

Digital UK – Response to 18 October 2016 Consultation

Executive Summary

We simply cannot accept Option A under this consultation. Option A would:

1. have an extremely negative effect on our business model, leading to declining revenues, following a consistent decline in revenues since our first move in 2009. [REDACTED]
2. result in Digital UK going directly against its own objectives, as well as against the LCN Policy;
3. perhaps most importantly, for all viewers of Freeview in the UK, would create significant consumer protection issues – which completely goes against one of Digital UK’s reasons for selecting Option A in the first place; and
4. would directly contradict the outcome of a decision made in 2012 and does not appear to properly consider the consumer research conducted by IPSOS – in particular it seems to pick and choose between the answers given to the research questions, directly prejudicing Adult channels in the process (e.g., not listening to a request to move Radio up the listings, but focusing purely on a request to keep Adult and Children’s channels separate).

The decision is therefore arbitrary, capricious, benefits your joint venture members, is not at all FRND and appears to unduly prejudice the Adult channels, just as we have been prejudiced in previous consultations. As a result, Option B is the only option that is satisfactory.

1. Do you believe that Option A would be a suitable new LCN listing structure for the DTT platform?

No, we do not believe that this would be a suitable listing structure for the following reasons:

The decision-making process leading to Option A goes against Digital UK’s own objectives and the LCN Policy.

[REDACTED] this move would make Freeview the only platform in the world, which we are aware of, where television content is below Text or Interactive services. Digital UK’s objectives include making “*it easy for viewers and listeners to discover content through simple navigation*”, and also to “*give channel providers the opportunity to reach viewers and listeners*”. If Adult services are moved in line with Option A, these objectives will not be fulfilled. Adult services will be positioned after all the other televisual content. Individuals who browse the LCN would hardly expect, via “*simple navigation*” to have to browse through the Text channels, streamed services and IP services before other TV channels are reached. Furthermore, placing the Adult channels right at the end of the list most certainly doesn’t give us “*the opportunity to reach viewers and listeners*”. Our content will not be able to be easily discovered “*through simple navigation*” and we would not be given “*the opportunity to reach viewers and listeners*”. Therefore, this move goes directly against your objectives in almost every way possible and it would not be at all FRND to make such a move.

Furthermore, the LCN Policy aims to “*minimise disruption to consumers and channel providers by providing reasonable certainty*”. In our opinion, moving the Adult channels to the end of the TV channels disrupts the Adult channels considerably – as you acknowledge on page 22 of the consultation by stating “*Option A requires Adult channels to move further away from their current position, and indeed away from other DTT-delivered video channels*”. In addition, given that the Adult channels have been moved twice in the last four years (see further our comments on this below), we would argue that a further move creates undue uncertainty for both us and our audience. Such a move would cause us to lose a significant amount of revenue as a result of being placed at the end of the list and away from all other DTT-delivered video channels and therefore would directly contravene the LCN Policy by causing us such significant disruption. [REDACTED]

[REDACTED]

Option A would create significant consumer protection risks, outlined as a reason for selecting Option A in the first place.

First, and as a general comment, we would note that if the move under Option A is suggested for consumer protection reasons, that there are a number of General Entertainment channels which of themselves would create more concern in relation to consumer protection issues than the Adult channels, for example “HORROR”, shown free to air on LCN 70 without any restrictions. This channel recently showed an unclassified version of “I spit on your grave” – which, according to OFCOM “*Chronicles the sexual torture and subsequent revenge of the principal character Jennifer Hills*” – in essence the lead character is raped in the early part of the film and seeks revenge on her rapists. The Horror Channel was found in breach of the Code.¹

Second, and more specifically in relation to this proposed move, Option A would have significant consumer protection issues in positioning the Adult channels right next to Radio 1. Radio 1’s target audience is stated as being for “15-29 year olds and it should also provide some programming for younger teenagers”. This would, therefore, create a much greater risk of children stumbling across the Adult channels under Option A (because Radio 1 and the Children’s channels have a certain number of the same audience members), as compared to Option B where Adult is buffered between News and Text/MHEG/IP (with different audience members). Indeed, in recent research commissioned by the BBC Trust² in March 2015 the BBC stated that it wanted Radio 1 to “*continue to focus on serving a young audience*”. Furthermore “*it is evident that the station has a clear focus on serving young people...*”. In addition, “*It is listened to by 27% of 10-14 year olds each week*”. This seems an incredibly high figure to put at risk of being one click away from an Adult channel. The BBC even comments that “*we think there may be further opportunities for providing content for younger teenagers*” and therefore it seems that the risk will get even greater in the future.

Furthermore, the Children’s channels have expanded in number (and, indeed, are expected to further increase) so there is actually a greater distance between the most commonly watched public service Children’s channels and the Adult genre with the current positioning/that stated under Option B. This is even more so when the News channels are added into this assessment (which create a buffer between the Children’s channels and the Adult channels in any event). As Digital UK acknowledges, most children are not awake when Adult channels are being broadcast and therefore to unduly prejudice our position as a result of the incredibly small percentage of the population that may (i) be watching the Children’s channels at that time; and (ii) then happen to flick through the channels at this time and accidentally stumble on the Adult channels is not a fair position to take. It seems to us that there is a far greater risk of consumer protection issues under Option A than under Option B.

Option A goes against your own previous consultation outcomes, in particular it suggests a repositioning of the Adult channels that was previously rejected in 2012.

The Adult channel move contemplated by Option A is completely unprecedented, and was decided against in 2012. Indeed, in your 2012 consultation (where a similar move to the Adult genre was mooted to behind Text and MHEG), you noted that “*the great majority of viewers who do not have*

¹https://www.ofcom.org.uk/data/assets/pdf_file/0031/88708/Issue_312_of_Ofcoms_Broadcast_and_On_Demand_Bulletin.pdf

² http://downloads.bbc.co.uk/bbctrust/assets/files/pdf/our_work/music_radio/music_radio.pdf

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connected equipment will have to scroll through an increasing number of LCN's which access only an MHEG slate, leading to what we consider will be a poor consumer experience for those unable to receive the internet delivered services". Whilst we understand that based on your research (which we have further questions on, as set out below) MHEG and Text services are set to decrease, the same logic still stands. This is because of the increase in the IP services.

As you acknowledge *"The proportion of DTT receivers capable of receiving IP-delivered services has grown significantly since our last review, and continues to grow...our working estimate is that just under one third of DTT primary receivers were capable of receiving IP services, via multicast and/or via MHEG-ICS"*. However, at the same time, you note that *"during our review horizon period, a sizeable number of DTT receivers will remain incapable of receiving channels delivered by IP"*. Therefore, the same problem remains as in 2012 - *"the great majority of viewers who do not have connected equipment will have to scroll through an increasing number of LCN's which...we consider will be a poor consumer experience for those unable to receive the internet delivered services"*. This is particularly so because, based on (acknowledged) research that most individuals scroll through the EPG to reach channels, we will therefore lose out significantly on viewers as a result of this poor consumer experience.

In addition, under Option A there are a greater number of LCNs allocated to Text and MHEG (5 extra Text channels and 15 extra MHEG channels) than under Option B (which preserves the status quo). Therefore, under Option A (where such channels appear before the Adult channels), users would have to scroll through more channels to reach Adult, as opposed to a scenario under Option B where Adult comes before these channels but where scrolling would happen by 20 less channels even if a viewer did have to scroll – this seems totally illogical, unreasonable and not at all FRND. It also goes directly against your policy by not giving us *"the opportunity to reach viewers and listeners"* (as noted above).

We therefore do not understand why this move is being mooted again now if it was rejected in 2012 and the same underlying logic behind rejecting the move in 2012 is still in place. Unless good reasons can be given for this it seems a totally non-FRND decision that has been made completely arbitrarily and prejudicially against the Adult channels.

The IPSOS Connect research results have not been adhered to and the research questions are flawed in their approach.

We also note that the results of the IPSOS Connect research do not appear to have been properly taken into account:

- a) The IPSOS Connect research states that the most common way that viewers select what to watch is flicking through the channels – 84% of people do this, closely followed by other similar methods. Why has Digital UK decided to unduly prejudice Adult channels by moving them to the end of the listings if Digital UK knows that this is how Adult channels would commonly be found? Furthermore, even if Digital UK can argue that viewers don't scroll through the EPG, (because, for example, 79% of people type in the channel number), Option A will still affect the Adult genre because viewers will not be able to find the Adult genre channels simply by keying in the LCN (because such channels will have moved c.400 LCNs under the proposal set out in Option A), and as a result viewers are likely to scroll through the EPG to find the Adult section as an alternative. Therefore, if this section is placed after all other DTT listings, the question remains as to whether viewers will actually be able to find the Adult channels they want and hence we will lose out on viewers as a result.
- b) The research also states that viewers rely on the EPG more as channel numbers grow and that young people use it more significantly than older people. Therefore, this problem is only going to get worse. Digital UK acknowledges that the reason for these LCN changes is that channel

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numbers are expanding, as this expansion occurs and viewers therefore rely increasingly on the EPG, Adult services are likely to lose more and more viewers as a result under Option A because we will be in a position below all the other DTT channels and viewers would have to scroll through even more of the EPG to reach the Adult channels. Again, this move would therefore go directly against Digital UK's own policy to "*give channel providers the opportunity to reach viewers and listeners*" and also go against this research.

- c) According to the IPSOS Connect research, 71% of individuals acknowledge that they want the channels in an order "*everyone is familiar with*". If Digital UK changes the Adult positioning, nearly $\frac{3}{4}$ of the UK population will thus be impacted. As stated above, we are not aware of any other TV provider worldwide that places Adult channels behind the Text and MHEG/IP services. This move would directly contradict the "*familiar*" positions, impacting 71% of people.
- d) Viewer preferences seem to have been ignored in certain instances - there is a clear preference from viewers to rank Radio ahead of Interactive and Adult channels but no suggestion has been made in this consultation to move the Radio channels. As we note further below, it appears that Adult channels are being unduly prejudiced.
- e) The definition of "Adult" used in the research unfairly prejudices the type of channels that we have on offer, and the question about channel order is based on an opinion for "*everyone in society*" which may well be different to individual viewer preferences. It almost seems that the question is intending to prejudice an individual's viewpoint by mentioning how "*society*" would view this vs. their personal preference. There is a difference to how an individual may want the channels to be ordered for society's sake vs. their own preference. It is also clear from Digital UK's "Adult" definition that it includes transactional sex chat channels. However, in the survey, "Adult" was defined as: "*Adult refers to material that contains images and/or language of a strong sexual nature which is for the primary purpose of sexual arousal or stimulation*". The full Digital UK definition of Adult should have been presented to those individuals being surveyed in order to ensure that a genuine response was given by such individuals. It is quite likely otherwise that such individuals would not have expected what we consider to be teleshopping channels to be deemed to fall within the "Adult" genre and hence their response to the research questions would have been flawed from the outset.
- f) The whole DTT listing should have been presented to viewers rather than simply selecting the seven "genres" that Digital UK selected. Were viewers presented with a definition for "Interactive" TV? Asking viewers to list seven genres in preferential order can hardly be the same as viewers being asked to view the EPG in the two formats which Digital UK is proposing. It seems that Digital UK has taken this research and made it fit the option it prefers, rather than proposing the two options to viewers to gauge their views. Whilst viewers want a separation between Children's and Adult channels (and we understand that) the complete channel listing was not presented to them. It cannot be deduced from the evidence presented that the Adult channels should move as significantly as Option A suggests. 71% of people still want the channels to be in an order everyone is familiar with and Option A would directly go against this.
- g) In addition, one reason for Option A highlighted under consumer protection, is that some platforms which carry IP-delivered Children's services are in the 300-599 LCN range and hence "*viewers might scroll past Adult services in order to find IP-delivered Children's services*". We do not understand why this is when, on page 14 of your consultation, you note that for the MHEG channels, the Adult and Children's services are, "*for consumer protection*

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purposes...allocated an LCN within their relevant content genre". How come the same position would not be taken for any Adult and Children's channels in the 300-599 range? Of course, if this is the case (which we do not understand why it wouldn't be), viewers wouldn't scroll past the Adult services as all Children's channels would be together, IP delivered or not and this consumer protection point is therefore somewhat moot.

[REDACTED]

You are unduly prejudicing the Adult channels, and have done so in each and every consultation over the past few years.

A key reason for not moving the News genre to second place was that it would conflict with viewers' preferences for a familiar order and would cause significant disruption to viewers – exactly the same argument could be made for the Adult genre move. Viewers will not be expecting the Adult genre to be at the end of the TV listings. This decision therefore unfairly prejudices the Adult channels vs. News in not making a move for News channels but still considering it for the Adult channels. Whilst we acknowledge the consumer protection measures that need to be in place and hence affect the decision to move the News channels, we would also argue that another channel genre could be moved to plug the gap between Children's channels and Adult, particularly because, as noted above, Option A in moving the Adult channels creates new consumer protection issues far greater than those raised under Option B. We do not understand why it is always the Adult genre that is subject to the greatest number of LCN moves. This is particularly so when, as noted above, the IPSOS Connect research seems to suggest that viewers would like the Radio genre to be at a lower LCN number but no suggestion is made as to moving these Radio channels.

The Adult channels have been moved first in April 2012 and then in October 2012. [REDACTED]

By far and away the most drastic move followed the publication in July 2012 of DMOL's Statement on reorganisation of the DTT LCN listing and on changes to DMOL's LCN policy ("**the July 2012 Statement**"). A consultation document was published in March 2012 and DMOL's conclusions were announced by way of the July 2012 Statement. In relation to the proposals with respect to the Adult genre, the conclusions were as follows

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“DMOL recognises that this move and change in LCNs for the genre may have economic impacts on some Adult services. However, having weighed up the arguments for leaving the Adult genre in its previous or its temporary LCN position, we consider that the change of LCNs is required for consumer protection reasons given the growth anticipated in the other television genres.”

[REDACTED]

The fact is that as the number of channels on the Freeview platform have increased since it was launched in 2005, and in particular since the analogue terrestrial transmission signal was switched as part of DSO, the audience numbers per channel, and therefore the revenue that can be generated by advertising or monetising audience participation has declined. This decline has been most dramatic for those channels, such as Adult channels, that are at the high end of the LCN spectrum, which are now much further away from the main PSB channels. Moving the Adult channels to a position behind Text, MHEG and IP will cause such a dramatic decline that we are likely to be put out of business [REDACTED].

[REDACTED]. Regardless of consumer views on the ability to access Adult TV, removing us from a free-to-air market will have an impact on consumers who will be forced to pay (via a Sky subscription) for such content. Indeed, as Sky is one of your joint venture members one could argue that this would indirectly benefit them in potentially moving viewers to their platform.

In addition, it seems that the impact on Adult channels has not been fairly assessed - viewer figures have been reviewed for the Children’s and News’ channels following their moves in 2014, but not for any other channels moved in 2012, why not? The Adult services have been moved a number of times (as discussed above) and yet, as far as we are aware, no similar investigations into Adult viewer figures following any of these moves has taken place (except for those that we have conducted ourselves). Is this because Adult services are not of benefit to your joint venture members, whereas Children and News services are? We would welcome the reasons as to why this research has not been carried out before such a move is made as this is a key point which surely would affect the outcome of Option A vs. Option B. In the absence of such research, it seems that you are unduly prejudiced against Adult channels in favour of freeing up space in other areas. This is because, in addition to expenditure that must have been incurred when carrying out a review of the Children’s and News’ channels viewing figures (which is of benefit to BBC, Channel 4, ITV and Sky), freeing up LCN space for Children’s and News’ channels when these channels don’t currently occupy all the LCN space allotted to them seems completely geared to benefiting these joint venture members and prejudicing Adult channels in the process.

Finally, we note with interest that the comparison table on page 22 of the consultation puts the Adult channels in the position that they would be in were Option A successful. Is this intentional? It seems unduly presumptuous to order them in this way prior to the consultation finishing and may unduly prejudice individuals who are responding to the consultation by suggesting that this is where the Adult channels currently reside when, in fact, they currently sit at much lower LCNs.

Ultimately, we do not understand why it is always the Adult channels which are said to have to move – and we believe we are unfairly prejudiced in each and every consultation that has taken place. If this move takes place now, as contemplated under Option A, the Adult channels will never be able to moved back up the EPG (as people would undoubtedly object to Adult being moved back up to lower LCNs) so, even if we were able to survive, we would be irredeemably impaired for the future on Freeview.

2. Do you believe that Option B would be a suitable new LCN listing structure for the DTT platform?

Whilst we do not think any movement of the LCN listing should occur, we are in agreement with this move as compared to the move outlined for Option A. Whilst not ideal, this at least retains the Adult genre's position in the LCN, minimising the disruption to our channels and aligning with viewer's expectations.

3. Do you have a preference for one option over the other?

For the reasons stated above, we would greatly prefer Option B over Option A. We believe that Option A will have an extremely detrimental effect on our viewing figures, would not be FRND, and would go against the LCN Policy and Digital UK's own objectives. In addition, all these reasons are foreshadowed by the huge consumer protection risks put in place by moving Adult next to Radio 1. We simply cannot accept such a move.

4. Do you have any other comments on Digital UK's proposed changes to the LCN listing?

As you are aware, we have undergone a number of recent channel moves in the past few years and it has never been clear to us when channel moves will take place. As stated in our responses to previous consultations, each time our position has moved, we have lost traffic, revenue and business generally.

Whilst we accept that there may be expansion to the LCN listing, the idea that channels are completely re-positioned to a new "block" within the LCN and without clear, identifiable reasons or a commercial justification for doing so is not at all FRND and, for the reasons identified in (1) above, goes completely against Digital UK's own objectives and the LCN Policy. We feel that the Adult channels are increasingly marginalised as compared to other marginal channels and that this unduly prejudices us within an already tough market.

We are also concerned about the references to several other consultations which make take place within 2017. We would like to obtain an undertaking that these consultations will not involve the repositioning of the Adult channels by the "back-door". We note that you state "*We have sought to conduct in-the-round LCN Policy reviews every three to four years...In the interest of striking a balance between adapting to changing market conditions and providing reasonable certainty to stakeholders, the proposals set out in this consultation are intended to cover a similar time horizon.*". Please confirm, therefore, that this means that no further repositioning of the Adult channels will occur until, at the earliest, 2020.

5. Do you agree with Digital UK's proposed approach to the timing of any changes?

Provided that the time stated allows enough time for consideration of any appeal, and that, if an appeal is ongoing, a channel move is not made, then yes, in principle it does appear that you are allowing enough time prior to any channel moves taking place.

6. Do you agree with Digital UK's proposals regarding minimum broadcast hours?

As this does not apply to Adult channels (and that is the core nature of our business), we do not have any objections to this proposal. However, this is based on this proposal not extending to Adult channels because, as you note, we are already restricted by law and do not need further restrictions artificially placed on us by broadcasters.

7. Do you agree with Digital UK's proposed new launch process and timings?

We have no objections in principle with this launch process and timings.

8. Do you agree with Digital UK’s proposed approach to LCN sharing?

We have no objections in principle.

9. Do you agree with Digital UK’s definition of ‘common control’?

We have no objections in principle, the definition proposed seems sensible.

10. Do you agree with Digital UK’s proposal regarding the ‘public service rule’?

This appears an acceptable and fair way to allocate vacant channels. However, we reserve our right to comment if and when a further, more detailed, consultation is launched in summer 2017.

11. Do you agree with Digital UK’s proposal regarding the ‘associated channels rule’?

This appears an acceptable and fair way to allocate vacant channels. However, we reserve our right to comment if and when a further, more detailed, consultation is launched in summer 2017.

12. We would welcome stakeholder’s views on the options for Stage 3 of the vacated LCN rules.

We would note that neither option seems ideal as: (i) as you state, there is a risk that with a “beauty contest” subjective criteria will come into play; and (ii) an auction process seems to unduly prejudice against the smaller, less funded channels who may not be able to afford to bid for an LCN place. We would prefer option (i), but would note that detailed criteria would need to be put in place to ensure that there is not arbitrary selection. We would be happy to comment further if and when a further, more detailed, consultation is launched in summer 2017.

13. Do you agree with Digital UK’s proposed timeline for channels to complete an LCN move following an allocation under the vacated channel rules?

Yes. These timings seem sensible.

14. Do you agree with Digital UK’s proposals to amend the rules around channel providers reordering channels within their channel portfolio?

The proposals seem to promote flexibility and so appear sensible.

15. We welcome stakeholder views on whether public service channels should be permitted to reorder the channels they control within a genre.

Whilst we understand the need for applying flexibility to the BBC and other public service channels, we would stress that where such a change does have an impact on other channels’ positions that those channels have the opportunity to provide feedback on any proposed moves and that the public service channel is not automatically given the right to move in such an instance. As noted in our responses to the consultation above, we believe that the reordering process generally favours the joint venture members.

16. Do you agree with Digital UK’s proposals around channels changing their name and/or content?

These proposals seem sensible.

17. Do you agree with Digital UK’s proposal to retain but re-word the “shuffle-up” rule?

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This seems acceptable, provided that the channels being offered the right to move have the right to a genuine consultation.

18. Do you agree with Digital UK's proposals around the treatment of streamed services?

We have no objections to this, but if the rules on the Adult streamed services change we should be appropriately consulted with. We agree that other channels should be treated in a similar fashion and, indeed, would argue that this should extend to any genre, and not just Children's e.g., News.

19. Do you have any comments on the proposed new wording and structure of the LCN Policy, aside from issues you have mentioned in response to other consultation questions?

No other comments except to state that paragraph 1.12, whilst being drafted in this way because no doubt Digital UK does not wish to be bound by previous decisions as precedent, should be amended to state that previous decisions will be taken into account if facts and circumstances are similar to allow Digital UK to do so. To completely ignore previous decisions when Digital UK does, for example, take into account previous research results where relevant, seems unfair.

We would also raise concerns around paragraph 8.4 and the fact that Digital UK "*reserves its right to conduct an expedited consultation process where there are deemed to be, or might be, consumer protection issues*". We would ask, as an Adult genre provider where consumer protection is often raised as an issue, that this is documented properly so that consumer protection is not put forward as a reason to speed up a consultation process without good, evidenced, grounds for doing so.