

## **The regulation of conditional access**

Setting of regulatory conditions

Explanatory statement and formal notification pursuant to  
Section 48 (1) of the Communications Act 2003

24 July 2003

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## Summary

S.1 A new package of EU Directives regarding electronic communications networks and services was implemented in the UK on 25 July 2003. The government has implemented four of those Directives through the Communications Act which received royal assent on 17 July 2003. Oftel has been conducting a major programme of work to ensure that implementation will happen to this deadline. The June 2003 consultation document *The future regulation of conditional access* formed part of that programme of work and considered how the Directives should be applied in relation to conditional access. The setting of conditional access conditions in the notification at Annex A of this document continues that work. The new conditions will take effect on 25 July 2003.

S.2 Conditional access services scramble (or encrypt) television signals so that only those who are entitled to see them can do so. The new Directives oblige conditional access providers who come within the scope of the Directives to supply access to conditional access services on fair, reasonable and non-discriminatory terms. In the consultation document, Oftel proposed applying the relevant conditions to suppliers who come within the scope of the Directives. At present in the UK, the only supplier of conditional access services is Sky Subscribers Services Limited. In the notification accompanying this document, Oftel sets conditions on Sky Subscribers Services Limited to provide conditional access services on fair, reasonable and non-discriminatory terms in accordance with sections 45(5), 73(5) and 75(2) of the Act.

S.3 Oftel has published guidelines under the existing conditional access regime on how it currently interprets a requirement to supply on fair, reasonable and non-discriminatory terms (*Terms of supply of conditional access: Oftel guidelines*, October 2002). Those guidelines will continue to have effect in relation to the new conditional access conditions to the extent that they are relevant, until such time as new guidelines are issued at a later date.

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## Chapter 1

### Introduction

#### A new regulatory regime

1.1 A new regulatory framework for electronic communications networks and services entered into force in the UK on 25 July 2003. The basis for the new regulatory framework is five new EU Communications Directives as follows:

- the Framework Directive (Directive 2002/21/EC);
- the Access Directive (Directive 2002/19/EC);
- the Authorisation Directive (Directive 2002/20/EC);
- the Universal Service Directive and (Directive 2002/22/EC); and
- the Privacy Directive (Directive 2002/58/EC).

1.2 The new regulatory framework is designed to create harmonised regulation across Europe and aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.

1.3 The Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across all the new directives. As its name suggests, it is the directive that establishes the new framework. Article 8 of the Framework Directive sets out three key policy objectives which have been taken into account in this document. The Authorisation Directive establishes a new system whereby any person will be generally authorised to provide electronic communications services and/or networks without prior approval. The general authorisation replaces the existing licensing regime. The Universal Service Directive defines a basic set of services that must be provided to end-users. The Access and Interconnection Directive sets out the terms on which providers may access each others' networks and services with a view to providing publicly available electronic communications services. These four Directives were required to be implemented in the UK as well as in other EU Member States on 25 July 2003. The fifth Directive on Privacy establishes users' rights with regard to the privacy of their communications. This Directive was adopted slightly later than the other four Directives and has an implementation date of 31 October 2003.

1.4 In the UK, the four main EC Communications Directives have been implemented through the new Communications Act 2003 ('the Act') which received royal assent on 17 July 2003. The Act provides for functions, powers and duties to be carried by Ofcom which include, inter alia, functions, powers and duties flowing from the four EC Communications Directives referred to above. Certain existing functions are also transferred to Ofcom. However, Ofcom is not expected to assume full functions under the Act until later this year. Accordingly, transitional arrangements are in place as described below.

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1.5 The Communications Act 2003 (Commencement Order No. 1) Order 2003 has been made under sections 411 and 408 of the Act. This order commences certain provisions of the Act for the purpose of enabling the networks and services functions under those provisions to be carried out by the Director until such time as those functions are transferred back to Ofcom later in the year. Accordingly, references in those provisions of the Act are, for the present time, to be read as references to the Director. For these reasons, the Director is empowered to set these conditions under the Act and the new conditional access conditions and this document refer to the Director rather than Ofcom.

1.6 In anticipation of the commencement of the Act (and the implementation of the new EC Communications Directives), the Director has been anticipating some of Ofcom's functions under the Act which relate to networks and service functions. Schedule 18, paragraph 2 of the Act has been commenced and provides that any anticipatory work carried out by the Director prior to 25 July 2003 is to have effect as if the provisions in the Act had been in force earlier.

### **The consultation process**

1.7 On 5 June 2003, the Director issued a consultation document discussing options for the regulation of conditional access services under the new Directives (*The future regulation of conditional access*, see [www.ofcom.gov.uk/publications/eu\\_directives/2003/ca0603.htm](http://www.ofcom.gov.uk/publications/eu_directives/2003/ca0603.htm)). The Access Directive requires that conditional access services be provided on fair, reasonable and non-discriminatory terms. Comments were invited to the consultation document by 7 July. All respondents save one asked that their responses be treated as confidential.

1.8 The consultation document was issued in anticipation of entry into force of the Act. As noted above, Schedule 18, paragraph 2 of the Act has been commenced which provides that the Director's notification issued in anticipation of entry into force of section 48(2) of the Act with the consultation document on 5 June 2003 is to have effect as if it section 48(2) had been in force at that time. Accordingly, the Director is permitted to set conditions by the further notification accompanying this document under section 48(1) of the Act, with or without modification. The Director has made slight modifications to the conditions upon which he consulted as detailed in this document.

1.9 Having carefully considered the responses to the consultation document, in this statement the Director sets new access related conditions under section 45(5) of the Act – in particular, conditional access conditions in accordance with sections 73(5) and 75(2) of the Act. The details of the conditions to be applied are provided in Chapter 3.

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## Summary of proposals

1.10 The Director sets the following conditions for Sky Subscribers Services Limited ('SSSL'):

- requirement to provide conditional access services;
- requirement to ensure that conditional access services have the necessary technical capability for cost effective transcontrol;
- requirement to keep separate financial accounts;
- requirements to ensure that holders of industrial property rights to conditional access products and systems ensure that this is done on fair, reasonable and non-discriminatory terms;
- obligation to not unduly discriminate in the provision of conditional access services; and
- obligation to publish charges, terms and conditions.

These conditions accord with the conditions required to be set under Annex 1, Part 1 of the Access Directive as required by section 75(2) of the Act.

## Conditional access services

1.11 Conditional access services encrypt (or scramble) broadcast signals so that only those who are entitled to receive them can do so. The new Directives oblige conditional access providers who come within the scope of the Directives to supply access to conditional access services on fair, reasonable and non-discriminatory terms.

## Proposals in the consultation document for regulation

1.12 The new Directives, as noted above, require that conditional access services be provided on fair, reasonable and non-discriminatory terms. The consultation document proposed that this be effected through imposing the following conditions on BSkyB Group plc:

- requirement to provide conditional access services;
  - requirement to ensure that conditional access services have the necessary technical capability for cost effective transcontrol;
  - requirement to keep separate financial accounts;
  - requirements to ensure that holders of industrial property rights to conditional access products and systems ensure that this is done on fair, reasonable and non-discriminatory terms;
  - obligation to not unduly discriminate in the provision of conditional access services; and
  - obligation to publish charges, terms and conditions.
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1.13 These conditions make limited changes to the regulation of conditional access under the Advanced Television Standards Directive, which conditions they closely mirror.

1.14 Further to the consultation document, Oftel has made amendments to certain elements of the conditions which are described in paragraphs 2.10-2.25 and 3.9-3.19.

### **The regulation of other technical broadcasting services**

1.15 The consultation document outlined the process for developing the future regulation of other aspects of technical broadcasting services which Oftel presently regulates.

These are:

- interactive functionality in digital television receivers ('access control' services)
- the provision of electronic programme guide listings ('EPGs'), and
- the regulation of broadcasting transmission services.

1.16 Access control and EPGs may be regulated through the imposition of Access Related conditions under sections 73(2) and 74(2) of the Act. Oftel will be consulting on this regulation as a separate exercise at a later stage.

1.17 To avoid a gap in the regulation of these important services pending the imposition of obligations under the new regime (if appropriate), Oftel has put in place continuation notices to ensure that the existing regulatory measures continue until the new regime has been put in place. Oftel has continued provisions in the conditional access class licence in relation to EPGs only. Oftel has also continued provisions of the access control class licence. The continuation notices may be found at [www.oftel.gov.uk/publications/eu\\_directives/cont\\_notices/index.htm](http://www.oftel.gov.uk/publications/eu_directives/cont_notices/index.htm).

1.18 Although under the Advanced Television Standards Directive, Oftel regulated EPGs as part of conditional access, under the new Directives these are separated from each other, and hence neither the consultation document nor this statement discuss EPG regulation. EPG services are subject to their own conditions under the continuation notice regime and will be also when the new regulations are in place.

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## Chapter 2

### Proposals for regulation of conditional access

2.1 The introduction of the new Directives and the Act means that the existing class licence regulating the provision of conditional access services would no longer remain in force. Instead, the new regulatory regime required that conditions are imposed on specified providers of conditional access services who come within the scope of the regulation set out in the Access Directive. Under section 45 of the Communications Act, the Director has the power to set different types of conditions. Section 45(5) provides that an access related condition is one that is authorised by section 73. Section 73(5) provides that an access related condition may be one which is set under section 75(2). Section 75(2) of the Act states that it must be ensured “that access related conditions are applied to every person who provides a conditional access system in relation to a protected programme service”. The same section also provides that it must be ensured “that those conditions make all such provision as required by the provision contained from time to time in Part I of Annex I of the Access Directive”.

2.2 Conditional access systems are defined in Article 2(f) of the Framework Directive as “any technical measure and/or arrangement whereby access to a protected radio or television broadcasting service in intelligible form is made conditional upon subscription or other form of prior individual authorisation”. In the UK, this has been implemented and defined in section 75(3) of the Act to mean “any system, facility, arrangements or technical measure under or by means of which access to programme services requires – (a) a subscription to the service or to a service that includes that service; or (b) an authorisation to view it, or listen to it, on a particular occasion”. A “Protected Programme Service” is defined in the same section 75(3) as “a programme service the programmes included in which cannot be viewed or listened to in an intelligible form except by the use of a conditional access system”.

2.3 Section 46(6)(b) provides that access related conditions (of which conditional access conditions are a particular type) may be applied to a particular person who provides an electronic communications network or makes associated facilities available. This means that the conditions outlined in this statement must be applied to particular persons rather than classes of persons as has been the case under the current regime.

2.4 As set out above, Article 6 and Annex I, Part 1 of the Access Directive set out the obligations that must be applied to conditional access providers. Annex I, Part I(b) of the Access Directive states that “all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to offer to all broadcasters on a fair, reasonable and non-discriminatory basis compatible with

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Community competition law, technical services enabling the broadcasters digitally-transmitted services to be received by viewers or listeners."

2.5 The consultation document outlined Oftel's view that in order to come within the scope of this requirement, the operator of the conditional access service must both "provide access services" and broadcasters must also "depend on" these access services to reach potential viewers or listeners. The definition of conditional access services included in the conditions attached at annex A reflects these points. The definition states that conditional access services means services, "by means of which, access to Protected Programme Services may be controlled so that only those viewers who are authorised to receive such services do so". This definition includes the broadcast of Protected Programme Services in encrypted form, and also the broadcast of Protected Programme Services which protection delimits the geographical reception by viewers of those Protected Programme Services depending on where they live – so that, for example, they receive the correct regional variant of a channel.

## **Application to different broadcasting platforms**

### ***Digital satellite platform***

2.6 The operator of conditional access services on the digital satellite platform is Sky Subscribers Services Ltd (SSSL). This operator currently provides conditional access services to a number of broadcasters including public service broadcasters (PSBs). It also provides conditional access services to British Sky Broadcasting Limited (BSkyB), which provides a pay TV service to subscribers.

2.7 Most broadcasters on the digital satellite platform reach viewers through inclusion in a Sky pay TV package. These broadcasters do not need to purchase technical services such as encryption from SSSL as any necessary arrangements are made by BSkyB, as package provider. Some broadcasters, however, supply their programming to digital satellite viewers outside a BSkyB pay TV package (since it is possible to receive digital satellite broadcasts without simultaneously subscribing to a BSkyB pay TV package). Where such broadcasters encrypt their programming (eg because of contractual agreements with the holders of programming rights or because they are supplying programming which is differentiated by region) they 'depend on' conditional access services supplied by the relevant provider in order to reach their designated digital satellite viewers. Oftel therefore considers that SSSL – the provider of conditional access services on the digital satellite platform – comes within the scope of the relevant obligations set out in Annex I of the Access Directive.

**Annex A to this statement sets out the conditions which Oftel is proposing to apply to SSSL in relation to the provision of conditional access services.**

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### ***Digital cable and Kingston***

2.8 In the UK, cable companies (NTL and Telewest) do not provide network access to third party broadcasters in a form which would allow those broadcasters to enter into direct contractual arrangements for programme supply with cable network customers. In order to reach cable viewers, broadcasters provide their channels to the cable companies who then include them in a TV package provided to their customers. Broadcasters on digital cable networks are not therefore reliant upon conditional access in order to reach cable viewers and listeners. As a result, Ofcom does not consider that broadcasters 'depend on' the conditional access services of the cable operator. The same also applies to the pay TV service operated by Kingston Communications, which operates using digital subscriber line (DSL) technology. **Ofcom is not proposing to impose regulatory obligations to supply conditional access upon Kingston or the cable companies.**

### ***Digital terrestrial television***

2.9 Prior to being placed in receivership, ITV Digital was a regulated supplier of conditional access services. The digital terrestrial television platform has since been relaunched as a free-to-air television platform, branded as Freeview. **The broadcasters on Freeview do not use conditional access services; hence there will be no regulation imposed in respect of conditional access on the digital terrestrial platform.**

### **Comments received during the consultation**

2.10 Many respondents welcomed the continuity represented by the proposals.

### ***Related regulation***

2.11 The consultation document outlined that the new conditional access regulation would be applied to a different timescale to that of access control and electronic programme guide (EPG) services. Several respondents sought reassurance that regulation would continue to apply to access control and EPG services and that there would not be a hiatus in regulation. As continuation notices are being applied to access control and EPG services until new regulation has been consulted upon, respondents may be reassured that there will not be a hiatus in regulation.

### ***Regulation of other platform providers***

2.12 One respondent queried the regulation of other platform providers, particularly Kingston. Ofcom has sought to clarify this matter and noted that Kingston have not ever been a licensee for the conditional access class licence, and that they only offer conditional access services bundled with transmission

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services (analogous to the cable companies as discussed at paragraph 2.8). Therefore, as Kingston is not providing conditional access services such that it should be subject to this regulation.

### ***Who is regulated***

2.13 There were a range of views regarding the regulation of BSkyB Group plc, as opposed to Sky Subscribers Services Limited (as at present). OfTel has considered this matter further and has decided to apply the regulation to Sky Subscribers Services Limited rather than BSkyB Group plc as proposed in the consultation document. SSSL is the corporate entity operating in this market and is therefore the appropriate named provider for this regulation. Some respondents considered that there might be advantages to regulating the whole BSkyB Group. The regulation of SSSL (and its subsidiaries and holding company) will enable OfTel to regulate the creations of BSkyB Group plc to the extent that they are caught by the relevant Companies Act definitions.

2.14 Section 46(6) of the Act provides that “particular persons” may be subject to access-related conditions. The Director considers it appropriate to prevent a person to whom an access-related condition is applied (ie the provider) which is part of a group of companies, exploiting the principle of corporate separation. That is to say, the provider should not use another member of its group to carry out activities or to fail to comply with a condition, which would otherwise render the provider in breach of its obligations.

2.15 Accordingly, the Director considers it appropriate that the obligations detailed in this consultation document and draft notification shall apply to SSSL and any SSSL subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

2.16 The Director is of the view that it is appropriate, reasonable and proportionate to define the Provider in this way. It is right that, in principle, the regulated entity should include all of the economic entities that are under the control of the person who is subject to the access-related condition. However, the Director does not intend to use this definition as a means of increasing the Provider’s obligations in an inappropriate manner. Rather, the Director will look to see which persons are operating on the relevant market and whether it is necessary to enforce the access-related obligations in relation to that person by virtue of the fact that it is controlled by the Provider. This definition is intended simply as a mechanism to prevent the Provider from avoiding its regulatory obligations.

2.17 It was submitted to OfTel that clause 29(4) of the Communications Bill (now section 32(4) of the Act) seeks to establish how regulatory obligations should apply to companies that are controlled by other companies. Section 32(4)

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provides that a provider who controls the electronic communications network or service cannot avoid his regulatory obligations on the basis that he has employed or engaged other persons to provide the network or service. The Director is of the view that this is a separate issue from that which the Director's definition of Provider intends to address. Section 32(4) does not address the situation where the Provider seeks to use other members of its corporate group to circumvent regulation. As explained above, the Director considers that this is an important issue and the proposed definition of Provider is a necessary safeguard.

2.18 Concern was also expressed that regulation was being applied to a specific person rather than to all providers as is the present case with the class licence. However, the Act is clear that regulation must be imposed on a specified person as noted above.

### **Condition 1**

2.19 Respondents raised the issue of the change in emphasis in condition 1, where the regulated provider is now required to offer conditional access services in response to reasonable requests. *Oftel is not of the view that this represents an extension of regulation beyond that currently. Oftel is of the view that this condition should not require the provider to offer services that were not technically feasible, and that where novel services were requested, that the provider would have the scope in prices and timings to reflect the novelty and risk of a new service.* Conversely, the condition would continue to offer broadcasters the scope to propose innovative services and to pursue via a commercial negotiation their availability.

### **Access guidelines**

2.20 Respondents sought clarity regarding the reference in the consultation document to the Oftel document *Imposing access obligations under the new EU Directives*, September 2002. As this document expressly states that conditional access falls outside its scope, respondents were unclear as to why Oftel was proposing that the approach outlined in that document would be used as a basis for developing the approach to network access for conditional access. Oftel is not seeking to extend the SMP access obligations to conditional access, but continues to be of the view that the approach in that document is a useful step to developing a consistent approach. This does not fetter the Director's discretion with regard to individual issues that may arise with regard to conditional access.

### **Condition 3**

2.21 With regard to the accounting separation regulation, several respondents proposed that Oftel should go much further regarding the disclosure of contracts and business plans than as is presently envisaged. The actual detail of what information would be needed under condition 3 will be agreed between Oftel and

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the regulated party by 24 December, but, for example to require disclosure of all conditional access contracts to Oftel would be very onerous regulation in the absence of a complaint. Respondents also suggested that accounting information requested by Oftel should be disclosed. Oftel considers that this would have major difficulties with regard to commercial confidentiality and would also be, again, very onerous.

2.22 It was suggested by one respondent that the Regulatory Auditor should owe a duty of care to broadcasters entering into conditional access agreements rather than to the regulator. This would be a major exception to normal practice and probably difficult to enforce and therefore has not been incorporated.

2.23 Clarification was sought on some aspects of condition 3. As these did not involve significant changes to the regulation proposed, Oftel has accepted this point and made clarifying amendments.

#### ***Condition 4***

2.24 Some respondents raised whether condition 4 (industrial property rights) is necessary. This condition is required by the Access Directive (annex 1 part I) and *therefore needs to be covered*.

#### ***References to electronic communications networks***

2.25 Conditions 4 and 6 both make reference to electronic communications networks. Oftel has considered the technical aspects of what constitutes an ECN in this case and the appropriateness of the use of the term in these conditions. Oftel has reconsidered this for the purposes of clarification and further to technical advice, Oftel now proposes that the use of the term “electronic communications network” should be replaced by “conditional access system” and conditions 4 and 6 have been amended in this respect.

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## Chapter 3

### Regulatory remedies

#### The framework for imposing regulatory remedies

3.1 The fundamental obligations which must be applied to a provider of conditional access systems in relation to a protected programme service are specified in Annex I Part 1 of the Access Directive. These conditions must be applied to particular persons.

3.2 The Director has considered all of the Community requirements detailed in section 4 of the Act and considers that the proposed conditions (set out in Annex A to this document) satisfy such requirements. In particular, Oftel has given careful consideration to the provisions of sections 4(3), (7) and (8) of the Act. Each condition which Oftel proposes to impose on the Provider must also pass the test set out in section 47(2) of the Act, namely that each condition must be:

- objectively justifiable in relation to the networks, services or facilities to which it relates;
- not such as to discriminate unduly against particular persons or a particular description of persons;
- proportionate to what the condition is intended to achieve; and
- in relation to what it is intended to achieve, transparent.

#### Aims of the conditions being proposed

3.3 The Access Directive noted that “Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television.” Conditional access is a vital component for broadcasters to operate their businesses on digital television. For example, it is necessary for broadcasters to encrypt their broadcasts if their programming is offered on subscription or pay per view. Without access to the technology to enable this, it would be difficult for broadcasters to take full advantage of digital television and radio, to the detriment of choice for end users and to the detriment of variety and innovation in the industry.

3.4 Requiring providers of conditional access services to offer those services on fair reasonable and non-discriminatory terms means that broadcasters are able to acquire those services as necessary to delivery their programming to end users. However, as a framework it also offers scope and flexibility for the provider to tailor their prices, terms and conditions to the particular needs of broadcasters, and to differentiate in pricing where such differentiation may be objectively justified.

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## Conclusions on the conditions

3.5 The fundamental obligations which must to be applied to a provider of conditional access systems in relation to a protected programme service are specified in Annex I Part 1 of the Access Directive. As set out in paragraphs 2.13-2.18 above, conditional access conditions must be applied to particular persons. In the consultation document, Oftel proposed to apply this regulation to British Sky Broadcasting Group Plc (including any of its subsidiaries or holding companies, or any subsidiary of such holding companies) only. However, as noted at 2.15 above, Oftel has now reviewed this proposal to apply the new conditions to Sky Subscribers Services Limited including any of its subsidiaries or holding companies, or any subsidiary of such holding companies. This approach offers similar rigour and would not permit the regulated provider to exploit the principle of corporate separation.

3.6 In the consultation document, Oftel gave careful consideration to the provisions of sections 4(3), (7) and (8) and the tests now set out in section 47(2) of the Act as set out above.

3.7 The Director has considered whether the conditions contained in Annex A satisfy all of the tests set out in section 47(2) of the Communications Act.

The Director considers that:

- They are objectively justifiable, in that they relate to the need to ensure that competition develops to the benefit of consumers. Specifically, they will ensure that end users (in this case, viewers and listeners) are provided with optimum choice through a wide availability of programme services.
  - They do not discriminate against Sky Subscribers Services Limited, because SSSL has been found to be the only operator that currently provides conditional access systems in relation to protected programme services.
  - The Director considers that they are also proportionate. They apply only to the necessary minimum set of suppliers of conditional access systems in relation to protected programme services. And they represent the minimum set of conditions necessary to implement the requirements of the Directive, in particular that services should be made available on fair and reasonable terms while providing a reasonable degree of clarity and regulatory certainty to all the relevant market players. The conditions ensure that any regulated supplier retains the flexibility to come to a wide range of pricing and supply arrangements for conditional access, which is important in a varied and still developing industry. They are also formulated in such a way that they do not impose an unreasonable burden on such suppliers. Such suppliers will be entitled to set charges designed to recover reasonably and efficiently incurred incremental and common
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costs of supply, including in particular a reasonable rate of return on capital employed.

- The conditions are set out in a transparent form in annex A of this document, so that the Director considers that they meet the requirement of transparency set out in the Act. The conditions aim to maximise accessibility for end-users to radio and television broadcasts, and to broadcasting channels and services. They also increase the transparency of the supply of conditional access, as they provide for its supply to be on fair terms and with those terms to be published.

3.8 The obligations set out in Annex 1 of the Access Directive closely mirror the regulation for conditional access systems set out in the 1995 Advanced Television Standards Directive. Article 4 of that Directive was implemented in the UK through the Conditional Access class licence. In developing proposals for the new regulation of conditional access, overall, the Director's intention was that the conditions should achieve broadly the same effect as the existing Conditional Access class licence. Those existing conditions which the Director considers to be redundant, for example because they duplicate other conditions, have been removed – resulting in a substantial reduction in the number of conditions. Other conditions have been retained. In some cases, existing conditions have been reformulated in order to fit in more naturally with the construction of the new regime or to be more closely analogous with the formulation of conditions in other markets. Where the purpose of conditions in different markets is, in essence, the same, it aids the understanding of market players and promotes legal certainty if the formulation of the conditions is as similar as possible.

3.9 **Condition 1** implements, in part, the obligation contained within the first bullet point of Part I(b) of Annex 1 to the Access Directive to provide conditional access services on fair and reasonable terms where a broadcaster reasonably requests such services in writing. In interpreting Condition 1 (and in particular in assessing whether a particular request is “reasonable”), the Director proposes to follow the approach described in his document: *Imposing access obligations under the new EU Directives*, September 2002. Although as noted above at 2.21 this document is not expressly applicable to conditional access, the Director nonetheless considers that it provides a useful basis from which to develop a consistent approach to access issues in relation to conditional access. Under condition 1, in accordance with section 45(10)(a), the Director also has the power to make directions. This power could be used to deal with issues relating to specific forms of access or the particular terms and conditions on which access is provided – for example to clarify whether a particular service being requested is in fact a reasonable request. Conditions 5 and 6 also implement the first bullet point of Part I(b) of Annex 1 to the Access Directive and these are discussed below.

3.10 The condition appears at first to be more widely drafted than condition 1 of the existing class licence. However, the differences are illusory. Under the

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present regime, if a broadcaster requested a conditional access service to which there was no significant technical impediment, for which there would be a reasonable level of demand and which could be supplied at a price which would cover the costs of developing and making the service available, the Director would consider that refusal to supply was a breach of the obligation to supply on fair and reasonable terms. This is precisely in line with condition 1 of the existing Conditional Access class licence and therefore this condition has not been amended in this respect.

3.11 Clarification was sought from respondents regarding whether condition 1 did refer to the provision of conditional access services in relation to protected programme services and it was suggested that those words were added to that condition to make this clear. As condition 1 does cover the provision of conditional access services in relation to the provision of protected programme services, the condition has been amended to make this point explicit.

3.12 **Condition 2** implements the obligation contained within Part I(a) of Annex 1 to the Access Directive to ensure that conditional access systems marketed in the Community are to have the necessary technical capability for cost effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using conditional access systems. This means that, where a protected programme service is initially encrypted using one platform's conditional access service (eg SSSL's for satellite), it will be possible for it to be retransmitted by another platform (such as cable) using its own conditional access system. The wording of the obligations in this condition reflects the wording of the existing condition 2 of the Conditional Access class licence. No amendments have been made to this condition further to the consultation.

3.13 **Condition 3** implements the obligation contained within the second bullet point of Part I(b) of Annex 1 to the Access Directive upon operators to keep separate financial accounts regarding their activities as conditional access providers. Although condition 3 appears to be more detailed than the other conditions, it does not impose a large number of fresh requirements. Instead, the detail provided in this condition will offer greater clarity and an unambiguous breakdown of the Provider's responsibilities compared to the corresponding condition under the old licensing regime. Moreover, condition 3 has been drafted in a more detailed manner in order that it can give effective practical application to the overarching principles set out in the other conditions.

3.14 However, it is worth noting that there are aspects of condition 3 which were not included in the earlier condition 5 under the class licence. In particular, this condition envisages that the Provider shall be required to prepare Accounting Documents for the purpose of condition 3 and produce and deliver them to the Director as soon as reasonably practicable but not later than 24 December 2002. Oftel's intention is that the Provider would then be required to comply with Conditions 3.6 to 3.18 from that same date. Oftel's practical intention is that this

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deadline shall allow the Provider sufficient time in which to organise its accounting practices so as to be able to comply with the condition. From 24 December 2003, the condition envisages that the Provider will be required to comply with the condition and the provisions of any directions issued by the Director from time to time in relation to the format and disclosure of the Accounting Documents. There is reference in condition 3.6 to the provider being required to prepare a financial statement in relation to “any period”. For the purposes of this condition, Oftel envisages that “any period” would be a reasonable period, and likely to be no less than one month.

3.15 Condition 3 also deals with the appointment of a Regulatory Auditor, and provides for that auditor to owe a duty of care to the Director. The Director recognises that discussion of the duty of care owed to Regulators is currently taking place within various accountancy bodies and that the position adopted by that auditor may change if further guidance on this issue is issued by the accountancy profession. However, notwithstanding this ongoing discussion, the Director considers that it is a vital and indispensable requirement of his role that he is able to rely on the veracity and accuracy of regulatory accounts prepared by the appointed Regulatory Auditor. The reason that this is so important is due to the fact that the Director, as economic regulator of conditional access services, is the primary user of those regulatory accounts. As a matter of public policy, it is not appropriate for the Director to enter into a contractual relationship with the Regulatory Auditor in order to ensure that he can rely on the regulatory accounts. Therefore, the Director proposes that the Regulatory Auditor should owe him a duty of care under the provisions of the Contracts (Rights of Third Parties) Act 1999. This proposal is consistent with the view of other UK regulators. Furthermore, it is also consistent with provisions contained within the accounting conditions that Oftel intends to impose upon other operators in the telecommunications industry. Further to the consultation, condition 3 has been amended slightly to make certain elements clearer and more explicit.

3.16 **Condition 4** implements the obligations contained within Part I (c) of Annex 1 to the Access Directive to ensure that when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. The wording of the obligations in this condition reflects that which is used in the existing condition 7 of the Conditional Access class licence. The condition has been amended from that included in the consultation document to clarify that references to connections to an electronic communications network actually mean connections to a conditional access system.

3.17 **Condition 5** imposes an obligation not to discriminate unduly in the provision of conditional access services. The obligation contained within the first bullet point of Part I(b) of Annex 1 to the Access Directive states that conditional access services must be offered to all broadcasters on a non-discriminatory

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basis. However, it is Of tel's understanding that the use of the word "non-discriminatory" in the Annex is not intended to suggest that there can be no differentiation at all. Instead, any differences should be objectively justifiable, for example, by differences in the underlying costs of supplying services to different undertakings. Condition 5 has therefore been conceived to implement the first bullet point of Part I(b) of Annex 1 to the Access Directive to reflect the view that the Directives prohibit discrimination which is undue. The main effect of the condition is that the Provider should not differentiate in such a way so as to have a material adverse effect on competition. This is because the Director considers that it is important to ensure that conditional access services are not provided to third party broadcasters on less favourable terms than those on which SSSL provides services to BSkyB. The Director has already outlined how Of tel might treat undue discrimination in its statement *Imposing access obligations under the new EU Directives*, September 2002. As noted in 2.21 above, this document is not expressly applicable to conditional access. However, as before the Director nonetheless considers that it provides a useful basis from which to develop a consistent approach to undue discrimination in relation to conditional access. No amendments have been made to this condition further to the consultation.

3.18 **Condition 6** imposes an obligation relating to the publication of charges, terms and conditions. This implements, (with conditions 1 and 5) the obligation contained within the first bullet point of Part I(b) of Annex 1 to the Access Directive). Where a conditional access system is provided after 25 July 2003, a copy of the notice containing the charges and terms and conditions should be sent to the Director within 28 days of the conditional access system being provided. In the event that any charges, terms or conditions are amended, a notice of such amendments must be provided to the Director not less than 90 days prior to their introduction. This is a notice period imposed on many markets for services regulated by Of tel. In the Director's view, these notice periods represent the appropriate balance: the Director considers that the publication of charges helps to ensure stability in markets and, without such a notice period, incentives to invest might be undermined and opportunities for market entry may therefore be less likely.

3.19 Publication of charges, terms and conditions also assists both the NRA and broadcasters in judging the state of the market and enables broadcasters to make a judgement as to whether the terms they are offered are likely to be fair, reasonable and non-discriminatory. It is thus a necessary complement to that requirement. The wording of the obligations in this condition – except for those concerned with the 90 day notice period – reflects that which is set out in the existing condition 14 of the Conditional Access class licence. As with condition 4, some consultation respondents found references to an electronic communications network here to be unclear, and therefore condition 6 has been amended to change certain references to electronic communications networks to conditional access systems.

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3.20 Some consultation respondents noted that Ofcom should keep the technological requirements and developments in the digital television arena under review, for example in the area of set top box developments and innovations in other areas such as access control and EPGs. Oftel notes this and expects that up to date knowledge of the market and of innovative approaches will be monitored by Ofcom.

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## **Annex A**

### **NOTIFICATION PURSUANT TO SECTION 48(1) OF THE COMMUNICATIONS ACT 2003**

#### **The setting of access-related conditions under Section 45 of the Communications Act 2003 as authorised by Section 73(5) of the Communications Act 2003**

#### **WHEREAS**

- (A) The Director General of Telecommunications (“the Director”) issued a notification in anticipation of the entry into force of section 48(2) of the Communications Act 2003 (“the Act”) setting out his proposals for the setting of access related conditions (as defined in section 45(5) of the Act) on 5 June 2003 (“the First Notification”);
- (B) A copy of the First Notification was sent to the Secretary of State in accordance with section 50(1)(a) of the Act;
- (C) By virtue of the Communications Act 2003 (Commencement Order No. 1) Order 2003 (“the Commencement Order”) made under sections 411 and 408 of the Act:
- (i) certain provisions of the Act are commenced on 25 July 2003 for the purpose only of enabling the networks and services functions under those provisions to be carried out by the Director;
  - (ii) those provisions of the Act are to have effect as if references to OFCOM were references to the Director; and
  - (iii) Schedule 18, paragraph 2 of the Act is commenced and the Director’s First Notification in anticipation of section 48(2) of the Act coming into force is to have effect as if section 48(2) had come into force before those steps were taken.
- (D) In the First Notification and the accompanying consultation document, the Director invited representations about any of the proposals set out therein by 7 July 2003;
- (E) By virtue of section 48(5) of the Act, the Director may give effect to any proposals set out in the First Notification, with or without modification, where:
- (i) he has considered every representation about the proposals made to him within the period specified in the First Notification; and
  - (ii) he has had regard to every international obligation of the United Kingdom (if any) which has been notified to him for this purpose by the Secretary of State;
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(F) The Director received responses to the First Notification and has considered every such representation made to him in respect of the proposals set out in the First Notification and the accompanying consultation document; and the Secretary of State has not notified the Director of any international obligation of the United Kingdom for this purpose;

(G) In considering whether to set the Conditions set out in this Notification, the Director has complied with all relevant requirements set out in sections 45 to 50 and sections 73 and 75(2) of the Act;

**THEREFORE**

1. The Director in accordance with section 48(1) of the Communications Act 2003 ('the Act') hereby sets pursuant to section 45 the access-related conditions as set out in the Schedule to this Notification to take effect from 25 July 2003.

2. The Director is proposing to set the access-related conditions referred to in paragraph 1 on the Provider (as defined in the Schedule to this Notification) who is particular person in accordance with section 46(6) of the Act who provides a Conditional Access System in relation to a Protected Programme Service.

3. The effect of, and the Director's reasons for setting, the access related conditions referred to in paragraph 1 above are contained in the statement accompanying this Notification.

4. The Director has sent a copy of this Notification to the Secretary of State in accordance with section 50(1)(a) of the Act.

5. Except as otherwise defined in this Notification, words or expressions used shall have the same meaning as in the Act.

**CHRIS KENNY**  
**DIRECTOR OF COMPLIANCE**

A person duly authorised by the Director General of Telecommunications pursuant to paragraph 8 of Schedule 1 to the Telecommunications Act 1984

24 July 2003

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## SCHEDULE

### CONDITIONS APPLICABLE TO PROVIDERS OF CONDITIONAL ACCESS SYSTEMS

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

##### Definitions

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

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

“Accounting Policies” means the manner in which the requirements of the Companies Act 1985 as amended by the Companies Act 1989, the accounting standards and the accounting policies whenever not superseded by the Regulatory Accounting Principles, that would be applied in the preparation of each of the Financial Statements, as produced and delivered to the Director by 24 December 2003 and as amended from time to time in accordance with Condition 3 as the case may be;

“Accounting Separation Activities” means services, facilities or arrangements used directly or indirectly in the course of supplying Conditional Access Services, that are individually identified by the Provider and agreed between the Provider and the Director and/or as directed by the Director from time to time;

“Accounting Separation Attribution” means, in relation to Conditional Access Services, the totality of all apparatus, data, procedures and

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

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

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

"Act" means the Communications Act 2003;

“Attribution Methods” means the practices used to attribute revenue, costs, assets and liabilities to Conditional Access Services, or activities related to Conditional Access Services, as produced and delivered to the Director by 24 December 2003 and as amended from time to time in accordance with Condition 3 as the case may be;

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

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

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"Broadcaster" includes the British Broadcasting Corporation, any person to whom a licence has been granted to provide, deliver or diffuse television services under one or more of the Wireless Telegraphy Act 1949, Cable and Broadcasting Act 1984 (as continued in force by the Broadcasting Act 1990), Broadcasting Act 1990, Broadcasting Act 1996, or any person acting on behalf of such a person;

"Conditional Access Services" means services, facilities or arrangements by means of which access to Protected Programme Services may be controlled so that only those viewers who are authorised to receive such services do so and includes -

- (i) Encryption Services that is to say -
    - (A) any encryption or scrambling of signals for Protected Programme Services; and
    - (B) the conveyance by the Electronic Communications Network of encryption or scrambling information;
  - (ii) Subscriber Authorisation Services that is to say -
    - (A) the actuation or control or the remote actuation or control of decoders; or
    - (B) the initial transmission of messages connected with (ii)(A) above;
  - (iii) Subscriber Management Services, that is to say -
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- (A) the preparation or preparation and supply to viewers of Essential Components; or
- (B) the preparation from viewers orders of instructions for authorisation signals for transmission to decoders,

or both;

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

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

“Director” means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;

"Essential Component" means the smart card or other technological component in electronic or tangible form which is necessary for the reception of authorisation signals and thus to enable customers to view Protected Programme Services in or upon which is mapped the Customer's viewing entitlements for insertion or incorporation into or other interoperation with the decoder;

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“Financial Statement” means any financial statement that is required under Condition 3.10;

"Industrial or Intellectual Property" includes, without prejudice to its generality, patents, designs, know-how and copyright;

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

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

"Product" includes any item which is used for the provision of a Conditional Access Service;

“Provider” means Sky Subscriber Services Limited, whose registered company number is 02340150, and any Sky Subscriber Services Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

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“Regulatory Accounting Principles” means the high level general principles and rules to be followed in meeting the reporting requirements of Condition 3 as produced and delivered to the Director by 24 December 2003 and as amended from time to time in accordance with Condition 3 as the case may be;

“Regulatory Auditor” means the Auditor for the time being appointed by the Provider in accordance with Condition 3 as the case may be;

"Relevant Intellectual Property Right" means any right, which is wholly or partly controlled by the Provider, in Industrial or Intellectual Property or is subject to an agreement, an arrangement or concerted practice to which the Provider is a party;

“Standard Audit Opinion” means an audit opinion in accordance with Condition 3.14 as the case may be; and

“Transfer Charge System Methodology” means methodologies used in deriving and accounting for transfer charges from and to the Provider’s activities as a provider of Conditional Access Services as produced and delivered to the Director by 24 December 2003.

1. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act.
  2. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.
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3. For the purpose of interpreting the conditions set out in Part 2 the headings and titles shall be disregarded.

**PART 2: The Conditions**

**Condition 1 – Requirement to provide Conditional Access Services**

1.1 Where a Broadcaster reasonably requests in writing Conditional Access Services in relation to the provision of Protected Programme Services, the Provider shall provide those Conditional Access Services. The Provider shall also provide such Conditional Access Services in relation to the provision of Protected Programme Services as the Director may from time to time direct.

1.2 The provision of Conditional Access Services in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct.

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

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**Condition 2 – Transcontrol Requirements Imposed On The Provider Of Conditional Access Services**

- 2.1 Where a Provider provides to a Broadcaster any Conditional Access Services in relation to the provision of Protected Programme Services and that Broadcaster's Protected Programme Services are provided to another provider of Electronic Communications Networks for the purpose of retransmission, the Provider shall co-operate with that provider of Electronic Communications Networks, including providing it with any necessary assistance and information, so that other Provider is able to transcontrol and re-transmit the Protected Programme Services cost-effectively using its own Conditional Access System, without incurring unnecessary or unreasonable expense.
- 2.2 Nothing in 2.1 above shall prevent the Provider charging and being paid for the assistance and information so provided.
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**Condition 3 – Obligation To Keep Separate Financial Accounts**

- 3.1 Except in so far as the Director may consent otherwise in writing, the Provider shall keep separate financial accounts regarding its activities as a provider of Conditional Access Services in the manner set out below.
- 3.2 The Director may from time to time make such directions as he considers appropriate with respect to the Provider's obligations to maintain a separation for accounting purposes under this Condition.
- 3.3 The Provider shall comply with any direction the Director may make from time to time under this Condition.
- 3.4 The Provider shall prepare Accounting Documents for the purpose of this Condition and produce and deliver them to the Director as soon as reasonably practicable but not later than 24 December 2003.
- 3.5 The Provider shall comply with Conditions 3.6 to 3.18 from 24 December 2003 as appropriate.
- 3.6 The Provider shall ensure that its accounting and reporting arrangements (including Accounting Separation Systems) are sufficient to enable the Provider, at all times, to be capable of preparing in relation to any period a financial statement in accordance with the Accounting Documents. These accounting and reporting arrangements shall be, in the opinion of the Director, suitable and sufficiently transparent to demonstrate at any, or over, time and in relation to any period that the Provider's charges for Conditional Access Services are, or have been, non discriminatory, fair and reasonable.
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3.7 The Provider shall maintain a separation for accounting purposes of Accounting Separation Activities from other activities, so as to:

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

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

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

3.9 The accounting records referred to in paragraph 3.8 and all associated documentation shall be:

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

3.10 The Provider shall,

- (a) prepare in accordance with the Accounting Documents, which shall be identified in the Financial Statements by reference to their date, the Financial Statements identified in any direction the Director may make from time to time;
  - (b) secure, in accordance with paragraph 3.14 (or, if the Director so consents, paragraph 3.15) the expression of an audit opinion upon the Financial Statements as identified in any direction the Director may make from time to time;
  - (c) deliver to the Director the Financial Statements and any corresponding audit opinion identified for delivery in any direction the Director may make from time to time;
  - (d) publish the Financial Statements and any corresponding audit opinion identified for publication in any direction the Director may make from time to time;
  - (e) ensure that any Financial Statements and any corresponding audit opinion are fit for such purpose, or purposes, if any, as notified by the Director in writing; and
  - (f) deliver to the Director a report detailing any changes in the Accounting Documents, any Process and any other methodology
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which caused any figure presented on any one of the Financial Statements to change by more than 5% from the figure that would have been presented had such a change not been made. Any such report shall include details sufficient to render transparent such changes in accordance with any direction the Director may make from time to time.

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

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

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

(a) amend the Accounting Documents in order to remedy the deficiencies identified by the Director;

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(b) restate the Financial Statements identified by the Director as requiring restatement in accordance with the Accounting Documents which have, where necessary, been amended pursuant to paragraph 3.13(a);

(c) secure in accordance with paragraph 3.14 (or where the Director so consents, 3.15) the expression of an audit opinion on the restated Accounting Separation Financial Statements;

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

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

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

3.16 The Provider shall use its best endeavours to obtain from the Regulatory Auditor any further explanation and clarification of the reports required under Condition 3.14 and/or 3.15 and any other information in respect of the matters which are the subject of those reports as the Director shall reasonably require.

3.17 The Regulatory Auditor that the Provider from time to time appoints shall at all times be satisfactory to the Director having regard to such reasonable matters as the Director considers appropriate. The Provider shall notify the Director in writing of the Auditor appointed to secure compliance with this Condition before

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the Auditor carries out any work for that purpose. The Provider shall notify the Director of any proposed change of Regulatory Auditor 28 days before effect is given to that change.

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

- (a) include an express obligation on the Regulatory Auditor that, in forming and/or expressing any audit opinion pursuant to this Condition, the Regulatory Auditor shall owe a duty of care to the Director (but not directly or indirectly to any other third party) subject only to such qualifications or limitations as are set out by the Regulatory Auditor to the Director in writing and acknowledged by him in writing prior to the expression of any audit opinion pursuant to this Condition; and
- (b) shall give effect to such duty of care by expressly acknowledging the Director's interest pursuant to the Contracts (Rights of Third Parties) Act 1999 and dis-applying any provision, term or condition of the Provider's letter of engagement that could otherwise exclude his interest.

3.19 The Provider shall secure that sufficient checks, controls and reconciliations are performed between figures contained in the Financial Statements and the accounting records to enable the Financial Statements to be audited and an audit opinion expressed upon them in accordance with paragraphs 3.14 (or where the Director so consents, 3.15).

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**Condition 4 – Intellectual Property**

4.1 Where it appears to the Director that any Relevant Intellectual Property Right has been, is being or is likely to be exercised (whether by the Provider or by any other person in pursuance of an agreement, arrangement or concerted practice to which the Provider is a party) so as to prevent:

- (a) any Conditional Access System, Electronic Communications Network, Essential Component which may lawfully be connected to any part of the Conditional Access System, from being so connected either at all or on reasonable charges, terms and conditions; or
- (b) any Conditional Access Service which may lawfully be in association with the Conditional Access System, from being so provided or obtained either at all or on reasonable charges, terms and conditions;

he may direct the Provider in accordance with paragraph 4.2 or 4.3.

4.2 Where the exercise of the Relevant Intellectual Property Right prevents a Product from being made available either at all or on reasonable charges, terms and conditions to the person wishing to make such a connection or to provide or obtain a Conditional Access Service, the Director may direct the Provider to take such steps as are within the power of the Provider and are, in the opinion of the Director, reasonable and necessary in all the circumstances to secure that the Product is made available to that person on charges, terms and conditions acceptable to that person or which (in default of agreement) are, in the opinion of the Director, reasonable to enable such connection to be made or such service to be provided or obtained.

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4.3 Where paragraph 4.1 applies in circumstances other than those described in paragraph 4.2, the Director may direct the Provider to take such steps as are within the power of the Provider and are, in the opinion of the Director, reasonable and necessary in all the circumstances to secure that the person wishing to make such a connection or to provide or obtain such a Conditional Access Service is enabled to make use of the Relevant Intellectual Property Right for the purpose of making the connection or of providing or obtaining the service, upon charges, terms and conditions acceptable to that person or which (in default of agreement) are, in the opinion of the Director, reasonable for such purpose.

4.4 The Provider shall comply with any direction made by the Director pursuant to this Condition.

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**Condition 5 – Requirement not to unduly discriminate**

5.1 The Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with the provision of Conditional Access Services.

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

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**Condition 6 – Publication Of Charges, Terms And Conditions**

6.1 The Provider shall except in so far as the Director may otherwise consent in writing:

(a) publish in the manner and at all times specified in paragraph 6.2(a) a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and condition on which it offers:

(i) to provide each Conditional Access Service, or package of such Services;

(ii) to connect to any part of the Conditional Access System in accordance with an obligation imposed by or under these conditions; or

(iii) to grant permission to connect Electronic Communications Networks to or to provide Conditional Access Services by means of any of the Conditional Access Systems;

and

(b) where it does any of the things mentioned in paragraph 6.1(a)(i) to 6.1(a)(iii), do those things at the charges and on the other terms and conditions so published.

6.2 Publication of the notice shall be effected in the following way:

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(a) where the Provider is providing a Conditional Access System on 25 July 2003, by sending a copy thereof to the Director not later than 25 August 2003; or

(b) where the Provider provides a Conditional Access System after 25 July 2003, by sending a copy thereof to the Director not than later than 28 days after the Provider first provides a Conditional Access System; and

(c) thereafter, 90 days before the date on which any proposal to amend any charge, term or conditions or the method of determining the same is to become effective,

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

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

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

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## **Annex B**

### **Non confidential representations received in response to *The future regulation of conditional access*, 5 June 2003**

- Scottish Advisory Committee on Telecommunications

There were six confidential responses.

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