh Government and the Welsh Language Commissioner.

A new fit for purpose legislation was required to progress and strengthen obligations set out within the Welsh Language Schemes under the Welsh Language Act 1993. Welsh Language Schemes did not ensure consistency between sectors, nor between organisations within the same sector which was a fundamental flaw and something that would hopefully be addressed under the new regime.

The Welsh Language (Wales) Measure 2011 has provided the stronger base that was required for organisations to build upon, something that was lacking in the previous requirements within the Welsh Language Act 1993.

This is especially true following the Welsh Government's vision to aim for one million Welsh speakers as part of the Cymraeg 2050 Strategy.

In taking into account the Welsh Government's Cymraeg 2050 Strategy, the Health Board agrees with the Minister's foreword which outlines the vision for a "country where the Welsh language is strong and sustainable....with bilingualism threaded through communities and workplaces across the country." A whole country

generational approach is needed in order to achieve the vision and aims of the Strategy.

Welsh Language Schemes under the Welsh Language Act 1993 were not seen to achieve policy objectives. Consideration needs to be given to why this was the case for certain organisation, and to ensure that the same errors are not repeated.

One of the key aims of the Welsh Language (Wales) Measure 2011 was to provide greater clarity and assurance to members of the public in terms of what their rights would be around language choice across the public sector. However, owing to the fact that what may be required from one body in one part of Wales may be different to what is required from another body in another part of Wales, the 2011 Measure has fallen short of achieving the level of consistency that had been anticipated across all organisations. In other words, our members do not feel that the Measure has clarified this issue. Legislation should ensure that an individual is able to receive the same level and quality of service regardless of whereabouts in Wales they live.

Implementation of the legislation needs to go a step further to ensure clarity and a consistent approach – an individual should be able to receive the same level and quality of service whether in North Wales or South Wales. A framework is required to ensure plans and procedures are put in place to allow for robust governance and accountability which should, in turn, assure all organisations who are working collectively to achieve the wider Welsh language goals within Cymraeg 2050.

Since the Welsh Language Board was abolished, it has become evident that there is a gap in terms of promoting the Welsh language. A balance is needed between supporting and enforcement action. Whilst acknowledging that regulation is key to the successful delivery of the Standards, there is a need to focus on supporting organisations and promoting the language. Both should be kept separate, but equally robust.

There should be greater focus on promotional activity, as organisations that are experienced in implementing Welsh language legislation and who have in the past embraced the concept of promoting the Welsh language, have seen a gap in this area. The undertaking of relevant, promotional activities are lacking in the current system and both organisations and the public require support and guidance.

Another core element which seems to be lacking in the current system is in relation to working with bodies to help them comply with the Standards, for example by providing training and holding workshops. A careful approach and clear outline of what is expected is needed from each service area. The Health Board would welcome this as there is currently a lack of consistency even within sectors.

In looking at possible future developments and implementation of Welsh language legislation, a balance is needed to ensure that correct governance and supportive frameworks are in place if we are to develop further. There is a need for:

- the promotion of the language,
- an advisory role for organisations who experience challenges,
- enforcement actions to ensure that organisations implement Standards

- regulation for the monitoring of compliance;
- and a provider of support for organisations

As a separate issue that requires attention, we would emphasise that there are challenges in the investigation process undertaken that act as barriers to reasonable and joint resolutions. The current system is a lengthy and prolonged process. The Health Board has experience of the current approach in dealing with alleged complaints where an escalation of a relatively wider concern, into an investigation when it could have been addressed locally in a logical manner. It is disappointing that this limitation provides a barrier to resolving issues locally, when attention could be better focused elsewhere.

As outlined in this response, the Health Board welcomes the growing recognition of the importance of meeting language need in the NHS in Wales and the impact this can have on the provision of services and patient experience. We would also emphasise the importance of progressing the positive baseline established by 'More than just words' and encourage forward planning by introducing long term goals as part of a revised Strategic Framework focusing on further progressing the "Active Offer".

Thank you for the opportunity to provide a response to this inquiry. You are welcome to contact us if you require any further information or clarification.

We hope that the comments are useful.

## Agenda Item 4

### **Supporting and Promoting the Welsh Language – An inquiry into the legislative, policy and wider context.**

#### **An International Perspective – legislation in Ireland to protect and promote the Irish language (submission by the Office of the Language Commissioner, Ireland)**

I welcome the invitation from the Committee to make a submission in respect of the inquiry into the legislative, policy and wider context aspects of supporting and promoting the Welsh Language. Ireland and Wales share many of the same experiences as to the status and use of our national languages. In both our jurisdictions our national languages are now lesser used languages but yet form an important part of our sense of identity in an ever more globalised world.

In my submission to the Committee I intend to concentrate primarily on my own sphere of responsibility; the implementation of the Official Languages Act. I appreciate that this must be contextualised by a fuller understanding of the language environment that we currently operate in and the measures in place to support the everyday use of the Irish language. My submission will therefore deal with the following areas:

- Government policy measures to support the language
- Language legislation and the role of my Office
- Our experience to date
- Conclusions

Article 8 of Bunreacht na hÉireann (The Irish Constitution) recognises the Irish language as our national language and our first official language. English is recognised as a second official language. Over the years precedents have been set by constitutional cases taken by citizens wishing to exercise their rights to the provision of a greater degree of public services in the Irish language.

The official status of the language is at variance with its level of usage by the general population and the dominant position of the English language in society as a whole. Irish remains a language of tuition at both the primary and the secondary levels of the education system, one of the more obvious official supports provided by the State. There are seven geographical areas in the country recognised as Gaeltacht districts where Irish was or is the predominant spoken language. The largest Gaeltacht regions are situated along the western seaboard.

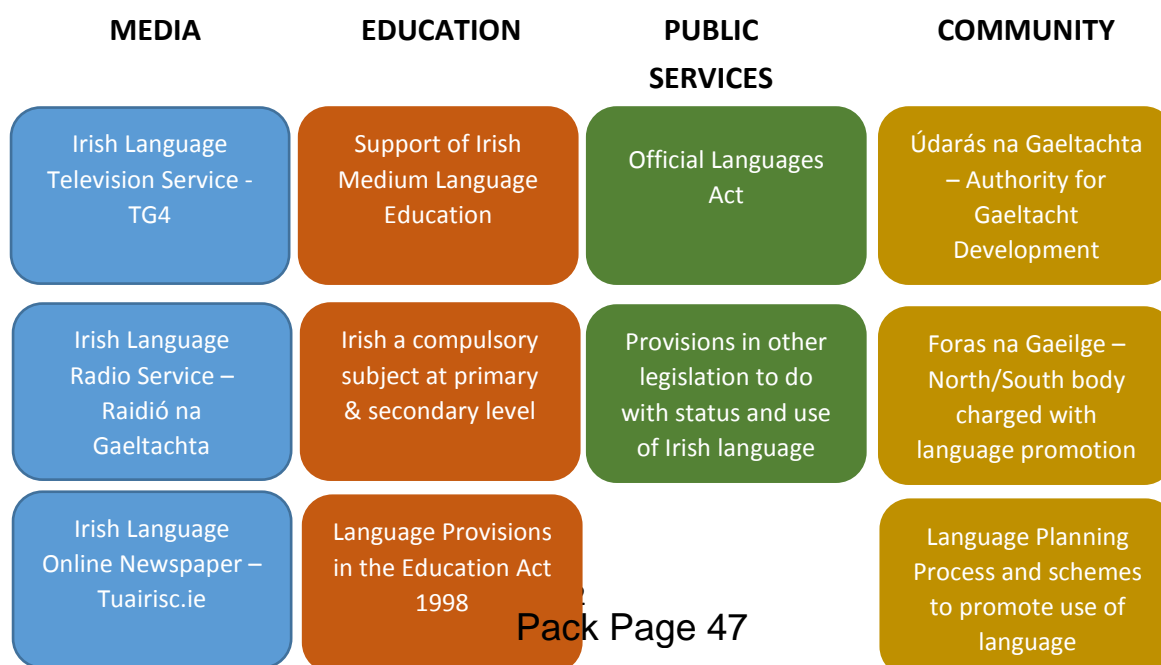
The use of the Irish language both outside and within the Gaeltacht is best illustrated by the census data as outlined below:

Census Statistics	2016	2011	% Change
Total Population	4,761,865	4,588,252	3.8%
Ability to speak Irish	1,761,420	1,774,737	-0.8%
Never speak Irish	418,420	438,782	-4.6%
Speak Irish within the education system only	558,608	519,181	7.6%
Speak Irish weekly outside the education system	111,473	110,642	0.8%
Speak Irish daily outside the education system	73,803	77,185	-4.4%
Gaeltacht areas: Speak Irish daily outside the education system	20,586	23,175	-11.2%

The census results clearly demonstrates a disconnect between people’s ability to speak the Irish language and the frequency of usage. A more worrying trend between 2011 and 2016 is the falloff in the numbers that speak Irish on a daily basis outside the education system. This statistic is widely regarded as the best indicator of the number of active speakers and has shown an overall decrease of 3,382. Of greater significance is the 11% decrease in the number of active speakers located in Gaeltacht areas. In those five years the overall number of people with the ability to speak Irish has remained relatively static. This highlights the need to increase the opportunities available to people to speak the language including opportunities in accessing public services.

### 1. Government policy measures to support the language

Since the foundation of the State various policy initiatives, legislation and other supports have been provided to cater for the provision of services in the Irish language and to stimulate its use. Outlined below is a summary of some of the key services and supports that are currently provided by the State.



The Department of Culture, Heritage and the Gaeltacht has overall responsibility for the promotion of the Irish language and the primary policy framework for the promotion and support of the language are stated below.

**i. Statement on the Irish Language**

The Government has introduced a number of measures in the last few years in relation to the language. One example is the Statement on the Irish Language, issued in 2006. This is a statement of policy affirming the Government's support for the development and preservation of the Irish Language and the Gaeltacht. It was to form a basis on which a series of actions to benefit the Irish Language and the Gaeltacht would be developed. The Statement contained 13 policy objectives:

1. To uphold the constitutional position of the language and its special status in legislation such as the Official Languages Act 2003, the Education Act 1998 and the Planning and Development Act 2000.
2. To fully implement the Official Languages Act.
3. To give encouragement to the Irish language community inside and outside the Gaeltacht to transmit the language to the next generation.
4. To support the Gaeltacht as an Irish Speaking area.
5. To teach Irish as an obligatory subject from Primary to Leaving Certificate level
6. To provide a high standard of all-Irish education to school students whose parents so wish.
7. To continue to support pre-school education through Irish and to further develop third-level education through Irish.
8. To continue to support Foras na Gaeilge in the context of the British-Irish Agreement 1999.
9. To ensure high quality broadcast services through the medium of Irish, especially through the continuous development of RTÉ, Raidió na Gaeltachta and TG4.
10. To provide every assistance and support to the EU in implementing the decision to make Irish a working and official language in the EU from 2007.
11. To reinforce the work being done by the Department of Community, Equality and Gaeltacht Affairs and by agencies and bodies under its aegis.
12. To continue and develop the use of Irish in An Garda Síochána and the Defence Forces.
13. To continue to support the vital role of the Irish language voluntary sector.

**ii. 20 Year Strategy for the Irish Language**

A twenty year strategy was developed based on the objectives set out in the Statement, and was published in 2008. The strategy set out the aims of Government policy in respect of the Irish language, mainly to increase on an incremental basis the use and knowledge of Irish as a community language, and specifically to ensure that as many citizens as possible are bilingual in Irish and English. The Strategy sets out 9 areas for action, including Education; The Gaeltacht; Family Transmission; Administration, Services and Community; Media and Technology; Dictionaries; Legislation and Status; Economic Life and Cross Cutting Initiatives.

The headline goals of the Strategy are to increase over 20 years (1) the number of people with a knowledge of Irish from 1.66m to 2m and (2) the current number of daily speakers from approximately 83,000 to 250,000. It also aims to increase the number of speakers who speak Irish on a daily basis in the Gaeltacht by 25% in overall terms and to increase the number of people that use State services through the Irish language and can access television, radio and print media through the language.

### **iii. 5 Year Action Plan**

The Government published a 5 year Action Plan 2018-2022 earlier this year detailing the main priorities towards delivering on the objectives of the 20 Year Strategy. The main objectives of this plan are:

- (1) To provide a more cohesive and coherent framework in support of the Strategy's implementation which focuses on specific, measurable, achievable, realistic and time-specific actions;
- (2) To ensure more efficient and effective engagement at Departmental, NGO and community level;
- (3) To further develop co-ownership, co-responsibility and accountability across Government and at agency and NGO level;

The plan sets out a suite of agreed actions to be implemented over the period 2018-2022 and also outlines a revised approach in monitoring progress in order to provide for greater accountability.

### **iv. Language Planning**

The Gaeltacht Act 2012 made provision for language planning in both Gaeltacht and non-Gaeltacht areas. This process requires communities to prepare language plans for their local areas to be implemented over a seven year period. Although not without merit this approach has received some criticism for placing an inordinate language planning burden on local communities without sufficient State supports. It should be recognised that the process is in its infancy and it remains to be seen how effective it will be.

## **2. Language legislation and the role of my Office**

### **i. The Official Languages Act 2003**

Irish language protection/promotion measures have been included in a number of pieces of legislation over the years. Over one hundred Acts of the Oireachtas include some specific provisions in respect of the status or use of the language, not least of which are the Education Act 1998 and the Planning and Development Act 2000 mentioned above, the Transport Act 1950 and the Garda Síochána Act 2005.

The enactment of the Official Languages Act 2003 marked an important legislative milestone towards the provision of public services in both official languages. It also established an independent statutory body charged with monitoring the implementation of the Act and



provided a mechanism that provided citizens with an opportunity to make complaints when those services fell short of what was required. The Commissioner has the power to investigate possible breaches of the provisions of the Official Languages Act and any other enactments that contain provisions to do with the use or status of an official language.

The purpose of the Act is to promote the use of the Irish language for official purposes in the State and to provide for the use of both official languages of the State in Parliamentary proceedings, in Acts of the Oireachtas, in the administration of Justice, in communicating with or providing services to the public and in carrying out the work of public bodies. It is divided into two main parts – direct provisions and language schemes.

(1) Direct provisions.

The direct provisions of the Act encompass the use of the Irish language in the Houses of the Oireachtas, in Acts of the Oireachtas and in the courts (sections 6-8). They also cover the use of the Irish language in communications with the public – in stationery, signage and recorded oral announcements (for which regulations have been made under Section 9 of the Act), in responses to written communications from the public and in providing information to the public in general and certain official publications - annual reports, audited accounts and public policy proposals (sections 9 &10).

(2) Schemes.

The second element of the Act provides for the drawing up of language schemes or plans by public bodies, and their confirmation by the Minister (sections 11-18). The schemes would encompass matters such as forms and leaflets, telephone services, counter services, websites and publications other than those under section 10 of the Act.

**ii. Importance of Independence of Language Commissioner Role**

The role of Language Commissioner in Ireland is that of an independent ombudsman, and the Office has been very mindful of that independence since its foundation.

The importance of this independent stance was highlighted in the submission made by the International Association of Language Commissioners, of which the Office is a member and current chair, to the Welsh Government last year, in response to the request for submissions in respect of the proposals for a Welsh Language Bill. In short, the IALC felt that the removal of a Commissioner could only be viewed as a retrograde step, as the promotion of a minority language and protection of the rights of its speakers is not always politically expedient from the perspective of whoever the government of the day may be. The appointment of an independent champion of the language is required in order to ensure the ongoing day-to-day protection of those rights, regardless of the government of the day. As

was pointed out by the IALC in its submission, it may be necessary to comment adversely at times on the action (or inaction) of government. The credibility of the linguistic regime in the eyes of stakeholders, parliamentarians, language rights advocates, scholars, the media and the general public lies in the knowledge that there is an independent office holder with the freedom to hold government to account.

### **3. Our experience to date**

As I mentioned above, the Office was founded in February 2004, and we now, therefore, have over 14 years' experience in monitoring the implementation of the Act and dealing with complaints from the public with regard to perceived failures of public bodies to comply with its provisions. The organisation is small, with a total of 8 staff supporting An Coimisinéir Teanga. It is essentially divided into 3 main sections – **Complaints and Investigations**, the section that deals with complaints from the public in respect of alleged breaches, and also provides advice on language rights to members of the public; **Compliance Section**, which monitors the implementation of the Act and of language schemes by public bodies; and **Communications Section**, which provides advice to public bodies, promotes the work of the Office and provides seminars for networks of officers from public bodies or local language planning groups/ community organisations.

The Office has found that in general, services provided in the Irish language have increased and improved especially those governed by the direct provisions of the Official Languages Act. Although a constitutional obligation existed prior to the Act's implementation, as the only recourse was to the courts, members of the public frequently put their language rights to one side in favour of receiving the required service. The establishment of a statutory obligation, and the provision of an independent monitoring and complaints system have ensured that individuals can now pursue their language rights without recourse to a slow and expensive legal procedure. This affords them the opportunity to request services in their preferred language and seek recourse where they are not available. The corollary can also be true however, where people become accustomed to services that are available in English only and thus do not seek services in Irish though this may be their preferred language of communication.

In addition to the Annual Report, which the Office publishes each year, giving a breakdown of statistics for complaints and a report on the investigations, audits and other work of the office during the year, the Office has produced two separate commentaries on the working of the Official Languages Act.

The first of these reports, published in 2011, was a commentary on the practical application and operation of the provisions of the Act. The report highlighted

- the elements of the Act that were working effectively,
- the gaps that needed to be addressed
- the provision of services in Gaeltacht areas

- the shortcomings in the State's recruitment policy and
- the need to properly implement language schemes.

In November 2011, the Department of Culture, Heritage and the Gaeltacht initiated a review of the Act, which incorporated a public consultation, with a view to revising the legislation. The results of the public consultation echoed the recommendations made by the Office in its commentary. Heads of Bill were published in April 2014 which were in variance with the views of the majority of respondents to the consultation process and were subsequently withdrawn. Amended Heads of Bill that were more in line with the consultation findings were published in June 2017, and were debated by the Parliamentary Committee on the Irish Language, the Gaeltacht and the Islands, which issued its findings in a report in June 2018.

I issued a second commentary in 2017 in respect of the language scheme system to highlight my serious concerns at how the system was being operated. The report found that the schemes system has not proved to be as effective a mechanism for delivery of services as was envisioned when the Act was first enacted. Having undertaken analysis of the schemes which had been confirmed by the Minister in 2015 and 2016, it was established by the Office that:

- Commitments that were the subject of an investigation were reduced or set aside in 64% of the following language schemes agreed
- There was an inordinate delay in agreeing language schemes and close to 50% of schemes had expired without a new scheme being agreed
- Follow on schemes contained very few additional services and regression in commitments could be detected in 52% of such schemes agreed in 2015 and 2016.
- Less than 20% of schemes agreed in 2015/2016 had specified post designated with an Irish language requirement
- The provisions made in relation to services in Gaeltacht regions were inadequate

In essence the operation of the language scheme system had stalled, regressed and was no longer an effective mechanism to deliver public services in both official languages.

#### **i. Proposed Legislation**

Almost seven years have passed since the review of the Official Languages Act was initiated. That process has not been without controversy. The original proposal to merge the Office with that of the Ombudsman's was abandoned when no obvious synergies, cost savings, policy or operational benefits could be detected. The pathway towards a more fit for purpose legislation with the necessary policy initiatives has been fraught with difficulties and have not yet reached a successful conclusion.

The Heads of Bill published in 2017 provide a better foundation for the delivery of public services in the Irish language as it seeks to address key policy deficiencies and shortcomings in the operation of the legislation.

A number of recommendations were made in my Commentary on the Act, aimed at improving the provision of services through Irish to those who require them. At the core of these recommendations was a realisation that the delivery of services required sufficient capacity and an appropriate legislative system. The recruitment of staff competent in the Irish language and a revision of the schemes system were key requirements. I also highlighted the need to formulate a national plan for the provision of public services in the Irish language which would guide the setting of national, sectoral or organisation specific standards. Such a plan would assess the current capacity of the public sector to deliver services in the Irish language and set out a roadmap, highlighting areas of priority, towards the delivery of an improved level of service. The necessity to independently monitor and assess the implementation of the plan would be a prerequisite to engender confidence in the process.

The Minister accepted the findings of the report and has included a number of the recommendations in the Heads of Bill for the revised Language Act which issued in June 2017. Our understanding is that the revised Bill is to be published in early autumn, with a view to being put before parliament in the late autumn or spring.

#### **4. Conclusions**

Since its introduction in 2003 the effect of the Official Languages Act has been, in general, a positive one. The Act has provided citizens with an official mechanism that can deal with their complaints regarding the provision of public services in Irish without the need to seek redress in the Courts. It has also created a culture where public bodies are more cognisant of their duties to provide additional services in the Irish language and the requirement to provide those services to the same standard as they are provided in English.

The lack of capacity of functional bilinguals within the Irish public sector has been the single greatest challenge to the delivery of quality public services in the Irish language. The failure to address this matter by way of an effective recruitment policy has hindered the impact of the legislation and this has manifested itself in a weak language scheme system that is now discredited. The inability to clearly plan for the delivery of a bilingual public service has resulted in a piecemeal type approach that concretes on the individual public body rather than working towards a national strategy or plan. Achieving an identifiable end-goal is something that must be addressed through a legislative based public-service plan for the Irish language as part of a revised Official Languages Act.

The appointment of a Commissioner with powers similar to that of an Ombudsman has copper fastened the status and the authority of this Office. It has also assisted with establishing the identity, independence, transparency and accountability of the Commissioner in a fashion similar to other language commissioner's offices throughout the

world. The importance of having a single Commissioner cannot be overstated in ensuring the efficient and smooth operation of an office. A single voice speaks with authority and assurance and provides confidence and continuity.

I believe that language-effective legislation is a key component in any Government strategy to support the use and status of an official language. Legislation that not only protects language rights but also provides for the delivery of public services is a prerequisite if a lesser used language is to have equal status. This presupposes that a sufficient number of language speakers exist that wish to avail of those services in the lesser used language. To deny speakers of a lesser used language the opportunity to access public services in their own language lessens the importance and status of their language and results in a vicious circle that can only result in an ever decreasing number of speakers. Without the necessary legislative protection it is hard to imagine how speakers of a lesser used language or of a minority language can have confidence that necessary and essential services will be available to them in their language of choice.

## Ofcom's EPG prominence consultation

### ITV PLC's response

#### Summary

##### **PSB is critical to our democracy, to our culture and to our economy**

For most of the post-war period in the UK, public service broadcasting (PSB) has made a vital contribution to the UK economy, to our culture, and to our democracy. PSBs still account for the bulk of spend on high quality original UK TV content each year (c.£2.5bn). This content delivers the PSB purposes – informing our understanding of the world, stimulating knowledge and learning, reflecting UK culture and identity, and representing diversity and different viewpoints. Each PSB makes a distinctive contribution to the system as a whole.

ITV's large audiences for original content enable us to raise the revenue to pay for accurate and impartial news and current affairs – and ensure a mass audience to consume it. This is crucial in an era of fake news and social media filter bubbles. Ofcom data shows that TV remains the most important source of news for UK citizens, and the BBC and ITV are the most used sources in the UK. ITV reaches 19m viewers per week with its news, reaching a great proportion of younger viewers, female viewers, and C2DE viewers than the BBC. Ofcom (and separate ITV) research shows that ITV is perceived as the most impartial of all the major TV news services<sup>1</sup>. The provision of high quality nations and regions TV news by ITV (and the BBC) is critical to audiences and to democracy as there is little other provision. In total, ITV spends around £120 million each year on national, international, nations and regions news.

At a time when national divisions are sometimes stark, PSB programming is able to bring people together like little else. Whether it is coverage of the World Cup or the Royal Wedding, Saturday night entertainment or high quality UK drama, PSBs play a crucial role in bringing the nation together and fuelling the national conversation. Original content “made by us, for us and about us” is the defining cultural purpose of PSB, with ITV dramas like *Endeavour*, *Vanity Fair*, *Marcella*, *The Good Karma Hospital*, *Butterfly* and *Vera* at the forefront. And of course PSB is about so much more than drama. In the first half of 2018, ITV showed 747 programmes with reach of over 3 million viewers across 88 different programme titles and 9 different genres.<sup>2</sup> The PSB system as a whole delivers substantial spend across a wide range of genres, including news, current affairs, drama, children's programming, factual, soaps, entertainment, and comedy.

The impact of the PSBs extends well beyond the programmes we make. ITV is a global business with the nations and regions of the UK at its heart. We work with a huge number of independent producers and other suppliers, and employ thousands of people across the country's nations and regions – nearly half of our group employees are outside London. This investment underpins the wider creative industries sector, which is growing around three times faster than the economy in general, and will have created a million jobs by 2030.

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<sup>1</sup> Ofcom, News Consumption in the UK: 2018 ( [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/116529/news-consumption-2018.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/116529/news-consumption-2018.pdf))

<sup>2</sup> Source: BARB/AdvantEdge. Jan-Jun 2018 Individuals. Programmes 10 mins or over.

## **PSB is highly valued by citizens and consumers**

Despite a boom in choice, viewing to PSB channels remains high, accounting for over half of all TV viewing. When including the portfolio channels from PSB providers, this rises to over 70%.<sup>3</sup> Satisfaction with the system is high, with three-quarters (75%) of regular or occasional viewers of any PSB channel claiming to be either very, or quite satisfied. Viewers continue to believe that the purposes and characteristics of PSB are important.

ITV plays a critical role within the PSB system and is performing strongly, recognised by audiences in Ofcom research for its “*well-made, high-quality programmes.*” Whether its *Coronation Street* or *Emmerdale*, *Vanity Fair* or *Victoria*, *The X Factor* or *The Voice*, *I’m a Celebrity* or *Love Island*, coverage of the World Cup or the Tour de France, people love the programmes that ITV provides.

This popularity is reflected in consumption: ITV is the biggest primetime channel in the UK<sup>4</sup> and registered the biggest year-on-year growth of any UK TV channel between 2017 and 2018<sup>5</sup>, with the channel’s share now standing at 16.9%. The ITV Family is the fastest-growing group of channels in the UK, with a share of 23.4%. ITV2 in particular is doing well and is now the biggest digital channel for 16-34s, overtaking E4.

## **Globalisation is fundamentally changing the media landscape**

It is increasingly obvious that across many areas of economic life, technological change is facilitating intense global competition. The result is a global commercial battle to shape and influence what we watch, listen to or buy from the comfort of our homes. Whether it’s Amazon’s search results determining what we buy when we shop online, Facebook deciding which stories and posts we see on social media, or Google controlling the results when we search the internet, these firms are shaping our choices and our influences.

Unsurprisingly, what we watch on television screens and tablets is emerging as a key battleground. Technological change is fundamentally changing the way people watch TV – superfast broadband delivers streaming services to the home through connected TVs and streaming sticks, 4G mobile allows people to watch on demand wherever they are, whenever they like.

Global online platforms and distributors are playing an ever-increasing role in content distribution and discovery, attempting to disintermediate UK players. Facebook, Google, Amazon and Apple in particular are emerging as key global distributors of video content. Global content providers such as Netflix (as well as Apple and Amazon themselves) are emerging in parallel.

In response, other distributors and content providers are consolidating and vertically integrating globally – Virgin is owned by Liberty Global and Sky by Comcast. Major TV manufacturers are adopting operating systems from global providers such as Google. The result is that we are now entering a different phase of competition in UK television driven

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<sup>3</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/116006/media-nations-2018-uk.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf)

<sup>4</sup> Source: BARB/AdvantEdge Individuals prime time (1900-2229) SOV

<sup>5</sup> Source: BARB/AdvantEdge Individuals, consolidated, all time Channels include +1 & HD where applicable Weeks1-38, 2018 vs Weeks1-38, 2017

by technological change which is facilitating intense global competition for the attention of UK audiences.

### **ITV is taking advantage of the opportunities this offers**

These developments bring real business opportunities for UK television producers. In particular, ITV has a growing international production business and has successfully produced programmes for both a UK and global audience in partnership with recent entrants. ITV Studios is successfully winning global commissions from the likes of Netflix and Amazon. We are working through our subsidiary production companies across the world and in partnership with other PSBs to maximise revenues globally, launching Britbox US with the BBC and investing for the long-term term in the future of Freeview as it develops into a full hybrid DTT-IP platform.

### **ITV is negotiating hard with global platform providers**

As a content distributor, the entry into the market of new competitors has also brought opportunity for ITV. Fairly obviously, in every carriage deal ITV enters into, we seek to ensure that our content is easy to find and access. To date this has been broadly successful, with the ITV Hub present on most major devices and platforms in a reasonably prominent position. To become established, many global players have recognised the attraction at the outset of accessing national content from players such as the PSBs in order to enter markets and build scale. This is because ITV, along with the other PSBs, offers high quality UK content that is loved and heavily consumed. In a world of increased choice, consumers continue to come to ITV in their millions each day.

### **Global players have commercial incentives to promote non-PSB content**

But that quality and popularity in the UK may not, by itself, be enough. The PSBs' medium term ability to maintain these positive outcomes is threatened by asymmetric competition from global media aggregators and distributors who have long run incentives not to promote PSB services (or other national players in other territories).

[🔗] For large vertically integrated global companies there is a clear incentive to promote their own content (or that of their commercial partners) globally ahead of that produced by the PSBs.

Platforms that are not vertically integrated in content and distribution nonetheless appear to show signs of preferring the convenience and immediate financial benefit of paid-for global partnerships with the likes of Netflix, rather than promoting the national content (such as that from the PSBs in the UK) that is most relevant and important to citizens and consumers in a particular country. This is also occurring worldwide on a country-by-country basis. The prominence of Netflix on UI's and remote controls is an illustration of this.

The risk is that, over time, popular PSB services become harder and harder to find, edged out by global content that delivers a greater benefit to platform operators and aggregators.



## **The way in which global players choose to exercise their power will be crucial**

The global TV aggregators and distributors are investing globally in artificial intelligence (AI), augmented reality (AR) and data processing on a scale that UK PSB cannot match<sup>6</sup>. This potentially offers much to be excited about for consumers as, over time, content recommendations become increasingly intelligent and targeted. But as more and more content discovery moves away from lists of channels and VOD services it is also important to recognise the potentially negative consequences this may bring. Instead of presenting the consumer with all possible options, the risk is that they surface and give prominence to that content they have commercial incentives to prioritise. In this world, the quality (or local/national popularity) of content alone will not be enough to ensure that consumers are made aware of its existence, and broader PSB outcomes are unlikely to be supported by global businesses or reflected in purely commercial algorithms.

User interfaces are only going to get more powerful, more personalised and more influential over time. The algorithms driving content recommendation will be powerful: already more than 80 per cent of the TV shows people watch on Netflix are reportedly discovered through the platform's recommendation system.<sup>7</sup> Recent Ofcom data bears this out: when people are using SVOD services it's not to watch UK content, with three quarters of the top 20 SVOD programmes in Q1 2018 coming from the USA or Canada. These concerns are not just hypothetical: we and the other PSBs are already beginning to experience them across the market.

## **There are already signs that global companies are changing their approach**

[✂]

### **A very real threat to PSB**

If left unchecked, over time, this emerging control over of content discovery by global content aggregators and TV manufacturers will threaten the virtuous circle of investment, viewing, and reinvestment that sustains the PSB system. In the medium term we should be concerned about the prospects for investment in UK-specific content, investment in key genres, and the wider creative economy. This will ultimately impact negatively on our democracy and our culture.

In an era of increasingly intense but asymmetric global competition, the policy concerns today are rather different to those of the last few decades. The emerging concern today is not about the lack of competition to all-powerful, vertically-integrated PSBs within a predominantly domestic market, or about PSBs withholding content from vulnerable platforms.

The concern today should be about how we can safeguard the flourishing free to air, universal PSB system we value so highly and which effectively serves citizens and consumers in the face of asymmetric competition from powerful, vertically-integrated global firms

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<sup>6</sup> This is not limited to those from Silicon Valley. Broadcast reports that Jeremy Darroch described Artificial intelligence, personalisation and on-demand content as among the "decisive bets" being laid by Sky. <https://www.broadcastnow.co.uk/the-tech-bets-at-the-heart-of-skys-plans/5132565.article>

<sup>7</sup> <https://www.wired.co.uk/article/how-do-netflixs-algorithms-work-machine-learning-helps-to-predict-what-viewers-will-like>

operating in a global market. At the heart of this will be the increasing inability of the PSBs to ensure that people can easily find and access the content they have paid for, directly or indirectly, that supports the UK's economy, culture and democracy. This is an issue that is not just of concern in the UK but across Europe too.

The power of the PSBs working in partnership, notably through Freeview Play, have hitherto helped to some extent in negotiations with global players. This is particularly true at a time when most operators are still in the process of designing and optimising their user interfaces. [🔗]

Experience in the linear space suggests that once user interfaces have become firmly embedded, reinforced by global commercial contracts, it becomes increasingly difficult and disruptive to change their layout and the ordering of services within them<sup>8</sup>. Reform of the regime now, whilst the market is still taking shape, will help overcome the negative externalities outlined. Relying on intervention ex post will be exceptionally challenging, if not impossible. Concerted action by Ofcom and by Government is therefore needed to support the steps taken by the PSBs before these trends fundamentally alter the UK media ecology.

### **The prominence regime needs to be reformed**

From the beginning of multichannel TV in the UK, Parliament has insisted that PSB services should be prominent on EPGs. This priority remains but needs adapting in an era of global content production and distribution. To support the steps being taken by the PSBs to compete in global market against international online players and global content providers, Government must reform the EPG prominence intervention to reflect the changing market and allow UK PSB to compete effectively.

### **The prominence regime must continue to deliver high levels of visibility for PSB content**

It is important that UK consumers benefit from the innovations that are emerging from global technology companies. However, at the same time, it is important that the major players in TV content distribution, both now and in future, who are investing heavily, have clarity at the outset about the degree of prominence expected for PSB in the UK market.

We believe the most effective legislative updates will not be based on trying to predict what future technologies for finding and accessing content will look like. Instead, key outcomes should be enshrined in legislation, and include a right to significant prominence for PSBs. Specifically, this should include:

- *Significant prominence for all PSB linear services and associated on-demand services provided by a PSB (or several PSBs):* The Secretary of State should maintain (and have the power to vary by Order) a list of these 'in-scope services'.
- *Significant prominence on all major user interfaces:* the regime should cover those who exercise editorial control of all user interfaces (UIs) on all major platforms, devices and services in the UK to consume TV or TV-like content. The Secretary of

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<sup>8</sup> This is particularly the case for smart televisions given the lengthy replacement cycle (5-7 years) once purchased.

State should have the power to vary this definition by Order. In the event of dispute about whether a UI is in-scope, Ofcom should determine.<sup>9</sup>

The law should place a requirement on Ofcom to define 'significant prominence' within its guidance. It should also require Ofcom's guidance to specify:

- *Which UI functions in-scope services should be prominent within*, including (but not limited to) all those areas of UIs:
  - *Positioned by the UI provider as central to the user experience*: This will vary by UI as different providers emphasise different functionality, but is generally likely to include homepages, linear EPGs; VOD player landing pages; search and recommendations; or
  - *Used by a substantial number of people to access TV or TV-like content*: It is possible that areas of a UI are not prominently positioned but nonetheless have significant appeal to consumers<sup>10</sup>. Such functions are likely to include linear EPGs and VOD player landing pages.
- *The degree of prominence to be provided*, including (but not limited to):
  - Where services are discoverable in their entirety (e.g. VOD app landing pages), in-scope services are easily discoverable and quick to access; and
  - Where individual pieces of content are discoverable as a result of editorial decisions and/or algorithmic curation, a substantial amount of such content should be immediately visible and attributable to the relevant PSB, and quick to access. The individual content displayed should be chosen by the relevant PSBs from the total catalogue of their in-scope services.

In putting in place its guidance, Ofcom should be required to have regard to:

- The need to deliver consumer benefit: High quality UK PSB content remains popular with UK audiences, and remains the bulk of content consumed despite the growth in choice. The prominence intervention should ensure that this popular content is not marginalised by global operators with an incentive to dilute consumer appetite for UK content over time and/or deliver global content deals and arrangements.
- The need to deliver citizen benefit: it is important that UI and content providers are able to continue to innovate to meet the demands their consumers. Taking account of consumer expectations is a part of this. But it is equally important that the citizen interest is served, for instance by ensuring a wide range of content from the PSBs is promoted, so ensuring people are encouraged to watch content that delivers the purposes and characteristics of PSB that they might not ordinarily have chosen. Where such interests appear to be in tension, the citizen benefit should take precedence.

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<sup>9</sup> In considering what constitutes a 'major platform' Ofcom should have the discretion to take into account a range of factors as it sees appropriate, potentially including the number of users, the volume of viewing delivered, its importance to certain demographics, or its place in the wider market.

<sup>10</sup> For example, linear EPGs remain a popular way to access programmes yet a platform might chose to make the EPG much less prominent

- The need for prominence to be free and non-contingent: The degree of prominence offered by EPG operators should not be made contingent on other factors (e.g. prominence should not be reduced unless VOD rights are granted) or require payment by PSBs.
- The importance of ensuring sufficient transparency: UI operators should be open with consumers and industry about how they decide which content to include in which areas of their UI, and how they choose to promote it. This should include not only decisions about PSB prominence but also any commercial arrangements (e.g. paid-for prominence), editorial decisions, and any data / algorithmic approaches taken. Such transparency is important in relation to all scheduling and promotion, whether PSB or non-PSB content and services.
- The right of consumers to personalise: PSB prominence should not be enforced above audiences' own direct actions (e.g. viewers should be free to set their own favourites menu or rearrange the order of apps on a page). Nor should prominence override requests for specific programme assets with a single possible outcome (e.g. 'show me episode 2, series 3 of...'). But in search with any ambiguity, where more than one outcome may be presented or served to consumers, prominence rules should apply.

Such a regime can be implemented in a way that is both proportionate and effective, potentially functioning in a broadly similar manner to the way it does today (with some enhancements).

### **The regime must also provide clarity, with clearly defined roles for Government, regulator and UI providers**

Currently, the EPG prominence legislation is enabling. It delegates power to the Secretary of State to set the channels within scope and enables Ofcom to decide how to apply the code. We believe the legislation should be updated to reflect developments in the market:

- Government: should retain enabling legislation, setting in law the required outcomes and giving the Secretary of State powers (after consulting Ofcom) to amend which services are in scope and the criteria by which user interfaces are assessed to be in scope so that the regime can be updated more easily as and when technology and audience needs and expectations change;
- UI providers: should be given the space to design products that work for consumers and foster competition, but given clarity as they do so on the minimum expectations of PSB prominence that those products should deliver. The regime should amend the existing requirement from publishing an EPG Policy to publishing a UI policy. Policies should be required to set out how UI providers have taken account of the views of the providers of 'in-scope services' and Ofcom; and
- Ofcom: should continue to hold responsibility for updating the prominence code, giving guidance as to practices to be followed, as it does today with the linear EPG code. It should determine whether user interfaces are in scope where there is disagreement. It should have a backstop role in compliance, taking firm action as necessary if either policies or outcomes do not comply with its code or guidance. Consideration should be given to the merits of requiring Ofcom to conduct reviews

of the effectiveness of the intervention, perhaps every 3-5 years. It should continue its role in relation to FRND for UI relationships beyond prominence.

This approach will ensure that PSBs can continue to play their vital role in the UK's democracy, culture and creative economy, whilst giving platforms and user interface operators the freedom to innovate.

**Ofcom is right to ensure the linear regime remains effective but needs to rethink its approach to ensure its proposals are proportionate**

ITV is clear and unequivocal in its support for prominence for PSB services. However, with fourteen<sup>11</sup> such services eligible for some form of prominence, clearly not all of these can be in the first slot or even on the first page. This means judgment is required in considering what degree of prominence is appropriate and proportionate for each service.

We agree with Ofcom's approach to distinguish between the degree of prominence required for the main five channels versus the others. The five main PSBs carry the most onerous public obligations, invest the most heavily in meeting them, and are intended for consumption by everyone in the UK. They are also the most used and most popular. As such, the highest degree of prominence is merited.

The proposal to ring-fence the first five slots in linear lists for the main channels appears unlikely to deliver any incremental public value. The combination of market dynamics in linear channel provision and the current high level requirement for 'appropriate prominence' would likely result in these channels retaining these positions due to their popularity with audiences and long history of being located in these slots. As such, whilst we do not oppose such a requirement nor do we believe it offers any material additional benefit to us.

Beyond the five main services, we believe Ofcom's proposals do not strike quite the right balance between affording all PSBs some degree of prominence and minimising the impact on the market. This is in part because Ofcom does not appear to have assessed the cost to commercial broadcasters, [redacted].

Whilst increased prominence might result in a small degree of increased consumption, the other factors that drive consumption (that Ofcom itself has identified) such as channel brand, audience loyalty, and the quality or appeal of content will remain unaltered and act as major constraints to consumption growth. This is particularly true for channels in indigenous minority languages or offering distinctive special interest content.

[redacted] in order to promote a small number of niche PSB services. It seems implausible that such changes could result in a growth in total TV consumption. The channels being promoted are somewhat niche in nature and, as such, already likely to be consumed by those with an interest. [redacted]

Such a disproportionate approach, [redacted] is particularly disappointing at a time when commercial television – and commercial PSB – is already under pressure due to the increase

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<sup>11</sup> BBC One, BBC Two, BBC Four, CBBC, CBeebies, BBC News, BBC Parliament, BBC Alba and forthcoming the BBC Scotland, ITV/STV, Channel 4, Channel 5, S4C, and local television services

in on demand viewing and asymmetric competition with international firms operating under substantially lower legal and regulatory burdens.

**Ofcom therefore needs to [✂]**

Absent a full impact assessment, ITV suggests that Ofcom should seek to mitigate the risk to the market by lowering the page threshold (or lower slot limit) from the first three to the first five pages. Such an approach would achieve Ofcom's policy objective of prominence for the smaller PSB services using "...the least intrusive means..." in line with Ofcom's own guidance

## Section 1: Context

### PSB is critical to our democracy, to our culture and to our economy

Ofcom's first *Media Nations* report<sup>12</sup> showed that in 2017 just over £7.5 billion was spent on network television programmes by UK channels. It also showed that the PSBs and their commercial portfolio channels still accounted for the bulk of this spend (over £3 billion), with the rest of the sector (defined by Ofcom as 'Other multichannels') contributing just under £1.2 billion on content other than sports. The bulk of this spend by PSB channels and PSB commercial portfolios is on new first run UK content (Ofcom puts this figure at just under £2.8 billion).

This investment funds programming that delivers the PSB purposes – informing our understanding of the world, stimulating knowledge and learning, reflecting UK culture and identity, and representing diversity and different viewpoints. Each PSB makes a distinctive contribution to the system as a whole.

ITV's large audiences for original content enable us to raise the revenue to pay for accurate and impartial news and current affairs – and ensure a mass audience to consume it. This is crucial in an era of fake news, social media filter bubbles, declining trust in public institutions and ever more challenging business models supporting the production of high quality international, national, regional and local news are under pressure.

Ofcom's publication *News Consumption in the UK* shows that TV remains the most important source of news for UK citizens and that the BBC and ITV are the most used sources in the UK. ITV reaches 19m viewers per week with its news, reaching a greater proportion of younger viewers, female viewers, and C2DE viewers than the BBC. ITV is perceived as the most impartial of all the major TV news services<sup>13</sup>. The provision of high quality national and regional TV news by ITV (and the BBC) is critical to audiences as there is little other provision. In total, ITV spends around £120 million each year on national, international, national and regional news.

The influence of the PSB extends online, with the BBC and ITV among the top 3 most-followed news providers on Facebook, Twitter and Instagram. PSB output is highly trusted and viewed as impartial, in stark contrast to audience attitudes to social media.<sup>14</sup>

At a time when national divisions are sometimes stark, PSB programming is able to bring people together like little else. Whether it is coverage of the World Cup or the Royal Wedding, Saturday night entertainment or high quality UK drama, PSBs play a crucial role in bringing the nation together and fuelling the national conversation.

Original content "made by us, for us and about us" is the defining cultural purpose of PSB, with ITV dramas like *Endeavour*, *Vanity Fair*, *Marcella*, *The Good Karma Hospital*, *Butterfly* and *Vera* at the forefront. And of course PSB is about so much more than drama. In the first half of 2018, ITV showed 747 programmes with reach of over 3 million viewers across 88 different programme titles and 9 different genres.<sup>15</sup> The PSB system as a whole delivers

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<sup>12</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/116006/media-nations-2018-uk.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf)

<sup>13</sup> Ofcom, *News Consumption in the UK: 2018* ([https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/116529/news-consumption-2018.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/116529/news-consumption-2018.pdf))

<sup>14</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0024/116529/news-consumption-2018.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0024/116529/news-consumption-2018.pdf)

<sup>15</sup> Source: BARB/Advantage. Jan-Jun 2018 Individuals. Programmes 10 mins or over.

substantial spend across a wide range of genres, including news, current affairs, drama, children’s programming, factual, soaps, entertainment, and comedy.

The impact of PSBs extends well beyond the programmes we make. ITV is a global business with the nations and regions of the UK at its heart. We work with a huge number of independent producers and other suppliers, and employ thousands of people across the country’s nations and regions – nearly half of our group employees are outside London. This investment underpins the wider creative industries sector, which is growing around three times faster than the economy in general, and will have created a million jobs by 2030. British content is loved not only at home but also abroad, accounting for around half the international trade in entertainment formats.

### **PSB is highly valued by citizens and consumers**

Ofcom’s own research shows that, despite the proliferation of choice in recent years, viewing to PSB channels remains high, accounting for over half of all TV viewing. When including the portfolio channels from PSB providers, this rises to over 70%.<sup>16</sup>

Satisfaction with the system is high, with three-quarters (75%) of regular or occasional viewers of any PSB channel claiming to be either very, or quite satisfied. Viewers continue to believe that the purposes and characteristics of PSB – such as informing our understanding of the world, reflecting UK cultural identity, and providing high quality, original programming – are important.

ITV plays a critical role within the PSB system and is performing strongly, recognised by audiences for its “well-made, high-quality programmes,” with 82% of respondents to Ofcom’s survey rating ITV highly for this.

This popularity is reflected in consumption. ITV registered the biggest year-on-year growth on an UK TV channel between 2017 and 2018<sup>17</sup>, with the channel’s share now standing at 16.9%. It is also the biggest primetime channel in the UK<sup>18</sup>.

ITV’s total share, including its portfolio channels, is 23.4%. The ITV Family is the fastest-growing group of channels in the UK. ITV2 in particular is doing well, with a total share of over 6%. It is now the biggest digital channel for 16-34s, overtaking E4.

### **Globalisation is fundamentally changing the media landscape**

It is increasingly obvious that across many areas of economic life, technological change is facilitating intense global competition. The result is a global commercial battle to shape and influence what we watch, listen to or buy from the comfort of our homes. Whether it’s Amazon’s search results determining what we buy when we shop online, Facebook deciding which stories and posts we see on social media, or Google controlling the results when we search the internet, these firms are shaping our choices and our influences.

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<sup>16</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/116006/media-nations-2018-uk.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf)

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Global online platforms and distributors are playing an ever-increasing role in content distribution and discovery, attempting to disintermediate UK players. Facebook, Google, Amazon and Apple in particular are emerging as key global distributors of video content. Major TV manufacturers are adopting operating systems from global providers such as Google. Global content providers such as Netflix (as well as Apple and Amazon themselves) are emerging in parallel.

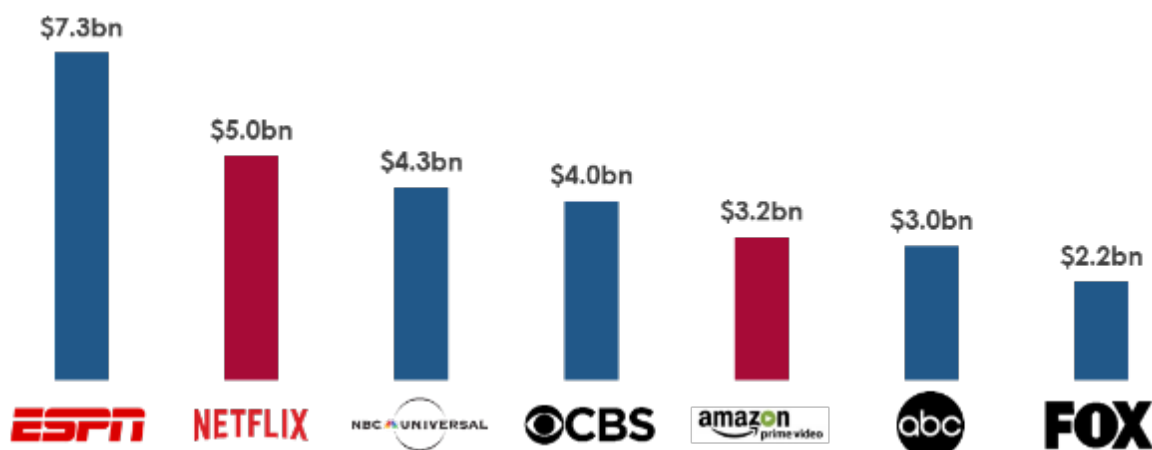
In response, other distributors and content providers are consolidating and vertically integrating globally – Virgin is owned by Liberty Global and Sky by Comcast.

The result is that we are now entering a different phase of competition in UK television driven by technological change which is facilitating intense global competition for the attention of UK audiences. There is clear evidence that younger people in particular are spending more and more time watching content on demand. Some of this consumption is shifting to the online services of linear TV players, some is shifting to new entrant online offerings and some away from TV content entirely. The main players in every point of the supply chain are now global technology firms and content aggregators.

### Content funding and production

It is increasingly clear that a global market for TV content is emerging rapidly. The scale of investment in content of global appeal by global players has been widely discussed in the media, although accurate and consistent numbers are hard to come by. BCG's The Future of Television suggested that Netflix and Amazon's spend on content was comparable to that of the major US networks:

Annual content spend Netflix and Amazon vs. top five US cable networks, 2016<sup>19</sup>



That spend has increased dramatically since 2016, with Netflix originally setting its content budget for 2018 at \$8bn and media reports suggesting this has now risen further,

<sup>19</sup> BCG, The Future of Television (2016)

potentially as high as \$13 billion.<sup>20</sup> Amazon is reported to be spending between \$4-5 billion this year.<sup>21</sup> At one level these figures are unmatched in the UK market, whether by the PSBs combined or by purely commercial providers. But, of course, these aggregate content spend numbers are for the whole world in contrast to PSB content investment which is still focussed primarily on engaging UK audiences.

The stimulus provided to the UK TV production market by the array of new players is clearly welcome economically. Making /commissioning TV programmes in the UK is clearly increasingly attractive. Many players that are investing in/making new content in the UK each year are part of global groups, including both broadcasters – for instance Sky (now owned by Comcast); Discovery (a US based company) etc – as well as the production companies supplying them – such as All3Media (Liberty Global), Shed Media (Warner Bros), Left Bank Pictures (Sony), Shine and Kudos (Endemol) and Carnival (NBCU).

### Content distribution and discovery

The presence of global groups is not limited simply to content production and channel ownership. Even more importantly, they are also increasingly present in content distribution and discovery, where we are moving rapidly from the old world of bespoke national platforms and televisions that were simply screens to the new, where platforms, services and devices are global products with little or no national variation.

This is not just about new online players but can also be seen in the changing approaches of more established TV platforms which are themselves increasingly part of global groups facing increasingly intense competition from the emerging online platforms. So, for instance, just under half of all UK households' television services<sup>22</sup> are provided by companies that are subsidiaries of global cable/entertainment groups: Virgin Media (owned by Liberty Global) and Sky (now owned by Comcast).

In this context, the importance of securing the long-term future of the Freeview platform clear. Reaching 20m households<sup>23</sup>, owned and controlled by the UK's PSBs, hitherto it has ensured high quality UK content is widely available, easily discoverable, and free to all.

Even in households where Freeview is the primary TV service, however, the take up of connected TVs and devices is growing. The number of households with a connected TV, including streaming sticks and consoles, has risen from 30% in 2012 to 77% in 2017. Sales of smart TVs complete with apps from SVOD and broadcasters have significantly increased in recent years, and now account for just under 80% of TV sales. This is a market dominated by international firms, such as Samsung, Sony, LG, Amazon, Apple.

There is a growing trend for these firms to be vertically integrated – involved not only in the distribution of content but also in investing heavily in their own content production. And, it is no longer necessary for these global players to even to have a broadcasting licence or platform in order to reach audiences in the UK. Some of the most popular routes to content – Netflix, Amazon Prime, YouTube and NowTV – are delivered via IP, with on-demand

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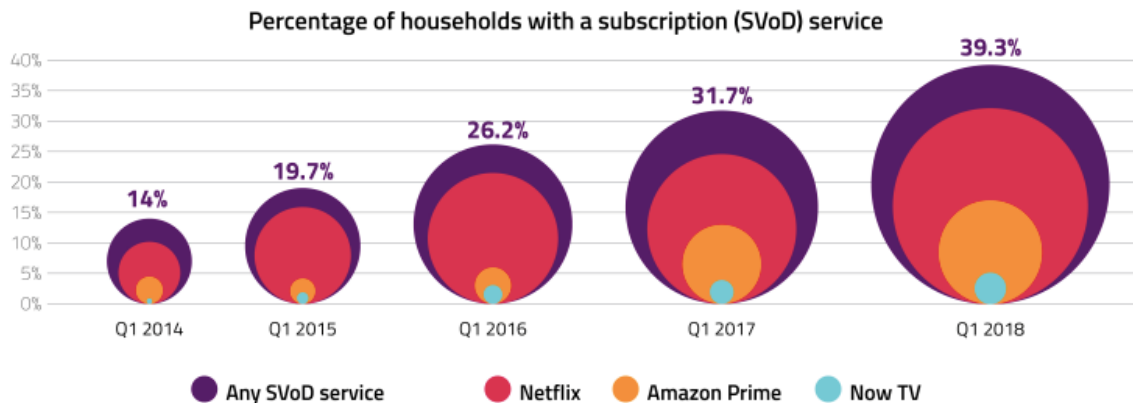
<sup>20</sup> <https://www.economist.com/briefing/2018/06/30/netflix-is-moving-television-beyond-time-slots-and-national-markets>

<sup>21</sup> <https://www.mediapost.com/publications/article/315055/amazon-expected-to-spend-5-billion-on-video-content.html>

<sup>22</sup> [https://www.ofcom.org.uk/data/assets/pdf\\_file/0014/116006/media-nations-2018-uk.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0014/116006/media-nations-2018-uk.pdf)

<sup>23</sup> [http://www.digitaluk.co.uk/data/assets/pdf\\_file/0006/94308/Digital\\_UK\\_Spectrum\\_factsheet\\_May\\_2018.pdf](http://www.digitaluk.co.uk/data/assets/pdf_file/0006/94308/Digital_UK_Spectrum_factsheet_May_2018.pdf)

services licensed very differently from broadcasting services in the UK. The growth in take-up of these services has been very substantial in recent years.



Source: Ofcom. *Media Nations 2018*.

As such, consumers have access to more content than ever before, and this choice is undoubtedly a good thing in general. But such choice can also be overwhelming without a trusted guide helping you to discover programming of most relevance to you. Improved recommendations and personalisation, if done well, could undoubtedly benefit consumers and citizens.

This means that control of routes to content discovery – control of consumer eyeballs – is becoming an increasingly critical part of the market that is emerging. Amazon is looking to control voice search, Google is seeking to become the standard operating system for smart TVs, with Android TV, while Netflix and others are seeking global deals for the most prominent positions in UIs.

Such power over what people choose to watch, if vested in only a handful of companies, could result in less than positive outcomes. The picture here, again, is one of the emerging power of global content service providers and content aggregators – Samsung, Amazon, Google, Apple, Sky and Roku. Each with global business models and little interest in the public benefits and investment delivered by UK PSB.

There are good reasons to believe that this combination vertical integration and global business models will have a negative impact on the UK market.

### **ITV is taking advantage of the opportunities a global market offers**

To be clear, the growth in global demand for content has brought economic advantages to UK producers. So, for instance, ITV has a growing international production business and has successfully produced programmes for both a UK and global audience in partnership with recent entrants. ITV Studios is successfully winning global commissions from the likes of Netflix and Amazon.

Recent global production highlights include:

- *Queer Eye*, made by ITV America (part of ITV Studios) and Scout Productions, debuted on Netflix in February this year, with the second season following soon afterwards and a third due to air in 2019. The show won three Creative Arts Emmy

Awards: Outstanding Structured Reality Series, Outstanding Picture Editing for a Structured or Competition Reality Program, and Outstanding Casting for a Reality Program

- *Love Island* has been commissioned in the US by CBS for a 20-episode series, which will be produced by ITV Entertainment, an ITV America company part of ITV Studios
- ITV Studios Australia to produce the first ever Australian version of *Saturday Night Takeaway*. Called *Sunday Night Takeaway*, commissioned by Network Ten
- ITV Studios France winning a number of recommissions, including a new season of *I'm a Celebrity... Get Me Out Of Here!* for TF1, *The Voice*, and *Four Weddings*
- *Dancing on Ice* in pre-production in Germany, through ITV Studios Germany

Similarly, new ways of distributing content online open up the possibility for ITV of reaching new audiences directly. So, for instance, we are working in partnership with other PSBs to maximise our audience and revenue online, launching Britbox US with the BBC and investing for the long-term term in the future of Freeview as it develops into a full hybrid DTT-IP platform.

### **ITV is negotiating hard with global platform providers.**

Similarly, the growth of new TV platforms also presents opportunities for ITV as a content and channel wholesaler. Fairly obviously, in every carriage deal ITV enters into, we seek to ensure that our content is easy to find and access. To date this has been broadly successful, with the ITV Hub present on most major devices and platforms in a reasonably prominent position.

This has been helped by that fact that, to become established, many global players have recognised the attraction at the outset of accessing national content from players such as the PSBs in order to build scale. This is because ITV, along with the other PSBs, offers high quality UK content that is loved and heavily consumed by consumers. In a world of increased choice, consumers continue to come to ITV in their millions each day.

The combination of these incentives and ITV's strong content offer have to date helped ensure positive outcomes for ITV on major content platforms and services. However, it is apparent that global players also have the incentives, and increasingly the ability to act on them, that could potentially threaten these outcomes.

### **Global players have commercial incentives to promote non-PSB content**

The PSBs' medium term ability to maintain these positive outcomes is potentially threatened by asymmetric competition from global media aggregators and distributors who have long run incentives not to promote PSB services (or other national players in other territories).

For large vertically integrated global companies there is a clear incentive to promote their own content ahead of that produced by the PSBs. This may take the form of content decisions – which content is promoted where – or be reflected in the structure of user interfaces – which might seek to relegate those areas where PSB performs well to less obvious locations within the overall UI. [✂]

Content discovery businesses will also be heavily incentivised to promote content from commercial partners globally in return for payment. [88] Global business models mean that user interface operators are likely to have a preference for striking single, global, paid-for deals with global content players, which are easier to negotiate, more lucrative than territory-by-territory deals, and certainly far more efficient for providers looking to roll out platforms globally. The result can be the first few slots on a smart TV homepage being occupied across the globe by global content players (e.g. Netflix) at launch.

These incentives will remain strong even if domestic content retains a strong appeal for UK audiences. While it is early in the development of these technologies for television, accusations of such behaviour have already surfaced in comparable areas.<sup>24</sup>

Such an outcome would be of grave concern, particularly given the increasing importance of user data and analytics could result in a handful of ‘white label’ user interfaces come to dominate the device market ([88]) in the same way that a handful of interfaces have come to dominate online retail.

The risk is that popular PSB services become harder and harder to find, edged out by global content that delivers a greater benefit to platform operators.

### **The way in which global players choose to exercise their power will be crucial**

Content discovery was straightforward in a world where the only option was linear broadcast. In channel listings, the main PSB channels occupy the top slots because this is where they have always been – and, as Ofcom’s own work shows, it is where consumers expect them to be. Despite the explosion of choice offered by multichannel television, and an Ofcom Code that allows platforms full discretion in how they choose to define ‘appropriate prominence’, the presence of the PSBs at the top of EPG listings has never been seriously challenged. Hitherto the market for TV has been overwhelmingly national rather than global.

However, the majority of consumer routes to content are no longer so simple. People are able to search – by text or by voice, to follow recommendations, browse programmes by genre or actor, choose between live and on-demand services, or press specific buttons on their remote controls to launch individual services. Often all of these functions and services are brought together within a single smart connected user interface.

These user interfaces and their myriad functions and tools do not offer single, standard products, identical for each user. Instead, the major players in the content discovery market are increasingly using or developing interfaces that can draw on the power of machine learning, artificial intelligence, augmented reality, and extensive data analytics to offer more personalised services.

The result will be a powerful, targeted user experience. Sky, for example, is reportedly developing technologies that will tailor its recommendations according to your mood,<sup>25</sup> while Samsung’s *Universal Guide* “...reflects the latest trends, in addition to the user’s past

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<sup>24</sup> <https://www.propublica.org/article/amazon-says-it-puts-customers-first-but-its-pricing-algorithm-doesnt>

<sup>25</sup> <https://www.computerworlduk.com/data/how-sky-is-looking-recommend-movies-according-your-mood-3673839/>

viewing patterns...”<sup>26</sup> with aspirations that “...the algorithm will evolve to be able to cater to individual user needs, instead of recognizing the viewing patterns of the whole family.”

Such ambitions are not limited to device manufacturers and TV platform operators. Netflix has said that:

*“We want our recommendations to be accurate in that they are relevant to the tastes of our members, but they also need to be diverse so that we can address the spectrum of a member’s interests versus only focusing on one. We want to be able to highlight the depth in the catalog we have in those interests and also the breadth we have across other areas to help our members explore and even find new interests. We want our recommendations to be fresh and responsive to the actions a member takes, such as watching a show, adding to their list, or rating; but we also want some stability so that people are familiar with their homepage and can easily find videos they’ve been recommended in the recent past.”<sup>27</sup>*

Its public explanations of how it makes its recommendations and how it decides which content to make most prominent amply demonstrates the power and complexity of its approach.<sup>28</sup>

This potentially offers much to be excited about for consumers as, over time, content recommendations become increasingly intelligent and targeted. But as more and more content discovery moves away from lists of channels and VOD services it is also important to recognise the potentially negative consequences this may bring too.

For established pay TV operators and more recent entrants alike, this sophistication offers the opportunity to push their own content at consumers ahead of that from the PSBs, so potentially increasing subscriber retention by highlighting exclusive content over free-to-air PSB.

The resulting algorithms are powerful: more than 80 per cent of the TV shows people watch on Netflix are reportedly discovered through the platform’s recommendation system.<sup>29</sup>

Recent Ofcom data bears this out: when people are using SVOD services it’s not to watch UK content, with three quarters of the top 20 SVOD programmes in Q1 2018 coming from the USA or Canada.

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<sup>26</sup> <https://news.samsung.com/global/all-in-on-ai-part-4-your-personal-guide-helps-find-your-new-favorite-tv-show>

<sup>27</sup> <https://medium.com/netflix-techblog/learning-a-personalized-homepage-aa8ec670359a>

<sup>28</sup> <https://medium.com/netflix-techblog/netflix-recommendations-beyond-the-5-stars-part-1-55838468f429>

<sup>29</sup> <https://www.wired.co.uk/article/how-do-netflixs-algorithms-work-machine-learning-helps-to-predict-what-viewers-will-like>

Rank	Programme	Genre	Sub Genre	Commission Type	Service	Origin	Total Streams
1	Friends	Comedy	Sitcom	Acquisition	Netflix	USA	1985
2	The Grand Tour	Entertainment	Magazine	Original	Amazon	UK	911
3	The Crown	Drama	History	Original	Netflix	UK	651
4	Stranger Things	Drama	Sci-Fi/Fantasy	Original	Netflix	USA	628
5	Peaky Blinders	Drama	Crime	Acquisition	Netflix	UK	519
6	Black Mirror	Drama	Sci-Fi/Fantasy	Original	Netflix	UK	504
7	The Big Bang Theory	Comedy	Sitcom	Acquisition	Netflix	USA	485
8	Brooklyn Nine-Nine	Comedy	Sitcom	Acquisition	Netflix	USA	369
9	The Good Place	Comedy	Sci-Fi/Fantasy	Original	Netflix	USA	343
10	Vikings	Drama	History & War	Acquisition	Amazon	Ireland/Canada	335
11	Lucifer	Drama	Sci-Fi/Fantasy	Acquisition	Amazon	USA	330
12	Altered Carbon	Drama	Sci-Fi/Fantasy	Original	Netflix	USA	312
13	Orange is the New Black	Drama	Comedy	Original	Netflix	USA	310
14	Designated Survivor	Drama	Thriller	Original	Netflix	USA	302
15	Grey's Anatomy	Drama	Medical	Acquisition	NOW TV	USA	298
16	Breaking Bad	Drama	Crime	Acquisition	Netflix	USA	290
17	Homeland	Drama	Crime	Acquisition	Netflix	USA	288
18	Paw Patrol	Animation	Children's	Acquisition	Netflix	Canada	278
19	Riverdale	Drama	Mystery	Acquisition	NOW TV	USA	256
20	Peppa Pig	Animation	Children's	Acquisition	Netflix/Amazon	UK	244

Source: Ofcom. *Media Nations 2018*.

In future, these interfaces are only going to get more powerful, as Viaccess Orca's Director of Product Management, Content Discovery & Personalization observes:

*"Contextual recommendation is the new frontier: algorithms that will be sophisticated enough and have enough data to work with, that they will be able to suggest what viewers want to watch at precisely that moment and get it right the majority of the time. And with sophisticated AI increasingly penetrating the home — Amazon has already incorporated its Alexa intelligent personal assistant into its Fire TV stick — TV content personalization is going to become the new normal fairly rapidly."*<sup>30</sup>

Instead of presenting the consumer with all possible options, the risk is that they surface and give prominence to that content they have commercial incentives to prioritise. In this world, the quality (or local/national popularity) of content alone will not be enough to ensure that consumers are made aware of its existence, and broader PSB outcomes are unlikely to be supported by global businesses or reflected in purely commercial algorithms.

These concerns are not just hypothetical: we and the other PSBs are already beginning to experience them across the market.

**There are already signs that global companies are changing their approach**

[🔗]

[🔗]

[🔗]

<sup>30</sup> <https://www.viaccess-orca.com/blog/how-content-personalization-enhances-tv-experience>



### **A very real threat to PSB**

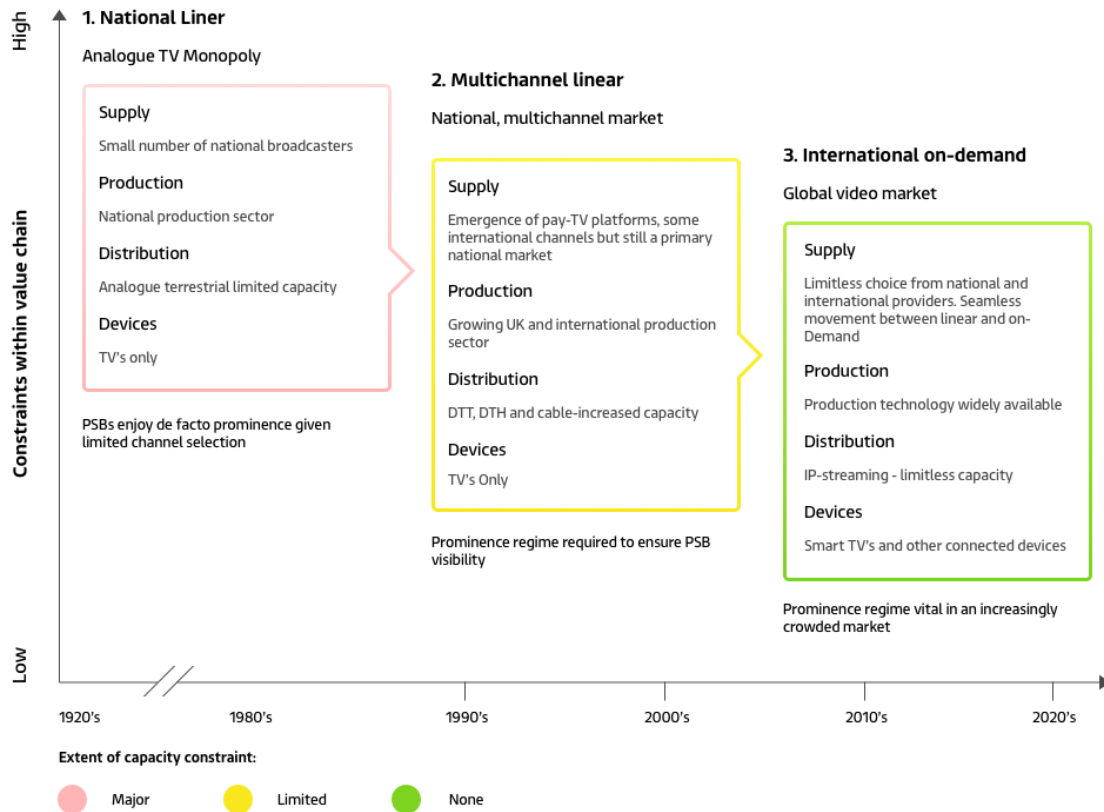
Over the past few decades, public policy has consistently sought to introduce more competition to the PSBs at every level of the value chain. For many years this made sense given the strong incumbent position they occupied. So, for instance:

- *Competing PSBs*: ITV was created to break the BBC monopoly. Channel 4 was created to provide an additional alternative voice and Channel 5 followed later, further increasing competition among the PSBs;
- *Competing content producers*: Channel 4 was also created to be a platform for content from the independent sector, which was further supported by the introduction of content commissioning quotas for ITV and the BBC, and regulated terms of trade allowing producers to retain the bulk of the secondary revenues raised from programmes commissioned by PSBs;
- *Competing infrastructure*: whereas once there was only analogue television, there was a deliberate policy of encouraging competing TV infrastructure in satellite, cable and latterly IP; and
- *Competing broadcasters more generally*: Multichannel subscription television on satellite and cable was encouraged and, coupled with the switch from analogue to digital television, resulted in the number of channels competing with PSB channels growing dramatically.

This pro-competitive approach was fully justified and played a part in developing the successful, vibrant, creative sector we have today. But while the benefits of this have been significant but there have also been costs. In particular, the old approach to funding PSB genres of content based on the regulation of monopoly has not been sustainable. The inevitable result of the decline in the value of PSB licences has been a set of choices about which genres of programming to prioritise above others. This process has been analysed at length in successive Ofcom PSB reviews.

As the chart below highlights we are increasingly moving from the familiar world of national multichannel TV to the more unfamiliar era of international online on-demand TV. And, as we have set out above, the world is changing rapidly.





In an era of increasingly intense but asymmetric global competition, arguably the policy concerns today are rather different to those of the past few decades. The emerging concern today is not about the lack of competition to all-powerful, vertically-integrated PSBs within a predominantly domestic market, or about PSBs withholding content from vulnerable platforms.

The concern going forwards will be how we can safeguard the flourishing PSB system we value so highly and which effectively serves citizens and consumers in the face of asymmetric competition from powerful, vertically-integrated global firms operating in a global market. At the heart of this will be the increasing inability of the PSBs to ensure that people can easily find and access the content they have paid for, directly or indirectly, that supports the UK's economy, culture and democracy. This is an issue that is not just of concern in the UK but across Europe too.

Across the value chain, global players will have powerful positions from content creation to distribution and devices, often vertically integrated or having powerful vertical relationships with other global players. They will benefit from global economies of scale, enabling them to invest more heavily in content, technology, marketing and partnership deals, and to recover their fixed costs across multiple territories.

The ability of these firms to in large part dictate in future what content is surfaced and when to UK citizens and consumers represents a fundamental challenge to the continuing effectiveness of the PSB system in delivering the aims set for it by Parliament.

The power of the PSBs working collectively, notably through Freeview Play, have hitherto helped to some extent in negotiations with global players. This is particularly true at a time when many newer platform operators are still in the process of designing and optimising their user interfaces. [✂]

Experience in the linear space suggests that once user interfaces have become firmly embedded, reinforced by global commercial contracts, it becomes increasingly difficult and disruptive to change their layout and the ordering of services within them<sup>31</sup>. Reform of the regime now, whilst the market is still taking shape, will help overcome the negative externalities outlined. Relying on intervention ex post will be exceptionally challenging, if not impossible.

If left unchecked, over time, this dominance of content discovery by global firms directing the audience away from UK PSB content will have potentially serious implications:

- *It threatens the virtuous circle of investment in UK-focussed TV content:* While some global firms may continue to invest in programmes made in the UK (albeit for the global market), it is the PSBs that are the engine room of UK-specific content creation for UK audiences.
- *It threatens investment in key genres:* in the face of such a sizable threat and with PSB licenses that deliver less and less compensating value, UK broadcasters will need to increasingly focus on the most profitable genres, and on content with global appeal. This puts less profitable – or loss-making – PSB genres, particularly news, at risk (continuing a trend Ofcom has identified in consecutive PSB reviews)
- *It threatens the wider UK creative economy:* PSBs, ITV included, are massive employers across the whole of the UK, it's nations and its regions. If revenues and investment are reduced the impact will be felt well beyond the individual broadcasters, in the creative industries more broadly
- *It threatens our democracy and civil society:* PSB content that helps people understand the world around them and informs debate will no longer be as widely provided or as easy for UK citizens to find. In an era of fake news and globalisation it is more important than ever that high quality, national PSB content remains highly prominent and easy to discover, delivered on mass-reach services that maximise impact and consumption.

Concerted action by Ofcom and by Government is therefore needed to support the steps taken by the PSBs before these trends fundamentally alter the UK media ecology.

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<sup>31</sup> This is particularly the case for smart televisions given the lengthy replacement cycle (5-7 years) once purchased.

## Section 2: Establishing a new framework for prominence

### The prominence regime needs to be reformed

From the beginning of multichannel TV in the UK, Parliament has insisted that PSB services should be prominent on EPGs. The Communications Act 2003 ensures PSB channels are easily discoverable on Electronic Programme Guides (EPGs). There are arguably three key benefits from this, which vary by PSB:

- *Increased impact and viewing of PSB content:* Benefiting all of the PSBs, prominence helps ensure that PSB services are easy to find and highly visible. This increases the consumption of PSB programmes, so increasing the public value that they deliver. Competing PSB news services, for example, are easily visible and accessible, helping to support the debate that underpins democracy.
- *Increased revenue for Channel 4:* as well as increased public value, higher viewing means greater advertising revenue for Channel 4. With its not-for-profit status, any additional revenues raised are available to Channel 4 to invest in the delivery of its public remit.
- *Sustaining the delivery of public value by the PSBs:* ITV's agreement to very substantial PSB obligations (particularly for news) above and beyond those of purely commercial broadcasters is critically reliant on the value in PSB licenses part of which is provided by the guarantee of prominence (as well as ring-fenced DTT spectrum).

Ultimately, investment in new, original and popular content is the key to the PSBs' success. Future success here is clearly in our own hands. But that success has also been underpinned by the combination of a strong free-to-air, UK-controlled platform (Freeview) run by the PSBs and prominence for PSB services on all major platforms which has allowed the PSB system and wider creative ecology to flourish and grow.

The importance of prominence remains but needs adapting in an era of global content production and distribution. Against this backdrop, Government must reform the EPG prominence intervention to reflect the changing market and ensure that UK PSB can compete effectively with global players.

Last year, Government gave Ofcom a new duty (in the Digital Economy Act), to review the prominence of PSB content on TV and on-demand, committing to legislate if Ofcom concluded there was a problem. Ofcom has published its initial findings and its conclusion is unequivocal:

***"...If Parliament wishes for PSB to remain easy to find, then new legislation is needed to reflect the growth in television delivered via the internet."***

We agree. Hybrid platforms and EPGs are the new normal but in these connected environments prominence often rules do not fully apply. It is therefore essential that Government updates the prominence rules to ensure PSB remains easily discoverable in an intensely competitive global media market.

Action is needed now, while these firms are still in the early stages of designing the products and user interfaces that will shape consumer behaviour in the decades to come. Action at a

later date, once these products are in every home, requiring these players to unpick their (often global) product designs, will be far harder (if not impossible) to achieve.

There appears to be an emerging political consensus that change is now required. For instance, in Jeremy Wright's speech at the recent RTS conference, he said that:

*"Younger viewers are more open to new technology and more receptive to new brands than any generation before them. This change in consumption habits is showing no sign of slowing down. So [the PSBs] must reach them where they want to be reached. **And they must find [PSB] where they expect [PSB] to be found.**"*

We agree. Government can play a part in ensuring PSBs continue to deliver the aims set for them by Parliament by ensuring that PSB services are found where audiences expect them to be found. Action on prominence is a vital step in supporting the PSBs' own actions and to deliver on the secretary of State's welcome commitment to:

*"...ensure the government is playing [its] part in supporting the future of public service broadcasting at the very heart of our vibrant media sector."*

### **A prominence regime that continues to deliver high levels of visibility for PSB content**

The degree of competition and innovation currently evident in the market, and the range of different UIs currently offered as a result, is to be welcomed. It is important that reform of the prominence regime does not dampen this process and that UK consumers benefit from the innovations that are emerging from global technology companies.

However, at the same time, it is important that the major players in TV content distribution, both now and in future, who are investing heavily, have clarity about the degree of prominence that will be expected for PSB in the UK market. This will not inhibit innovation but will ensure that within that innovation PSB is built into the foundations.

This means that the new regime should place the onus on UI providers to work with PSBs to deliver prominence that works with the grain of individual products and consumer expectations, giving them discretion as to how to implement the legal and regulatory requirements.

We believe the most effective legislative updates will not be based on trying to predict what future technologies for finding and accessing content will look like. Instead, key outcomes should be enshrined in legislation, and include a right to significant prominence for PSBs. Specifically, this should include:

- *Significant prominence for all PSB linear services and associated on-demand services provided by a PSB (or several PSBs):* The Secretary of State should maintain (and have the power to vary by Order) a list of these 'in-scope services'.
- *Significant prominence on all major user interfaces:* the regime should cover those who exercise editorial control of all user interfaces (UIs) on all major platforms, devices and services in the UK to consume TV or TV-like content. The Secretary of

State should have the power to vary this definition by Order. In the event of dispute about whether a UI is in-scope, Ofcom should determine.<sup>32</sup>

The law should place a requirement on Ofcom to define 'significant prominence' within its guidance. It should also require Ofcom's guidance to specify:

- *Which UI functions in-scope services should be prominent within*, including (but not limited to) all those areas of UIs:
  - *Positioned by the UI provider as central to the user experience*: This will vary by UI as different providers emphasise different functionality, but is generally likely to include homepages, linear EPGs; VOD player landing pages; search and recommendations; or
  - *Used by a substantial number of people to access TV or TV-like content*: It is possible that areas of a UI are not prominently positioned but nonetheless have significant appeal to consumers<sup>33</sup>. Such functions are likely to include linear EPGs and VOD player landing pages.
- *The degree of prominence to be provided*, including (but not limited to):
  - Where services are discoverable in their entirety (e.g. VOD app landing pages), in-scope services are easily discoverable and quick to access; and
  - Where individual pieces of content are discoverable as a result of editorial decisions and/or algorithmic curation, a substantial amount of such content should be immediately visible and attributable to the relevant PSB, and quick to access. The individual content displayed should be chosen by the relevant PSBs from the total catalogue of their in-scope services.

In putting in place its guidance, Ofcom should be required to have regard to:

- The need to deliver consumer benefit: High quality UK PSB content remains popular with UK audiences, and remains the bulk of content consumed despite the growth in choice. The prominence intervention should ensure that this popular content is not marginalised by global operators with an incentive to dilute consumer appetite for UK content over time and/or deliver global content deals and arrangements.
- The need to deliver citizen benefit: it is important that UI and content providers are able to continue to innovate to meet the demands their consumers. Taking account of consumer expectations is a part of this. But it is equally important that the citizen interest is served, for instance by ensuring a wide range of content from the PSBs is promoted, so ensuring people are encouraged to watch content that delivers the purposes and characteristics of PSB that they might not ordinarily have chosen. Where such interests appear to be in tension, the citizen benefit should take precedence.

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<sup>32</sup> In considering what constitutes a 'major platform' Ofcom should have the discretion to take into account a range of factors as it sees appropriate, potentially including the number of users, the volume of viewing delivered, its importance to certain demographics, or its place in the wider market.

<sup>33</sup> For example, linear EPGs remain a popular way to access programmes yet a platform might choose to make the EPG much less prominent

- The need for prominence to be free and non-contingent: The degree of prominence offered by EPG operators should not be made contingent on other factors (e.g. prominence should not be reduced unless VOD rights are granted) or require payment by PSBs.
- The importance of ensuring sufficient transparency: UI operators should be open with consumers and industry about how they decide which content to include in which areas of their UI, and how they choose to promote it. This should include not only decisions about PSB prominence but also any commercial arrangements (e.g. paid-for prominence), editorial decisions, and any data / algorithmic approaches taken. Such transparency is important in relation to all scheduling and promotion, whether PSB or non-PSB content and services.
- The right of consumers to personalise: PSB prominence should not be enforced above audiences' own direct actions (e.g. viewers should be free to set their own favourites menu or rearrange the order of apps on a page). Nor should prominence override requests for specific programme assets with a single possible outcome (e.g. 'show me episode 2, series 3 of...'). But in search with any ambiguity, where more than one outcome may be presented or served to consumers, prominence rules should apply.

Such a regime can be implemented in a way that is both proportionate and effective, potentially functioning in a broadly similar manner to the way it does today (with some enhancements).

### **The regime must provide clarity, with clearly defined roles for Government, regulator and UI providers**

Currently, the legislation is enabling. It delegates power to the Secretary of State to set the channels within scope and enables Ofcom to decide how to apply the code. We believe the legislation should be updated to reflect developments in the market:

- Government: should retain enabling legislation, setting in law the required outcomes and giving the Secretary of State powers (after consulting Ofcom) to amend which services are in scope and the criteria by which user interfaces are assessed to be in scope so that the regime can be updated more easily as and when technology and audience needs and expectations change;
- UI providers: should be given the space to design products that work for consumers and foster competition, but given clarity as they do so on the minimum expectations of PSB prominence that those products should deliver. The regime should amend the existing requirement from publishing an EPG Policy to publishing a UI policy. Policies should be required to set out how UI providers have taken account of the views of the providers of 'in-scope services' and Ofcom; and
- Ofcom: should continue to hold responsibility for updating the prominence code, giving guidance as to practices to be followed, as it does today with the linear EPG code. It should determine whether user interfaces are in scope where there is disagreement. It should have a backstop role in compliance, taking firm action as necessary if either policies or outcomes do not comply with its code or guidance. Consideration should be given to the merits of requiring Ofcom to conduct reviews

of the effectiveness of the intervention, perhaps every 3-5 years. It should continue its role in relation to FRND for UI relationships beyond prominence.

This approach will ensure that PSBs can continue to play their vital role in the UK's democracy, culture and creative economy, whilst giving platforms and user interface operators the freedom to innovate.

### **Ofcom is right to ensure the linear regime remains effective but should ensure that its proposals are proportionate**

ITV is clear and unequivocal in its support for appropriate prominence for PSB services. However, fourteen such services eligible for some form of prominence, clearly not all of these can be in the first slot or even on the first page. This means Ofcom's judgment is required in considering what degree of prominence is appropriate and proportionate for each service.

We agree with Ofcom's approach to distinguish between the degree of prominence required for the main five channels versus the others. The five main PSBs carry the most onerous public obligations, invest the most heavily in meeting them, and are intended for consumption by everyone in the UK. They are also the most used and most popular. As such, the highest degree of prominence is merited.

Ofcom's proposal to ring-fence the first five slots in linear lists for the main channels is a sensible confirmation of the status quo but appears unlikely to deliver incremental public value. This is because a) the services are already in slots 1-5; and b) it is highly likely that, in linear lists, the combination of market dynamics in linear channel provision and the current high level requirement for 'appropriate prominence' would likely result in these channels retaining these positions due to their popularity with audiences and long history of being located in these slots. As such, whilst we certainly do not oppose such a requirement nor do we believe it offers any material additional benefit to us.

Beyond the five main services, we believe Ofcom's proposals do not strike quite the right balance between affording all PSBs some degree of prominence and minimising the impact on the market. As a result, the proposals are disproportionate. Our concerns, more specifically, are:

- *They will deliver little to no public benefit* [🗑️]: Ofcom itself acknowledges that its proposals will only "...help secure..." or at best "...slightly increase..." the discoverability and viewing of the services in question. Set against this, [🗑️].
- *They go against audience preferences in relation to nations and regions services*: Ofcom's own research shows that just 4% of adults across the UK place some importance on S4C and BBC Alba being easy to find in the TV guide on their TVs. This figure is higher for local TV but still very much a minority, at 22%. Such support cannot justify the degree of pan-UK prominence Ofcom proposes for these services in non-regionalised EPGs. Even where EPGs are regionalised, there is still not a high degree of support for prominence for S4C (just 22% of adults in Wales place some importance on the service being easy to find) or BBC Alba (12% of adults in Scotland in Scotland).
- *They go against audience behaviour*: the small reach and share of the services Ofcom proposes to promote reflects in large part the value placed on them by UK

consumers as a whole. These services offer valuable niche content offer of strong appeal to a small subset of UK viewers. Given the distinctive nature of these services, and the lack of alternative sources of such content, all viewers who are likely to watch these channels are likely to seek them out regardless of EPG position.

Such a disproportionate approach which, as we set out in more detail below, [redacted], is particularly disappointing at a time when commercial television – and commercial PSB – is already under pressure in a market where competition for the audience and for advertising revenue is intensifying rapidly.

### **Ofcom therefore needs to reduce the negative impact of its proposals on the market**

Ofcom states that “*Public value benefits are qualitative and are challenging to quantify in any meaningful way*” but that it nonetheless believes that the: “*...proposals would help secure or slightly increase the discoverability and viewing to these nation specific and Local TV channels, thereby supporting the personal and public value created for the relevant audiences and better secure the policy objective of the prominence regime and our broader broadcasting duties.*”<sup>34</sup> It is unclear from the consultation document on what basis it has reached this view.

Whilst increased prominence might result in a small degree of increased consumption, the other factors that drive consumption (that Ofcom itself has identified) such as channel brand, audience loyalty, and the quality or appeal of content will remain unaltered and act as major constraints to consumption growth. This is particularly true for channels in minority languages or offering distinctive special interest content.

Whilst the increase in public value is therefore likely to be minimal, the proposals appear near-guaranteed [redacted]

It seems implausible that such changes could result in a growth in total TV consumption. The channels being promoted are somewhat niche in nature and, as such, already likely to be consumed by those with an interest. [redacted].

[redacted]

[redacted], it is somewhat disappointing that while Ofcom states that it has “*...had regard to the potential impacts of [its] proposal[s]...*” it does not appear to have set out that assessment in its consultation document. While it has identified possible high-level impacts of the proposals overall (in paragraphs 5.7 and 5.8), it is not clear whether Ofcom has then gone on to consider the extent to which these factors apply to the proposals they put forward.

Where it has published supporting data, in the form of the EMP report and its own economic model, they exclude any information of the impact of changes on the Freeview platform, the largest in the UK, due to a lack of slot trading. Indeed, Ofcom has been explicit that it has “*...not sought to quantify the potential impact of our proposals in relation to the Freesat or Freeview EPGs.*”

Absent a full impact assessment, ITV suggests that Ofcom should seek to mitigate the risk to the market by lowering the page threshold (or lower slot limit) from the first three to the first five pages. Such an approach would achieve Ofcom’s policy objective of prominence for

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<sup>34</sup> [https://www.ofcom.org.uk/\\_data/assets/pdf\\_file/0020/116273/consultation-epg-code-prominence-regime.pdf](https://www.ofcom.org.uk/_data/assets/pdf_file/0020/116273/consultation-epg-code-prominence-regime.pdf)



the smaller PSB services using “...the least intrusive means...,” in line with Ofcom’s own guidance.<sup>35</sup>

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<sup>35</sup> Ofcom. *Better Policy Making: Ofcom’s approach to impact assessment*.

### Section 3: Response to Ofcom's consultation questions

Q1) Do you agree with our proposals that the main five PSB channels hold the top five slots on EPGs provided UK wide or in the UK outside of Wales?

The proportionality of any proposed changes might be assessed by considering the balance between the delivery of the policy goals set for each individual service by Parliament versus the associated impact on the broader market. Such an approach could consider the scale of obligations attached to PSB services, the level of investment in the content they produce, and the size of their target audience.

On this basis, we agree with Ofcom's approach to distinguish between the degree of prominence required for the main five channels versus the others. The five main PSBs carry the most onerous public obligations, invest the most heavily in meeting them, and are intended for consumption by everyone in the UK. They are also the most used and most popular. As such, the highest degree of prominence is merited.

Crucially, though, while it should be open to Ofcom to put in place a regime that distinguishes between different levels of PSB provision or different levels of consumption etc, once Ofcom's requirements are in place it should not be for UI operators to judge further the relative value of different types of PSB obligations or the 'PSB-ness' of different services within their UI policies.

The proposal to ring-fence the first five slots in linear lists for the main channels is a sensible confirmation of the status quo but appears unlikely to deliver incremental public value. This is because a) the services are already in slots 1-5; and b) it is highly likely that, in linear lists, the combination of market dynamics in linear channel provision and the current high level requirement for 'appropriate prominence' would likely result in these channels retaining these positions due to their popularity with audiences and long history of being located in these slots. As such, whilst we certainly do not oppose such a requirement nor do we believe it offers any material additional benefit to us.

Q2) Do you agree that on EPGs provided for viewers specifically in Wales BBC One, BBC Two and the relevant Channel 3 service should take the top three slots, with S4C in slot four, Channel 5 in slot five and Channel 4 guaranteed a position on the first page?

ITV would welcome clarification that Ofcom does not believe there are any circumstances where it would consider the position of the main PSB channels in the first five slots as open to question. Were this not the case it would negate any conceivable benefit Ofcom intends from the introduction of ring-fencing or minimum requirements in the first place.

Such an approach could also open the door for UIs to leave PSB services in insufficiently prominent positions if that's where they have historically been – a concern that would appear particularly pertinent in relation to where VOD services are placed ahead of legislative reform, given this might create an incentive to fill up home screens before any new regime comes in.

Q3) Do you agree that BBC Four should be guaranteed a slot within the top three pages of all EPGs?

Q4) Do you agree that the designated public service News channels (currently BBC News and BBC Parliament) should be guaranteed slots on the first page of the news genre section or an equivalent position within the grouping of news channels on the EPG, as applicable?

Q5) Do you agree that CBeebies and CBBC should have guaranteed slots on the first page of the Children's genre or area of the EPG, as applicable?

We agree with the underlying principle behind the proposals, guaranteeing a degree of prominence for these services commensurate with the scale of their obligations and original UK content investment while remaining proportionate in light of BBC's funding model and potential impact on the broader market. This is particularly important in relation to news and children's TV, where the economics of provision are sensitive and market provision should be disrupted as little as possible while meeting policy goals.

However, we do not believe that 'number of pages' is the most meaningful or effective way in which to define the intended outcome. We unpack this further in answer to questions 6-9, where the issue of 'number of pages' is particularly relevant.

Q6) Do you agree that S4C, BBC Alba, and BBC Scotland should be guaranteed prominence within the first three pages of UK wide EPGs?

Q7) Do you agree that local TV should be guaranteed prominence within the first three pages of UK wide EPGs?

Q8) Do you agree that S4C, BBC Alba, and BBC Scotland should be guaranteed prominence within the first three pages of relevant Nation specific EPGs e.g. S4C in Wales, BBC Alba and BBC Scotland in Scotland?

Q9) Do you agree that local TV should be guaranteed prominence within the first three pages of relevant regionalised EPGs?

ITV does not entirely agree with these proposals. We believe Ofcom should consider in more detail whether the likely benefit of their approach is proportionate relative to the impact on others.

As Ofcom has previously noted, local TV services are unlikely to be in a position to increase the delivery of their obligations any time soon. Indeed, the direction of travel for local television appears to be to reduce licence commitments. Despite very significant prominence on DTT, local TV still achieved only 0.15% share in 2017.

BBC Alba and S4C's obligations and revenues are unlikely to be positively and materially impacted by the proposals, as people interested in these services are highly likely to already be aware of them and viewing.

While the citizen benefit of such proposals is therefore marginal, [🚫].

This is particularly the case on non-regionalised guides, where the proposals result in the first three pages being disproportionately full of content not of interest to most UK audiences (e.g. S4C, Alba and BBC Scotland across England). Outside of the particular nation in which the particular service should be prominent, platforms should be free to take

into account the interests of the viewer experience in deciding whether such focussed national services should in fact be visible at the prominent national EPG position across the UK.

The impact of these proposals (and those in relation to BBC Four above) are exacerbated by the fact that on major TV platforms the number of channels per page varies widely. This is particularly the case for Freeview (which represents 47% of all TV viewing<sup>36</sup>) and Freesat, where the number of channels per page ranges between five and nine. We understand similar challenges occur on Sky and Virgin Media boxes. It is unclear how Ofcom's proposals are intended to apply to the millions of devices in people's homes. With as few as five channels per page on some devices, to achieve compliance in all cases could require eleven PSB services (BBC One, BBC Two, ITV/STV, C4, C5, BBC Four, BBC Alba, BBC Scotland, S4C, BBC Scotland and local TV) to be included within the first 15 slots of general entertainment menus. This outcome appears disproportionate.

We suggest a more practical and proportionate approach is adopted, such as a specific slot 'floor' below which services may not be listed (e.g. 'must be listed no lower than slot 25').

If Ofcom decides to persist with a focus on pages then it will need to clarify how such rules apply in relation to services with a range of channels per page. Were Ofcom to require compliance on all devices, we would suggest that inclusion within the first five pages rather than first three would be more appropriate. Such an approach would arguably deliver a similar degree of benefit for these specialist services whilst ensuring Ofcom has chosen "*...the least intrusive means of achieving [its] objectives...*"<sup>37</sup> as it is committed to doing.

A similar approach might apply to the launch of new services. If a compliant slot is unavailable, new channels could be offered the highest available slot at launch and promoted over time.

As set out above, regardless of the approach Ofcom ultimately decides to adopt, if it wishes to proceed with such changes it should consult on a full assessment of both the incremental public value created by its proposals and the likely impact on the market. Currently its proposals are disproportionate.

Q10) Do you agree with our proposals to ensure prominence for either the SD or HD version of BBC channels rather than both?

Q11) Do you agree with our proposals to allow broadcasters to swap HD simulcast variants of their SD designated channels, such that those HD variants could occupy the slots which the SD channels would be entitled to?

There are a number of considerations in relation to the SD/HD swapping issue. These include the extent to which there are legacy SD receivers/TVs still being used at scale, and the ability of the channel/platform to deal with expensive and complex regionality requirements.

In addition, ITV offers HD variants of its services on a purely commercial basis, which is an important revenue stream for PSB channel operators. While HD take-up is increasing, we

<sup>36</sup> [http://www.digitaluk.co.uk/policy/research\\_and\\_reports/digital\\_uk\\_update\\_2018/facts\\_and\\_stats](http://www.digitaluk.co.uk/policy/research_and_reports/digital_uk_update_2018/facts_and_stats)

<sup>37</sup> Ofcom, Better Policy Making. [https://www.ofcom.org.uk/data/assets/pdf\\_file/0029/45596/condoc.pdf](https://www.ofcom.org.uk/data/assets/pdf_file/0029/45596/condoc.pdf)

are nonetheless likely to be operating in a mixed economy for some time. It therefore makes sense for a degree of pragmatism to be taken in relation to the application of prominence rules where platforms and PSBs are in agreement about which PSB service should be given prominence.

However, it is important that such pragmatism does not undermine over time the absolute, legally enshrined prominence afforded to the SD channels. If platforms wish to agree with the PSB to swap the HD with the SD version this should be negotiated and not mandated.

Q12) Do you agree with our proposal to provide a 12 month transition period once the Code is finalised?

Some period of time is clearly needed, following the publication of Ofcom's revised EPG Code, for EPG providers to implement the required changes. Specifically, EPG providers will need to:

- a) Revise their EPG Policies (in consultation with industry);
- b) Deal with any possible legal challenges;
- c) Communicate forthcoming changes to viewers; and
- d) Implement changes to channel listings (as required by their revised Policies).

Given Ofcom is not mandating specific slots for each PSB services on each platform, a degree of discretion is left with EPG providers. Ofcom is therefore right to consider an extended time period for the implementation of the requirements of its new Code. This will allow channel and EPG operators time to consider what form revised policies might take, what form of channel reordering (or, indeed, EPG restructuring more broadly, such as genre changes or regionalisation) would be required as a result, and the potential to mitigate the impact of this on their platforms and third party services as best they can. Sufficient time should be given to allow EPG providers to explore options that are both compliant with Ofcom's Code and in line with consumer expectations.

However, 12 months is not a sufficient amount of time to do this. We know, for instance, that reorganisations on DTT have taken 18 months to two years in the past. At most, Ofcom should specify a backstop of two years to complete any changes.

However, we believe a better approach would be for Ofcom to allow compliance to be delivered over time via a 'right to promotion' for any PSB services in non-compliant slots (as is the case with DUK's current policy) as and when higher slots become vacant. This would achieve the same objectives over time but without the disruption for viewers and the market that would result from a forced reshuffle. If Ofcom requires services to be 'bumped' to accommodate PSB services then it should be explicit about this – and assess the impact of such a requirement fully.

Q13) Do you think that the prominence regime should be extended to ensure EPGs themselves can be easily found?

Yes. It is critical that PSB services are prominent within UIs as a whole, as our detailed proposals above make clear.

Q14) Do you agree with the broad range of factors for consideration we have identified? Are there other factors that policy makers should consider?

ITV agrees broadly with the factors for consideration as set out by Ofcom. We have followed these in developing our detailed proposals for a reformed regime as set out above.

#### What degree of prominence is desirable and what metrics should define prominence?

ITV would urge caution in seeking to develop a regime based on “metrics [that] define prominence” as Ofcom suggests. It is difficult to be too prescriptive about what ‘significant prominence’ should look like. It is therefore desirable that the regime avoids being unduly restrictive in this sense.

A reliance on simplistic universal metrics such as ‘clicks’, whilst appearing superficially attractive at first glance, risks a regime that is compliant in letter but misses the much wider and subtler influence of UI design on content discovery and user behaviour.

Instead we propose above a regime that defines the outcomes to be delivered and places the onus on user interface operators to set out how such outcomes will be delivered in the context of their own services.

UI operators should be open with consumers and industry about how they decide which content to include in which areas of their UI, and how they choose to promote it. This should include not only decisions about PSB prominence but also any commercial arrangements (e.g. paid-for prominence), editorial decisions, and any data / algorithmic approaches taken. Such transparency is important in relation to all scheduling and promotion, whether PSB or non-PSB content and services.

#### What types of content should benefit from prominence?

As set out above, we believe significant prominence should be required for all PSB linear services and associated on-demand services provided by one of more PSBs. The Secretary of State should maintain (and have the power to vary by Order) a list of these ‘in-scope services’. We expand on this further in response to question 16 below.

#### What platforms, services or devices should be captured?

The regime should cover those who exercise editorial control of all user interfaces (UIs) on all major platforms, devices and services in the UK to consume TV or TV-like content. The Secretary of State should have the power to vary this definition by Order. In the event of dispute about whether a UI is in-scope, Ofcom should determine.

This would ensure that established, regulated platforms (such as Sky and Virgin Media) would remain within scope, but that major players currently outside of scope (such as Amazon’s Firestick and Samsung’s smart TVs) would be brought within scope.

Standalone content services (such as Netflix) carrying only their own content or that acquired from others would remain out of scope for now.

#### What elements of navigation interfaces should be included?

The law should place a requirement on Ofcom to define ‘significant prominence’ within its guidance, and require such guidance to include (but not limited to):

- Which UI functions in-scope services should be prominent within, including (but not limited to) all those areas of UIs:
  - *Positioned by the UI provider as central to the user experience:* This will vary by UI as different providers emphasise different functionality, but is generally likely to include homepages, linear EPGs; VOD player landing pages; search and recommendations; or
  - *Used by a substantial number of people to access TV or TV-like content:* It is possible that areas of a UI are not prominently positioned but nonetheless have significant appeal to consumers<sup>38</sup>. Such functions are likely to include linear EPGs and VOD player landing pages.
- *The degree of prominence to be provided,* including (but not limited to):
  - Where services are discoverable in their entirety (e.g. VOD app landing pages), in-scope services are easily discoverable and quick to access; and
  - Where individual pieces of content are discoverable as a result of editorial decisions and/or algorithmic curation, a substantial amount of such content should be immediately visible and attributable to the relevant PSB, and quick to access. The individual content displayed should be chosen by the relevant PSBs from the total catalogue of their in-scope services.

Q15) Do you agree with the principles we have set out? Are there other principles that should be considered?

ITV agrees that basing the regime on a set of enduring principles is sensible. However, we are concerned that Ofcom’s principles are somewhat too limited and negative in nature. As a result, they risk diluting the regime and offering UI providers a method to avoid ensuring appropriate prominence for PSB services. We have suggested above a broader set of overarching outcomes and principles which should be introduced through legislation and developed further through regulation.

We are concerned by Ofcom’s characterisation of the ‘promotion of programmes based purely on personal preferences’ as somehow akin to ‘active consumer choice’. There are broadly only two categories into which consumer behavior falls:

1. *A precise and unambiguous choice:* where a consumer knows exactly what they are looking for and makes a specific request (or follows a pre-determined series of actions in their UI which they know will deliver the programme they want)
2. *All other search and browsing behaviour:* the more normal approach in a world of potentially overwhelming choice, browsing by channel type, brand, content genre or terms such as ‘something entertaining’.

The clarity of search required for category 1 to apply is rare. Even a search such as Sherlock Holmes could legitimately encompass the latest series of *Sherlock* on BBC One, catch up on

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<sup>38</sup> For example, linear EPGs remain a popular way to access programmes yet a platform might choose to make the EPG much less prominent

BBC iPlayer, repeats of a previous series on another linear channel, *Elementary* on Sky, or a number of films potentially available live, in box sets or in online stores.

It is category 2 that constitutes that vast majority of content discovery. And it is this on which modern UIs are focused – intending to remove doubt or ambiguity, to present ‘choice’ but in a manner which is in fact heavily guided and curated.

In those limited instances where a consumer does legitimately search for something unambiguously returning a single result, that search should not be undermined either by PSB prominence or platform choices.

But in reality, the distinction is likely to be less clear cut. For instance, other programmes will be suggested alongside the searched-for result or legitimate results may be available from both PSB and non-PSB providers.

‘Personal preferences’ is a potentially broad definition. This could cover, for instance, a ‘preference’ for drama, for a particular sports team, or for programmes starring a certain actor. Serving recommendations or programme results in relation to these preferences will still require a high degree of intervention and choice (whether editorial or algorithmic) by the UI provider.

Inherent within the very existence of a prominence regime is the idea that a reliance on consumer preferences only will not deliver the intended policy results. The regime needs to allow for both consumer and citizen needs to be met and balanced. As such, consumer preference is an unhelpful principle against which to judge prominence and offers scope for UI providers to ignore the intent of the regime.

Transparency is an important consideration. But it is unclear to ITV why it is only the PSBs – and associated search results – that should be made transparent. UI providers should need to be transparent about why any given search result is served, whether due to prominence rules, a commercial deal with a global content service provider, or data-driven analytics. Such transparency does not necessarily need to appear on-screen, but could instead be provided within the policies of UI providers. This would allow for due scrutiny of prominence decisions without unduly negatively impacting on either the consumer experience or, in the case of Ofcom’s suggestion, the reputation of PSB.

Q16) Do you think that the prominence regime should be extended to ensure PSB Players can be easily found?
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We support the extension of the regime beyond linear services: it is in line with consumer behaviour, technological changes, and evolving market norms. It would support the continued effectiveness of the PSB system in meeting the goals set for it by Parliament – and be in line with the direction of travel indicated by Ofcom in its recent statement on the future of PSB.

Prominence has traditionally attached to individual licenced linear services, packaged and controlled by the PSBs. It is also straightforward to identify the standalone VOD services provided by PSBs (whether individually or, potentially, in partnership). It is these services, packaged and controlled by the PSBs, clearly and appropriately branded, that should be granted appropriate prominence throughout UIs. Those on demand services contain most if not all of the PSB content broadcast so their inclusion within the prominence regime is a



logical extension of the current regime as consumption habits change. The bulk of the impact will be increased PSB delivery as the majority of viewing on ITV Hub is to content first shown on the linear PSB service. Such an approach is more straightforward than either brand prominence or individual programme prominence.

This will require technical support for non-linear services. Just as UIs are currently required to carry PSB linear services in full – including not only the individual programmes but also the full schedule of programmes as broadcast, the adverts within and between programmes, subtitles, audio description, red button functionality, regionalisation etc – so we would expect the same to apply in the non-linear space. The ITV Hub service, for instance, includes the prevention of ad-skipping, full Hub functionality, dynamic ad insertion, and control of end user data. This should be the default position for platforms and is key to the future sustainability of PSB.

Ofcom is concerned that audiences are confused about the different regulatory systems for linear versus VOD content, and the potential for extending VOD prominence to the non-linear space to make this worse. ITV views this as an exaggerated problem: PSBs are highly responsible, with the vast majority of content having previously been carried on linear services. The issue that needs addressing is surely that entirely unregulated video services are appearing on our TV screens. Ofcom's recent statements on internet regulation are to be applauded in this context. The boundary is blurring faster than ever and will continue to do so regardless of whether PSB's are granted non-linear prominence.

Q17) Do you think that the prominence regime should be extended to ensure PSB content can be easily found via recommendations and / or search? If so, what key parameters would you set for this aspect of the regime?

As set out in answer to question 14, we believe caution should be exercised in seeking to too-tightly define what prominence means across the board. Instead, the onus should be on UI providers to determine what prominence means in their particular circumstance. To the extent to which search and recommendation functions are integral parts of the UI experience, then PSB content and services should be prominent within them.

Q18) Do you think that the prominence regime should be extended to platforms and devices not currently captured by the EPG prominence regime? If so, how do you think the regime could be extended and who should be captured?

Q19) Do you think that the prominence regime should be extended to online services? If so, who should be captured?

As set out in our suggested principles above, we agree that the prominence requirements should apply to all major user interfaces. Such a regime should be technologically neutral and, subject to any scale thresholds, UIs should be caught regardless of the device they are carried on (whether TVs, streaming boxes or devices, mobiles, tablets etc) and how they are delivered (i.e. DTT, satellite, cable, IP).

In the event that a consumer has access to multiple UIs (e.g. a smart TV or the Firestick plugged into it), there is no need to 'choose' which is the responsible party, as Ofcom suggests. Both are UI operators, both are competing to control content discovery, both are

providing access to PSB services, and both fall within the definition of a UI, and so both should provide prominence within those elements of their products within their control. To the extent to which they share control, the onus should be on such providers to agree a shared solution.

The current definition of UI excludes standalone services offering only their own content or content acquired commercially under license (e.g. Netflix). We believe that such an outcome is acceptable for now, although the Secretary of State should be given powers to vary the definition of UI by Order should market developments make the proposed framework ineffective.

To the extent that social media services develop to focus on the discovery and distribution of TV and/or TV-like content, and meet the thresholds for regulation we have suggested, they would clearly come into scope sooner rather than later.

Away from the current Ofcom consultation, which is focused on TV and TV-like content services and platforms, there is a different debate to be had about the prominence of reliable news on social media and other internet platforms in an era of fake news and filter bubbles. This is a critical debate for the future which may be addressed in the Cairncross Review. However, it is separate from the current debate about TV content.



## Ofcom's EPG prominence consultation

### Joint PSB position paper

#### Establishing a new framework for prominence

The PSBs continue to strongly support the principle of prominence for linear PSB television channels and welcome Ofcom's review of the extent to which this is delivered. But globalisation is fundamentally changing the media landscape. Technological change is facilitating intense global competition. Global online platforms and global TV distributors are playing an ever-increasing role in content distribution and discovery, attempting to disintermediate UK players. To address this growing threat, the critical priority on which the PSBs are agreed is to update legislation to modernise the current prominence regime by extending it beyond linear television and linear EPGs.

We believe the most effective legislative updates will not be based on trying to predict what future technologies for finding and accessing content will look like. Instead, key outcomes should be enshrined in legislation, and include a right to significant prominence for PSBs. Specifically, this should include:

- *Significant prominence for all PSB linear services and associated on-demand services provided by a PSB (or several PSBs):* The Secretary of State should maintain (and have the power to vary by Order) a list of these 'in-scope services'.
- *Significant prominence on all major user interfaces:* the regime should cover those who exercise editorial control of all user interfaces (UIs) on all major platforms, devices and services in the UK to consume TV or TV-like content. The Secretary of State should have the power to vary this definition by Order. In the event of dispute about whether a UI is in-scope, Ofcom should determine.<sup>1</sup>

The law should place a requirement on Ofcom to define 'significant prominence' within its guidance. It should also require Ofcom's guidance to specify:

- *Which UI functions in-scope services should be prominent within,* including (but not limited to) all those areas of UIs:
  - *Positioned by the UI provider as central to the user experience:* This will vary by UI as different providers emphasise different functionality, but is generally likely to include homepages, linear EPGs; VOD player landing pages; search and recommendations; or
  - *Used by a substantial number of people to access TV or TV-like content:* It is possible that areas of a UI are not prominently positioned but nonetheless have significant appeal to consumers<sup>2</sup>. Such functions are likely to include linear EPGs and VOD player landing pages.

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<sup>1</sup> In considering what constitutes a 'major platform' Ofcom should have the discretion to take into account a range of factors as it sees appropriate, potentially including the number of users, the volume of viewing delivered, its importance to certain demographics, or its place in the wider market.

<sup>2</sup> For example, linear EPGs remain a popular way to access programmes yet a platform might choose to make the EPG much less prominent

- *The degree of prominence to be provided, including (but not limited to):*
  - Where services are discoverable in their entirety (e.g. VOD app landing pages), in-scope services are easily discoverable and quick to access; and
  - Where individual pieces of content are discoverable as a result of editorial decisions and/or algorithmic curation, a substantial amount of such content should be immediately visible and attributable to the relevant PSB, and quick to access. The individual content displayed should be chosen by the relevant PSBs from the total catalogue of their in-scope services.

In putting in place its guidance, Ofcom should be required to have regard to:

- The need to deliver consumer benefit: High quality UK PSB content remains popular with UK audiences, and remains the bulk of content consumed despite the growth in choice. The prominence intervention should ensure that this popular content is not marginalised by global operators with an incentive to dilute consumer appetite for UK content over time and/or deliver global content deals and arrangements.
- The need to deliver citizen benefit: it is important that UI and content providers are able to continue to innovate to meet the demands their consumers. Taking account of consumer expectations is a part of this. But it is equally important that the citizen interest is served, for instance by ensuring a wide range of content from the PSBs is promoted, so ensuring people are encouraged to watch content that delivers the purposes and characteristics of PSB that they might not ordinarily have chosen. Where such interests appear to be in tension, the citizen benefit should take precedence.
- The need for prominence to be free and non-contingent: The degree of prominence offered by EPG operators should not be made contingent on other factors (e.g. prominence should not be reduced unless VOD rights are granted) or require payment by PSBs.
- The importance of ensuring sufficient transparency: UI operators should be open with consumers and industry about how they decide which content to include in which areas of their UI, and how they choose to promote it. This should include not only decisions about PSB prominence but also any commercial arrangements (e.g. paid-for prominence), editorial decisions, and any data / algorithmic approaches taken. Such transparency is important in relation to all scheduling and promotion, whether PSB or non-PSB content and services.
- The right of consumers to personalise: PSB prominence should not be enforced above audiences' own direct actions (e.g. viewers should be free to set their own favourites menu or rearrange the order of apps on a page). Nor should prominence override requests for specific programme assets with a single possible outcome (e.g. 'show me episode 2, series 3 of...'). But in search with any ambiguity, where more than one outcome may be presented or served to consumers, prominence rules should apply.

Such a regime can be implemented in a way that is both proportionate and effective, potentially functioning in a broadly similar manner to the way it does today (with some enhancements). Currently, the legislation is enabling. It delegates power to the Secretary of

State to set the channels within scope and enables Ofcom to decide how to apply the code. We believe the legislation should be updated to reflect developments in the market:

- Government: should retain enabling legislation, setting in law the required outcomes and giving the Secretary of State powers (after consulting Ofcom) to amend which services are in scope and the criteria by which user interfaces are assessed to be in scope so that the regime can be updated more easily as and when technology and audience needs and expectations change;
- UI providers: should be given the space to design products that work for consumers and foster competition, but given clarity as they do so on the minimum expectations of PSB prominence that those products should deliver. The regime should amend the existing requirement from publishing an EPG Policy to publishing a UI policy. Policies should be required to set out how UI providers have taken account of the views of the providers of 'in-scope services' and Ofcom; and
- Ofcom: should continue to hold responsibility for updating the prominence code, giving guidance as to practices to be followed, as it does today with the linear EPG code. It should determine whether user interfaces are in scope where there is disagreement. It should have a backstop role in compliance, taking firm action as necessary if either policies or outcomes do not comply with its code or guidance. Consideration should be given to the merits of requiring Ofcom to conduct reviews of the effectiveness of the intervention, perhaps every 3-5 years. It should continue its role in relation to FRND for UI relationships beyond prominence.