



Review of ITV Networking Arrangements

Compliance and New Media Rights

Statement

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Section 1

Summary

The requirements upon Ofcom

- 1.1 The ITV Networking Arrangements (the 'NWA') are a set of arrangements between ITV Network Ltd ('ITV Network') and the holders of the 15 regional Channel 3 licences.¹ These arrangements, which currently comprise five main documents, are intended to facilitate the provision of a national television service across the Channel 3 licence regions, which is capable of competing effectively with other television broadcasters in the UK.
- 1.2 Ofcom has a statutory duty to carry out a general review of the NWA from time to time under section 293 of the Communications Act 2003 (the 'Act'). Essentially, such a review is intended to assess whether the arrangements enable the licensees to provide a competitive, regionalised Channel 3 service. Beyond this, we may not approve arrangements if they do not meet certain specified competition tests or are likely to prove prejudicial to the ability of the licensees to comply with their public service or regional programming obligations. Subject to these and other specified considerations, including our principal duty to further the interests of citizens and consumers, we may require the Channel 3 licensees to make modifications to the NWA.

The current review

- 1.3 We issued a consultation document as part of our current NWA review in February 2009. In the consultation, we explained our view that our current approach to sanctions relating to network programming on the regional Channel 3 services needed to be refreshed and described the approach that we intended to apply in future. We also considered whether that would have an impact on the arrangements for network programme compliance. Finally, we examined the arrangements under which ITV Network acquires new media rights on behalf of the licensees collectively.
- 1.4 This statement describes and assesses the responses which we received to our consultation document. It also outlines the conclusions which we have reached and, in some cases, the modifications which we are requiring to the NWA.

Ofcom's sanctions practice

- 1.5 Under the Broadcasting Act 1990 and the Communications Act 2003, we are empowered to sanction all the regional Channel 3 licensees if a programme broadcast across the Channel 3 network is found to breach the Broadcasting Code. It is a condition of each of the regional Channel 3 licences to ensure that the provisions of the Broadcasting Code are observed in the provision of their respective regional Channel 3 services in accordance with section 325 of the Communications Act 2003. Under sections 40 - 42 of the Broadcasting Act 1990, Ofcom is empowered to impose sanctions if it finds that the regional Channel 3 licensee has failed to comply with any condition of its licence. Thus, under the legislative scheme, it is the regional

¹ The 11 regional English and Welsh licenses are currently held by ITV Broadcasting Limited (a wholly owned subsidiary of ITV plc). The two Scottish licenses are held by STV Central Ltd and STV North Ltd, two subsidiaries of STV Group plc. The licences in Northern Ireland and the Channel Islands are held by UTV Ltd and Channel Television Ltd respectively.

Channel 3 licensee that is held responsible for the programmes it broadcasts, not the licensee that carries out compliance in relation to that programme.

- 1.6 Nonetheless, our custom and practice in the past had been to hold only the compliance licensee accountable for Broadcasting Code breaches. However, in the light of a series of recent cases in which viewers have suffered direct financial harm as a result of compliance failures by UK-licensed television broadcasters, including the regional Channel 3 licensees,² our concern has been to ensure that our sanctions practice enabled us to meet our duty to secure adequate protection for members of the public from harm and offence via the codes we create and administer – in this case, the Broadcasting Code. Accordingly, having identified a number of issues with our approach in relation to sanctions for the ITV licensees, we set out a revised approach in our consultation document.
- 1.7 In the light of objections we received from all the regional Channel 3 licensees to the restatement of our sanctions policy without consultation, we decided to reconsider the issue. As the parties directly affected, we invited the licensees to submit any further observations that they wished to make in relation to the proposals. We then considered all the comments we received before reaching our conclusions.
- 1.8 We have concluded that the arguments advanced by the licensees, that we should retain our current practice of sanctioning only the compliance licensee where a networked Channel 3 programme has been found in breach of the Broadcasting Code, do not outweigh our concern that this approach fails to provide sufficient incentives for the licensees to maintain broadcasting standards for the protection of members of the public from the inclusion of offensive and harmful material.
- 1.9 Accordingly, and against the background of direct consumer harm resulting from compliance failures, we consider it is appropriate that we should revise our sanctions practice:
 - 1.9.1 to protect consumers from potential harm;
 - 1.9.2 to ensure that the sanctions regime effectively incentivises all licensees to maintain a high standard of compliance;
 - 1.9.3 to clarify the responsibilities of all regional Channel 3 licensees with regards to compliance; and
 - 1.9.4 to ensure that the financial penalties we impose on the Channel 3 network adequately reflect the seriousness of the Broadcasting Code breach and the consequent consumer harm.
- 1.10 As a result, and in light of the obligation placed on each licensee by the Broadcasting Act (1990) to comply with the terms of its licence or face possible sanction, including the potential of a financial sanction, we may:
 - 1.10.1 depending on the particular facts of the specific breach in question, impose a sanction against all Channel 3 regional licensees that broadcast material in breach of the Broadcasting Code;

² Details of cases considered by Ofcom's Content Sanctions Committee can be found at: http://www.ofcom.org.uk/tv/obb/ocsc_adjud/.

- 1.10.2 in the event that we decide to impose a financial sanction on more than one licensee, consider whether to fine some licensees more significantly than others depending on where culpability for the specific breach lies; and
- 1.10.3 in taking such decisions, which will be based on the facts of the particular case, take specific account of steps taken by non-compliance licensees to ensure that they had minimised the risk of a breach of the Broadcasting Code.

Compliance arrangements

- 1.11 In relation to the compliance arrangements specified in the NWA, we consider, in light of changes to our sanctions practice, that revisions are necessary to remove regulatory sanctions from the scope of the indemnity given by the compliance licensee to the other Channel 3 licensees under the NWA. In the absence of available insurance to back up the indemnity against statutory sanction, there is a risk that in the event of financial sanctions being imposed on all the regional Channel 3 licensees, claims under the indemnity against the compliance licensee could, in the case of one of the smaller licensees, prejudice its ability to meet its public service obligations.
- 1.12 We consider that removing regulatory sanctions from the scope of the indemnity provided by the compliance licensee in the NWA, as outlined in option 2 of the consultation document, eliminates this problem. Instead, the regulatory risk faced by the compliance licensee is unchanged (from the position as currently understood by the licensees) by the change to our sanctions practice while each of the other licensees is incentivised to ensure compliance standards are maintained.
- 1.13 We require the licensees to amend clause 10.9 of the Tripartite Agreement and clause 13.4 of the Network Programme Licence to exclude regulatory sanctions by Ofcom for a breach of the Broadcast Code.

New media rights

- 1.14 In relation to new media rights, we have concluded that the NWA should provide for the following:
 - 1.14.1 ITV Network to acquire on behalf of the licensees primary rights as defined in the Terms of Trade, unless agreed otherwise by ITV Network and the producer. Where ITV Network acquires a bundle of primary rights that is different to the bundle of primary rights defined in the Terms of Trade, ITV Network is to draw this to the attention of the licensees;
 - 1.14.2 ITV Network may acquire additional content rights on behalf of one or more of the licensees if it is requested to do so. Where such a request is made, the other licensees should be offered an opportunity to opt-in to the acquisition. Licensees should be advised of the cost-sharing mechanism that will be applied between participating licensees in advance; and
 - 1.14.3 ITV Network is required to disclose the terms of the acquisition of additional content rights to the participating licensees.
- 1.15 The focus of this review has been on the role of ITV Network in the acquisition of rights on behalf of some or all of the Channel 3 licensees. However, it has become clear from the responses to the consultation that there is a related issue in respect of

the exploitation of rights on a UK-wide basis via third party agreements where those rights are held individually by the licensees. These are complex issues, particularly given the rapid development of new avenues for exploitation. In our view, it is for the licensees to agree between themselves a framework in relation to third party agreements. As a general principle, any restrictions which ITV Network may develop as part of such a framework should be objectively justified, proportionate and non-discriminatory.

- 1.16 We consider the changes to the NWA we are proposing should enhance transparency for licensees as to the rights that are acquired on their behalf by ITV Network.
- 1.17 We do not propose at this stage to prescribe the modifications to the NWA that should be made in order to implement the changes in respect of rights acquisition. However, having regard to the fact that modifications to the NWA arising from previous reviews have still in some cases to be implemented, we will be monitoring closely the licensees' progress in making the changes and signing off agreements. We would remind licensees that failure to have in place approved Networking Arrangements would constitute a breach of their licences. We therefore intend to review progress on the implementation of our recommendations three months from the publication of this statement.

Section 2

Introduction

Background to the Networking Arrangements

- 2.1 Channel 3 is a free-to-air, commercially funded national television broadcast channel made up of 15 regional licensed areas. The 11 regional English and Welsh licenses are currently held by ITV Broadcasting Limited (a wholly owned subsidiary of ITV plc) – hence ITV plc. The two Scottish licenses are held by STV Central Ltd and STV North Ltd, two subsidiaries of STV Group plc ('STV'). The licences in Northern Ireland and the Channel Islands are held by UTV Ltd ('UTV') and Channel Television Ltd ('Channel') respectively. Throughout this document, STV, UTV and Channel are referred to collectively as the 'non-consolidated licensees' ('NCLs').
- 2.2 In accordance with section 290 of the Communications Act 2003 (the 'Act'), the regional Channel 3 licensees have concluded the NWA in order to:
- 2.2.1 provide for programmes made, commissioned or acquired by or on behalf of one or more of the Channel 3 licensees to be available for broadcasting in all the regional Channel 3 services; and
 - 2.2.2 enable Channel 3 services (taken as a whole) to be a nationwide system of services which is able to compete effectively with other television programme services provided in the UK.
- 2.3 Also party to the NWA is ITV Network Ltd ('ITV Network'). ITV Network is a company limited by guarantee, with a membership composed of the regional Channel 3 licensees. It acts as the agent of the licensees in the purchase, commission and administration of a schedule of network programmes (programmes for broadcast across the Channel 3 network) which it provides to each of the licensees for inclusion in its regional Channel 3 service.
- 2.4 The NWA currently comprise five documents:
- 2.4.1 Network Supply Contract ('NSC') – an agreement between ITV Network and each of the regional Channel 3 licensees in relation to the acquisition and supply of network programmes;
 - 2.4.2 Statement of Principles – the principles by which ITV Network carries out its functions on behalf of the regional Channel 3 licensees, including the principle that ITV Network acts in the interests of all the licensees and independently of any production interests of any of them;
 - 2.4.3 Code of Practice – which provides guidance to programme producers on how ITV Network selects and commissions programmes for broadcast on the Channel 3 network and the terms on which such programmes are licensed for broadcast;
 - 2.4.4 Network Programme Licence ('NPL') – a standard form contract for programme commissions from a regional Channel 3 licensee made between ITV Network and the relevant licensee; and

- 2.4.5 Tripartite Commissioning, Production and Compliance Agreement ('TA') – a standard form contract for the commission of a programme from an independent producer made between ITV Network, the independent producer and the regional Channel 3 licensee carrying out compliance.

Ofcom Review of the NWA

- 2.5 Although the NWA were initially introduced under the 1990 Broadcasting Act,³ the Communications Act 2003 (the 'Act') introduced a requirement for periodic reviews of the NWA.⁴ Following a review, we may require the Channel 3 licensees to make modifications to the NWA.
- 2.6 We have a wide discretion as to the matters that we may consider in the course of our review. However, the substance of any modifications that we may propose is regulated by Schedule 11 to the 2003 Act. Specifically, we must be satisfied that the NWA as modified:
- 2.6.1 satisfy the first or second competition test in paragraph 6 to Schedule 11;⁵
 - 2.6.2 are a satisfactory means of enabling regional Channel 3 services to be a nationwide system of services able to compete effectively with other television programme services provided in the UK; and
 - 2.6.3 would not be likely to be prejudicial to the ability of the regional Channel 3 licensees to comply with their public service remits and their regional programming obligations.
- 2.7 In addition, we are required to consider the effect of the arrangements on the ability of the regional Channel 3 licensees to maintain the quality and range of both regional programmes and other programmes contributing to the regional character of the services.
- 2.8 In reviewing the NWA, we are also bound by our general duties in section 3 of the Act, including our principal duty to further the interests of citizens in relation to communication matters and to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 2.9 The provisions of the NWA are also subject to the undertakings given by ITV plc's predecessors Carlton Communications plc and Granada plc to the Secretary of State for Trade and Industry in 2003 following the report of the Competition Commission on the merger of those companies. The undertakings bind ITV plc and any person that it controls, directly or indirectly, "where such person is a Licensee or carries on any activity that involves or is related to or connected with the broadcast or sale of Commercial Airtime".
- 2.10 Of particular relevance in the context of the current review is the provision of the undertaking which ensures that ITV plc does "not make the commissioning or

³ See section 39 of the 1990 Act, available at http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900042_en_1.htm.

⁴ See section 293 of the 2003 Act.

⁵ The first competition test mirrors the wording of the Chapter I prohibition in the Competition Act 1998. The second competition test mirrors the exemption criteria in section 9 of that Act.

broadcasting of a programme conditional on using Carlton and/or Granada for Programme Compliance for that programme".⁶

The current review

- 2.11 In August 2008, we wrote to the regional Channel 3 licensees to invite proposals on the scope of the 2008 review. Licensees responded in a series of submissions during the course of September 2008. We took into account the issues that were put forward in those submissions and, following further correspondence, wrote to the parties in November to confirm the scope of the 2008 review.
- 2.12 The two main issues that we proposed to focus on were:
- 2.12.1 the arrangements for compliance of Channel 3 network programming, and
 - 2.12.2 the arrangements for ensuring transparency in relation to new media rights acquired by ITV Network on behalf of all the licensees.
- 2.13 Our general duties under section 3 of the Act include securing the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services.
- 2.14 In light of this, we have reviewed the compliance arrangements under the NWA in conjunction with a reconsideration of our sanctions practice in relation to a Broadcasting Code breach by a networked Channel 3 programme.
- 2.15 In relation to new media rights, we were keen to ensure transparency for all licensees about the packages of rights obtained by ITV Network on their behalf when programmes are commissioned or acquired. Our view has been that transparency will assist licensees in formulating their plans for the delivery of public service content across a range of platforms in the future.
- 2.16 Following a number of discussions with licensees on these issues, we set out a series of proposals in our consultation document, published in February 2009.⁷
- 2.17 In relation to compliance, we examined four potential options for the NWA to ensure compliance arrangements in the NWA are in line with revisions to our sanctions policy (see below) and invited the views of respondents in considering how to overcome any potential issues. These are discussed in section 4 below.
- 2.18 In relation to new rights issues, we proposed that the NWA are modified to make it clear that rights acquired by ITV Network on behalf of the network as a whole are available for use by all licensees on an equivalent basis. We also considered that all licensees should be informed as to which primary new media rights have been acquired by ITV Network. The views of respondents to these proposals are discussed in section 5 below.

⁶ The full text of the merger undertakings can be found at <http://www.adjudicator-crr.org.uk/undertakings.htm>.

⁷ A copy of the consultation can be found at: http://www.ofcom.org.uk/consult/condocs/itv_network2008/itv_network08.pdf.

Ofcom's sanctions practice in relation to Broadcasting Code breaches

- 2.19 We used our consultation in February 2009 to explain a revised approach to sanctions for breaches of the Broadcasting Code by the regional Channel 3 licensees. We sought to make it clear that each of the Channel 3 licensees which broadcast a programme that breached the Broadcasting Code would be liable for a sanction, as opposed to the compliance licensee alone. We received a number of objections from the Channel 3 licensees that we had made this announcement without consultation. In light of these objections, we decided to reconsider this announcement. We invited all the licensees, as the parties directly affected, to submit any further comments that they wished to make on the issue. Our consideration of the comments we received and the conclusions we have reached having taken account of those comments is set out in section 3 below.

Section 3

Sanctions Practice

Introduction

- 3.1 In our consultation document, we explained our view that our current approach to sanctions of network programming on the regional Channel 3 services needed to be refreshed and described the approach that we intended to apply in future.
- 3.2 We received a number of objections to the changes we announced on the grounds that there had been no prior consultation. We therefore decided to reconsider the matter and invited the licensees to submit any further comments they wished to make on the issue.
- 3.3 In this section we set out the responses we received to the original announcement in relation to our sanctions practice and to our subsequent invitation to the licensees, offering our view on the arguments presented and our conclusions.

Summary of Responses

- 3.4 We received 15 responses which broadly addressed these issues. In addition to responses from each of the four companies holding Channel 3 licences, we received nine responses from independent producers, one from the Producers' Alliance for Cinema and Television ('PACT') and one combined response from the Jersey & Guernsey governments (hence 'the States').

Sanctions Practice

- 3.5 In our consultation document, we highlighted a range of issues which we considered called into question our current approach to sanctions on networked Channel 3 programming. These included:
- 3.5.1 Our view that the current approach may have weakened the engagement of non-complying licensees with their regulatory obligations; and
- 3.5.2 A lack of clarity about the division of responsibility for compliance issues between the compliance licensee and ITV Network, given that in cases where premium rate telephony services ('PRS') are used, the PRS contracts are managed and held by ITV Network.
- 3.6 We were concerned that our current sanctions practice did not enable us to meet our duty to secure adequate protection for members of the public from harm and offence via the codes we create and administer – in this case, the Broadcasting Code – and noted the harm suffered by consumers as a result of compliance failures by UK-licensed television broadcasters in the previous two years. In light of this, we questioned whether Channel 3 licensees remained correctly incentivised to ensure high standards apply in programme compliance. Under the restated policy set out in the consultation document, we said that:
- 3.6.1 Our starting position would be that all Channel 3 regional licensees which broadcast material in breach of the Broadcasting Code would be liable for a sanction; and

- 3.6.2 In the event that a financial sanction was imposed, we could choose to fine some licensees more significantly than others depending on where culpability for the specific breach lay.
- 3.7 Although we did not invite comments about this restatement of policy in the consultation, each of the licensees (and tangentially some of the other respondents) objected that we had changed our sanctions practice without prior consultation. The licensees also made a number of substantive objections to this change.
- 3.8 In light of these comments, we decided to reconsider our restatement of sanctions policy. In order to ensure that we were aware of all the points which the licensees (as the only respondents directly affected by the change) wished to make about this issue, we wrote to the licensees on 26 June 2009 inviting additional comments specifically in relation to sanctions. We received responses from each of the licensees which we have considered together with the original consultation responses on this issue in writing this statement.

Consultee comments

- 3.9 The licensees made a number of objections to the principle that we were able to restate our sanctions policy:
- 3.9.1 Each of the licensees argued that it had long been our policy and practice to hold the compliance licensee alone responsible for breaches of the Broadcasting Code;
- 3.9.2 ITV plc and Channel also noted that, in our 2005 NWA statement, we had explicitly cited this principle as the basis for the Channel 3 compliance framework.⁸ ITV plc questioned whether it would be lawful for us to sanction regional licensees other than the compliance licensee on the basis that it had simply broadcast a programme in breach of the Broadcasting Code;
- 3.9.3 All of the licensees objected that we had sought to distinguish inappropriately in the consultation document between our sanctions policy and our custom and practice in relation to sanctions. They argued that it was improper for us to introduce a change which they believe had major implications on licensee businesses without direct consultation;
- 3.9.4 Channel argued that by changing our sanctions practice in this way we had failed to advance a genuine 'status quo' position and rejected the premise on which the consultation was drafted;
- 3.9.5 Channel also questioned whether we were, by our actions, amending our Penalty Guidelines without following due process. It argued that we were attempting to introduce a policy that "ignore[d] the fact that economic regulations throughout the developed world provide for penalties that are based on turnover" exposing small licensees "to greater financial burdens than [Ofcom] can do under the applicable legislation"; and

⁸ Ofcom, Review of ITV Networking Arrangements, June 2005, para. 7.38: "... the risk of poor quality control rests ultimately with the compliance licensee, since it is that licensee which would bear the cost of any statutory fine levied by Ofcom for a breach of the Broadcasting Code."

- 3.9.6 Channel objected that the reference in the consultation to the Independent Television Commission's ('ITC') *Guidance Note for Channel 3 Licensees on Sanctions* from 1993 was misleading. It considered the *Note* was obsolete on announcement because the NWA had been drafted on the basis that network programming would be complied by a single licensee. Given this background, the licensee questioned whether the ITC had ever had the power to sanction all of the licensees in the event of a Broadcasting Code breach.
- 3.10 The licensees also raised a range of additional objections to our restatement of sanctions policy on the basis of the consequences of such a move:
- 3.10.1 ITV plc, Channel and UTV, which noted the ITC's comments to the Monopolies & Mergers Commission⁹ that collective compliance was not practicable in a federal Channel 3, argued that Ofcom's proposed sanctions practice would lead each of the licensees to duplicate costly compliance processes;
- 3.10.2 The non-consolidated licensees considered that our proposals were incompatible with our duty as a competition regulator, as they were likely to lead to the end of an internal market in compliance and reduce the quality of the service;
- 3.10.3 Channel argued that independent producers would be adversely affected by the move, as its likely outcome (the centralisation of compliance at ITV plc) would create a conflict of interest that would distort competition between ITV Studios and the independent sector;
- 3.10.4 Channel argued that its income from the provision of compliance services would fall in the event that we introduced a new sanctions practice, threatening the viability of its regional licence. As a result it considered that any move to implement the proposal would leave us in breach of our duty under Schedule 11 of the Act not to approve NWA if they were likely to be prejudicial to the abilities of regional licensees to comply with their public service remits;
- 3.10.5 ITV plc challenged whether¹⁰ the centralisation by ITV plc of its 11 licences into one legal entity, ITV Broadcasting Ltd, meant that, in the event of a compliance failure by ITV Broadcasting Ltd, a financial sanction could be calculated by reference to all of the licences it holds; and
- 3.10.6 ITV plc noted that a collective sanction across the network at the upper limit of 5% would run to many millions of pounds. It considered that it would be disproportionate for us to retain the ability to sanction at such a level, particularly in light of the maximum £250,000 penalty which Ofcom was able to impose on the BBC. ITV plc called for us to bring our financial penalty structure in line with that operated by regulators in other industry sectors.

⁹ Cited in the consultation document at para. 3.8.

¹⁰ See consultation document, para. 3.24, footnote 11.

Our response

- 3.11 Although the legal basis for our restated sanctions policy was questioned by the licensees, we are quite clear that we are empowered under the Broadcasting Act 1990 and the Communications Act 2003 to sanction all the regional Channel 3 licensees if a programme broadcast across the Channel 3 network is found to breach the Broadcasting Code. It is a condition of each of the regional Channel 3 licences to ensure that the provisions of the Broadcasting Code are observed in the provision of their respective regional Channel 3 services in accordance with section 325 of the Communications Act 2003. Under sections 40 - 42 of the Broadcasting Act 1990, Ofcom is empowered to impose sanctions if it finds that the regional Channel 3 licensee has failed to comply with any condition of its licence. The sanctions which can be imposed include a financial penalty up to a maximum of 5% of the licensee's qualifying revenue.¹¹ Thus, under the legislative scheme, it is the regional Channel 3 licensee that is held responsible for the programmes it broadcasts, not the licensee that carries out compliance in relation to that programme.¹²
- 3.12 Nonetheless, as we acknowledged in the consultation document, our custom and practice in the past had been to hold only the compliance licensee accountable for Broadcasting Code breaches.¹³ However, given the legal framework described above, we are not bound to follow this practice indefinitely; we are able to change it within the confines of the legal framework if we consider there are grounds for doing so. We consider that there are, for the reasons set out in paragraph 3 above.
- 3.13 We acknowledge the comment in the 2005 NWA statement cited by respondents, but for the reasons set out above, do not consider that it prevents us from changing our sanctions practice should we consider there are grounds for doing so. We also note that those comments were made in the context of considering a different issue, namely whether a term in the Code of Practice, which stated that ITV Network would commend the choice of compliance licensee, served to restrict competition between the licensees for compliance services.¹⁴ They therefore do not represent a considered view on the effectiveness of our sanctions procedures in preventing harm to viewers, the issue now under consideration.
- 3.14 As noted above, we made clear that we might choose to fine some licensees more significantly than others depending on where culpability for a breach of the Broadcasting Code lay. Our view is that such a position is entirely in keeping with our current Penalty Guidelines, which require us to remain mindful of a number of factors in setting a penalty, including "the extent to which any contravention was caused by a third party, or any relevant circumstances beyond the control of the regulated body." We concur therefore with the view advanced by ITV plc among others that the imposition of a financial sanction should depend on the culpability of the broadcaster, although we disagree with its conclusion that culpability cannot extend to non-compliance licensees. Our expectations as to how non-compliance licensees might

¹¹ Section 41 of the Broadcasting Act 1996, as amended.

¹² Similar provisions apply to other broadcasters and, consistent with the principle of broadcaster responsibility, it is of note that in this context there is precedent for the Ofcom Content Sanctions Committee deciding to impose statutory sanctions on two broadcasters - S4C and the radio station Mercury FM - for broadcasting harmful programme content which had been complied initially by a separate broadcaster.

¹³ See consultation document, para. 3.36.

¹⁴ See 2005 NWA review statement, paras. 7.34-40 at <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/>

discharge their licence obligation to ensure compliance are discussed at paragraph 3.21 below.

- 3.15 It is also worth noting that the maximum fine for which any individual licensee could be liable would remain at 5% of its turnover. Although it is the case that our powers to impose sanctions on the BBC are different to those we are able to impose on the Channel 3 licensees, it is important to remember that those powers derive from statute. We consider it would be inappropriate for us to seek to fetter our discretion regarding sanctions beyond the limits set by Parliament.¹⁵ We also consider that we should be able to ensure that the financial penalties we impose on the Channel 3 network adequately reflect the seriousness of the Broadcasting Code breach and the consequent consumer harm.
- 3.16 In response to the objection that the ITC's *Guidance Note* inaccurately reflected the scope of its powers, we note that this document is dated March 1993, after the initial NWA were substantially drafted, but *predating* the report of the MMC. In light of the fact that the MMC made no modifications to the compliance provisions of the NWA, it follows that the ITC's *Note*, drawn up at a time when it was arguing "there should be one named licensee who had undertaken to carry out the full range of compliance work and accepted responsibility for what was passed to the transmitters for broadcasting",¹⁶ reflected not only the provisions of the Broadcasting Act 1990, but also the responsibilities of the licensees as listed in the NWA. Our analysis of the relevant files confirms that the ITC executive considered this to be the case.
- 3.17 We have also assessed the licensees' arguments about the consequences of our proposed revision to our sanctions practice. We have concluded on balance that the points made by the licensees do not outweigh the need for a revised approach on sanctions in order to meet the regulatory objectives we have set out.
- 3.18 In the consultation document we argued that the imposition of sanctions on the licensees in January 2009 for breaching their quotas for Out of London ('OOL') production¹⁷ were indicative of how our existing approach may have inadvertently served to weaken the engagement of non-compliance licensees with their regulatory obligations. We made clear, however, that greater involvement:
- "... does not mean that we would expect all licensees to start duplicating the processes of programme compliance, but rather that we expect them to take a more proactive role in seeking assurances that regulatory obligations on the ITV1 service are being complied with."¹⁸
- 3.19 We do not accept that licensees would be required to implement duplicative compliance structures if we were to introduce new practices in relation to sanctions. Indeed, three of the four options for modifying network compliance arrangements that we put forward in the consultation document to take account of the change to our sanctions practice retained a primary compliance role for a single licensee.¹⁹ We also consider that there is precedent in relation to advertising and national news (as

¹⁵ Ofcom's powers to impose fines on the BBC are set out in section 198 (5) and part 3 of schedule 13 of the Act.

¹⁶ MMC, *Channel 3 Networking Arrangements*, April 1993, para 4.11.

¹⁷ See http://www.ofcom.org.uk/tv/obb/ocsc_adjud/itvjan09/

¹⁸ See consultation document, para. 3.41.

¹⁹ As set out in section 4, the option we have selected is the second of the three.

discussed below) for such a model to work effectively, notwithstanding collective responsibility.

- 3.20 We do not accept that non-compliance licensees are faced with only two options in order to secure compliance with the Broadcasting Code; either passively accepting content for broadcast or seeking to 're-comply' material in full which will be un-contentious in the vast majority of cases.
- 3.21 We have previously made clear, in the Mercury FM adjudication in which that broadcaster was fined for transmitting harmful content complied initially by a separate broadcaster, that licensees are expected to have "appropriate checks or procedures in place" when acquiring content for broadcast.²⁰ The OOL adjudication made a similar finding. Although the action taken by licensees should depend on the particular circumstances, it is our expectation that within such a system licensees should seek to inform themselves of how compliance is achieved in relation to network programming and satisfy themselves about the effectiveness of the processes in place, rather than repeating compliance work done by other licensees. For example, although it is for the Channel 3 licensees to decide how to share information about programme compliance and raise concerns about compliance matters, it is our view that regular meetings between compliance officers and ITV Network could serve as a basis for co-operation and risk-based assessment. This should also facilitate greater interaction between ITV Network and the compliance licensee, the two entities directly involved in programme commissioning, in relation to compliance matters. As a result, we do not accept that increased costs or production delays are inevitable or that the sanctions practice outlined will result in the duplication of compliance across the federal structure of Channel 3.
- 3.22 We also consider the arguments advanced by the licensees suggesting that our proposal is incompatible with our duties as a competition regulator are misconceived for two reasons. As set out in section 4, the modifications to the network compliance arrangements that we have determined are required as a result of the change in our sanctions practice will retain the role of a compliance licensee freely selected by the programme producer while aiming to ensure the regulatory risk faced by the compliance licensee remains unchanged. We do not consider, therefore, that these changes will inevitably result in the centralisation of the compliance function.
- 3.23 We also observe in this context that it is not clear that this system has delivered the benefits typically associated with competition, namely cheaper prices and improved quality. Producers do not select on the basis of price since the compliance fee is paid by ITV Network on the basis of a genre based tariff which has not changed for over a decade. Furthermore, since they do not bear the risk of regulatory sanctions in the event of a breach, producers may not have the necessary incentives to select a high quality compliance service over one offering a lighter touch approach.
- 3.24 In any event, Ofcom's principal duty is to further the interests of consumers, where appropriate by promoting competition. In this context and in the circumstances described above, we consider that other objectives defined in section 3 of the Act, notably the protection of members of the public from the inclusion of offensive and harmful material in television services, carry equal or greater weight than the promotion of competition. We note that we adopted a similar view in our 2005 review, when we rejected a system in which compliance licensees would negotiate the price for compliance work with the external producer, on the grounds that such an

²⁰ See para. 9.6 of the adjudication of the Ofcom Content Sanctions Committee at http://www.ofcom.org.uk/tv/obb/ocsc_adjud/hertsmercury.pdf

approach raised “new risks concerning the quality control of the compliance process.”²¹

- 3.25 We note the view that we would be acting *ultra vires* if we sought to impose a financial penalty calculated by reference to all of the eleven licences held by ITV Broadcasting Ltd if we found it in breach of the Broadcasting Code.²² ITV plc opted to consolidate all its licences within one legal entity, ITV Broadcasting Ltd, and to create a centralised compliance function within that entity. Having taken that decision, we do not consider it open to ITV Broadcasting Ltd to elect which licence it is holding for the purpose of calculating a sanction. Instead, we consider it is appropriate that ITV Broadcasting Ltd face the risk of a sanction for each of the eleven licences that it holds in the event of a compliance failure by the company.

Other comments from consultees

- 3.26 In its response, PACT stated that the licensees could potentially decide, as a consequence of our proposed sanctions practice, that they needed to undertake additional compliance checks on top of those undertaken by the nominated compliance licensee. PACT considered this was “almost bound to increase costs, delay productions and introduce potential conflicts and differences of opinion.”
- 3.27 The States argued that Ofcom had sought to impose a new sanctions practice unilaterally and prematurely, given the ongoing review by the Office of Fair Trading and Competition Commission into the CRR remedy. The States considered that Ofcom’s proposals were unfair and disproportionate, arguing that administrative fines should only be levied where a company had either breached or could reasonably have been expected to know that a breach had taken place.

Our response

- 3.28 We note the comments made by PACT (and reiterated by Channel) that independent producers may be concerned that fewer licensees will be prepared to undertake compliance work in light of our proposed sanctions practice. PACT considers that forcing independent producers to take compliance services from ITV plc would result in a conflict of interest, as ITV plc has its own production arm. As noted above, we do not accept that a reduction in producer choice is inevitable and propose revisions to the compliance arrangements which are specifically designed to retain a role for the compliance licensee and to ensure that the regulatory risk it faces is unchanged. It also remains our view that incentivising licensees to ensure better compliance is desirable and meets the regulatory objectives we have set for this review.
- 3.29 Although we recognise the Competition Commission’s assessment of CRR is of great significance to the Channel 3 licensees, we do not see the relevance of this or of the arrangements in place for the sale of advertising across the network to the question of whether a non-compliance licensee should receive a penalty for breaching the Broadcast Code. Further, as noted above, we do not consider that passive acceptance of the procedures implemented by other broadcasters is sufficient to enable a licensee to discharge its responsibility for the content it shows. We consider it is reasonable to expect the licensees in conjunction with ITV Network to work together to ensure that compliance processes work effectively.

²¹ See 2005 NWA review statement, para. 7.37 at <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/>

²² See consultation document, para. 3.24, footnote 11.

Network news

- 3.30 In the consultation document, we noted that national Channel 3 news programming was in effect self-complied by ITN, the producer. We stated that, as the ultimate responsibility for compliance of news broadcasts rests with the regional licensees collectively, all of the regional licensees would be liable for any sanctions imposed by us as a result of Broadcasting Code breaches in national ITN programming.
- 3.31 Only ITV plc commented on network news compliance. It stated that given the unique and fast moving nature of the services required in news content that the producer was best placed to comply this programming.
- 3.32 It remains our view that it is appropriate for the regional licensees to retain liability for any sanctions imposed by us as a result of Broadcasting Code breaches in national ITN programming.

Our conclusion on sanctions

- 3.33 We recognise that this new approach is a significant matter for the licensees and have therefore carefully considered their opposition to collective sanctions. However, we consider that our powers in relation to sanctions of Channel 3 licensees as described in the Broadcasting Act are clear. We are mindful of the number of cases over the past two years in which viewers have suffered direct harm as a result of compliance failures by UK licensed television broadcasters and have concluded that our approach to sanctions to date may not provide sufficient incentives for the licensees to secure that Channel 3 network programming complies with the Broadcasting Code for the purpose of providing adequate public protection from harm and offence. We consider this justifies a revised approach whereby all licensees will be considered liable to sanction in the event of a breach. We have reconsidered that justification and the change proposed in the light of the comments we have received. However, we do not consider that any of the objections put forward outweigh the grounds for revising our current sanctions regime nor undermine our view of the practicality and effectiveness of the changes we are making.
- 3.34 On the basis of this and for the reasons outlined in our consultation document described above, we consider it is appropriate that Ofcom, in the event of serious breaches of the Broadcasting Code, should be able to:
- 3.34.1 depending on the particular facts of the specific breach in question, impose a sanction against all Channel 3 regional licensees that broadcast material in breach of the Broadcasting Code;
 - 3.34.2 in the event that we decide to impose a financial sanction on more than one licensee, consider whether to fine some licensees more significantly than others depending on where culpability for the specific breach lies; and
 - 3.34.3 in taking such decisions, which will be based on the facts of the particular case, take specific account of the steps taken by non-compliance licensees to ensure that they had minimised the risk of a breach of the Broadcasting Code.

Section 4

Compliance Arrangements

Introduction

- 4.1 In our consultation document we outlined the background to the compliance arrangements which apply to network programming on the regional Channel 3 services. We examined whether adjustments to the compliance arrangements in the NWA were appropriate in light of our restated sanctions policy and invited the views of consultees on a range of possible structures for compliance arrangements.
- 4.2 In this section we set out the responses we received from consultees about compliance issues, offering our view on the arguments presented and our conclusions.

Our Consultation

- 4.3 In the consultation document, we presented four separate structures for compliance which we considered were in line with the sanctions policy described in section 3 above. We invited consultees to state in their responses:
- 4.3.1 which option they preferred, including details of any regulatory or statutory changes which they felt were necessary in order to enact the proposal;
 - 4.3.2 whether their preferred option was compatible with our duties under Schedule 11 of the Act;
 - 4.3.3 whether there was scope for the Channel 3 licensees to secure appropriate indemnity insurance, either in the market or by modifying the compliance fee to enable compliance licensees to self-insure; and
 - 4.3.4 whether a review of the tariff structure for compliance was necessary, and if so how it should be conducted.

Option 1 – Status Quo

- 4.4 Under Option 1 the current compliance arrangements would remain in place. A regional licensee, freely chosen by programme producers, would continue to act as the compliance licensee. The requirement in the NWA for the compliance licence to indemnify the other Channel 3 licensees for any loss or damage suffered in the event that it fails to fulfil its compliance role would also be retained.
- 4.5 In the consultation document, we noted that option 1 made it more likely that this indemnity would be called upon than has been the case to date, since all licensees would be potentially at risk of a sanction in the event of a Broadcasting Code breach. It was unclear to us whether compliance licensees would be able to obtain insurance in order to provide such an indemnity. We also considered that there was a possibility that this option might fall foul of our responsibilities under Schedule 11 of the Act, as the smaller licences may not be able to meet the costs of indemnifying the other licensees in the event of a sanction.

Consultee comments

- 4.6 One respondent, PACT, supported this option. It believed that current system delivered both cost efficiency and producer choice.
- 4.7 Another respondent, Shine Ltd, argued that this option placed an unreasonable burden on the non-consolidated licensees, as they could not be expected to indemnify the other licensees against such a risk. It considered that under this proposal “there is an appreciable concern that advice may be rendered for financial reasons which is unnecessarily risk averse.”
- 4.8 The licensees all rejected option 1:
- 4.8.1 ITV plc, STV and Channel argued that the indemnity provisions in the NWA had never been intended to include regulatory sanctions. Channel suggested that, if this had been the case, the fee structure would have been formulated differently to reflect the additional risk. ITV plc suggested that it was entirely inappropriate that contractual indemnities, which represent an option of last resort for entities which have suffered loss, should “constitute the cornerstone of a robust system of regulatory liability”;
- 4.8.2 All of the licensees argued that appropriate indemnity cover would not be available to allow the smaller licensees to lay off the risk of a significant fine. They suggested there was a fundamental legal problem with any entity seeking to lay off the risk of regulatory sanctions. In the event that such a liability crystallised, therefore, there could be serious financial implications for smaller licensees;
- 4.8.3 UTV and Channel considered that NWA which contained an indemnity provision of this kind would breach Schedule 11 of the Act. As each of the licensees was, in their view, likely to seek to comply all of the programming it broadcast in order to protect itself, compliance tariffs would fall and Channel Television’s business model would become uneconomic; and
- 4.8.4 ITV plc rejected this option on the grounds that it merely prolonged a system which was failing because of a “fundamental misalignment” of incentives between the producer, in whose interests it was to choose the least intrusive service, and the network, which required programmes to be complied to the highest standards.

Our response

- 4.9 In the consultation document, we noted that the viability of this option depended on the availability of insurance to be taken out by the compliance licensee in the event that we imposed a significant financial penalty on all of the licensees that transmitted a network programme which breached of the Broadcasting Code. On the basis of the submissions we have received, we accept that this is not possible. We consider therefore that option 1 is unlikely to yield a satisfactory regulatory outcome.
- 4.10 We do not accept the arguments advanced by the licensees, however, that our approach in the consultation document misunderstood the scope of the indemnity provisions within the NWA, which are to be interpreted objectively²³ and not

²³ In this context, the views of the ITC may be of interest. As noted above, the ITC’s *Guidance Note* from 1993 makes quite clear that the regulator retained the right to issue sanctions against each of

subjectively in accordance with the parties' intentions. In any event, notwithstanding their assertions as to the intended effect of the indemnity, we note that the same licensees have put forward submissions on the basis that the indemnity does cover regulatory sanctions.

- 4.11 Nevertheless, it remains the case that in the absence of insurance to offset risk, the indemnity provisions, as drafted, could have serious financial implications for a compliance licensee if the liability crystallised and cause it to bear a heavier financial burden in relation to a regulatory breach than is intended under the legislation. It is also possible that, as a result, licensees adopt 'risk-averse' strategies towards their broadcast output that would not necessarily be in the best interests of the viewer.

Option 2 – Amendment to Indemnity Provisions

- 4.12 As with option 1, under this option, compliance would continue to be undertaken by one of the regional licensees who would be chosen by the programme producer. In this scenario, however, the indemnity provisions in the NWA would be amended to remove sanctions for breaches of the Broadcasting Code. In the event that a sanction was imposed on all of the licensees, the non-complying licensees would not be able within the terms of the NWA to recover the amount of the sanction from the compliance licensee.
- 4.13 In the consultation document we broadly compared this model – in which a company provides a compliance service, while regulatory liability continues to sit with each of the licensees – with the model for advertising compliance managed by Clearcast on behalf of most of the UK's commercial broadcasters. As with option 1, we recognised that this model could potentially also lead to a review of the existing compliance tariff structure to reflect the amended regulatory risk faced by the compliance licensee – although if the current tariffs have been set by the licensees based on an expectation that only the compliance licensee would be liable for a financial penalty, it may be that their level would not necessarily change significantly.

Consultee comments

- 4.14 PACT considered there was some merit in option 2, but was concerned about the potential for duplication of compliance by the licensees.
- 4.15 The licensees all rejected option 2:
- 4.15.1 All of the licensees argued that this option would effectively introduce a second layer of compliance and therefore cost, because each of the licensees would seek to duplicate the work of the compliance licensee. They considered that in practical terms the proposal was unworkable;
- 4.15.2 ITV plc, STV and UTV considered that a compliance regime which could allow non-compliance licensees to be fined for the failings of the compliance licensee was inherently unfair. ITV plc suggested the effect of such a move would be to insulate a compliance licensee from the financial sanctions which should incentivise it to provide a high standard of compliance;

the licensees in the appropriate circumstances. Further analysis of the ITC's records from 1992 demonstrates that it envisaged non-complying licensees would seek to recover sanctions incurred in this way from the compliance licensee under the indemnity provisions in the NWA.

- 4.15.3 All of the licensees rejected the comparison with Clearcast. The non-consolidated licensees suggested that the compliance of short advertisements could not be compared with the complexities of programme compliance.
- 4.15.4 Channel argued that this option would inevitably lead to a reduction in the fee paid by the network for compliance work with the result that its broadcasting business would no longer be viable. It argued this outcome would put Ofcom in breach of its duties under Schedule 11 of the Act.

Our response

- 4.16 We do not accept that we would be in breach of our Schedule 11 responsibilities in proposing this option. The exact effect that an amendment to the indemnity provisions would have on the compliance tariff is difficult to ascertain. As stated in 4.13 above, it may be that compliance tariff levels would not necessarily change significantly. In any case, we note that compliance fees, which could be reviewed by ITV Network at any time, are not set in the NWA.
- 4.17 As discussed in paragraph 3.11 above, it is the broadcaster's responsibility to ensure that it does not show content which is in breach of the Broadcasting Code. In light of the fact that a compliance licensee would continue to face a sanction up to 5% of its turnover, we do not see how it would be insulated from the risks of poor compliance under this system. In addition, under this option, non-compliance licensees would need to keep themselves informed about compliance issues and satisfy themselves that any other licensee acting on their behalf has robust compliance procedures. The compliance licensee on the other hand, based on the assertions made by the licensees, would not be under a greater or lesser risk than they have considered themselves to be in the past.
- 4.18 We have also made clear that we will take account of a broadcaster's culpability in a breach in determining the appropriate level of any sanction. We see no reason to believe that the risk of duplication is as great as the respondents have suggested. We again note that the licensees do not operate duplicate structures for national news programming. Further, we believe the arguments presented by the licensees rejecting our comparison with Clearcast are unconvincing. The purpose of our analogy was not to suggest that programme and advertising compliance procedures should be identical, but rather to demonstrate that the licensees are already prepared to allow a third party to carry out compliance on their behalf while remaining liable for regulatory sanctions. Furthermore, none of the licensees have attempted to substantiate their assertion that option 2 would raise costs.

Option 3 – Compliance by ITV Network

- 4.19 Under option 3, which was proposed by ITV plc, the role of the compliance licensee would disappear and ITV Network would become responsible for compliance. Independent producers would therefore lose the ability to choose a compliance licensee, as all compliance work would be conducted by a single unit at Network Centre. Licensees would still be liable for sanctions on an individual basis.

Consultee comments

- 4.20 The non-consolidated licensees rejected option 3:

- 4.20.1 They argued that ITV Network was under the control of ITV plc and that therefore any proposal to make compliance a network function would undermine what they perceived to be one of the objectives of the Carlton-Granada merger Undertakings, that compliance should not solely be carried out by an entity controlled directly or indirectly by ITV plc;
 - 4.20.2 STV and UTV argued that this proposal would leave the non-consolidated licensees liable for sanctions despite having no control over the running of Network Centre;
 - 4.20.3 UTV and Channel suggested that such a move would be in breach of Schedule 11 of the Act as it would necessarily mean the end of Channel Television's compliance business; and
 - 4.20.4 UTV argued that, given that ITV Network was controlled by ITV plc which had its own significant production business, this proposal would create a conflict of interest.
- 4.21 In contrast, ITV plc argued that:
- 4.21.1 Network centralisation of compliance would not breach the Undertakings because it would be the result of a regulatory change, required by Ofcom, rather than a move forced on the non-consolidated licensees by ITV plc. It also considered that the scope of the Undertakings was limited to licences owned by ITV plc and therefore did not include the Network;
 - 4.21.2 The proposal would not be in breach of Schedule 11 of the Act because the scope of the schedule covered only licensees' broadcasting business and not the indirect effect that a decision to implement network compliance would have on a licensee's ancillary compliance business;
 - 4.21.3 The option would allow the integration of compliance with other critical network functions to ensure Network had end-to-end control of the pre-broadcast process;
 - 4.21.4 A single compliance centre would also lead to a set of consistent standards being applied and a cost reduction on the grounds that compliance provision could no longer be run as a profit centre by licensees; and
 - 4.21.5 Centralised compliance was the only way that Ofcom's revised sanctions proposal could work fairly, with fines issued on the basis of the qualifying revenue of each licensee.
- 4.22 PACT and a further nine respondents, who were all independent producers, rejected any proposal which removed the system of producer choice:
- 4.22.1 They all noted the strong relationships which many had built up with Channel Television's compliance team;
 - 4.22.2 Several were concerned that compliance handled by ITV Network would in effect make independent producers dependent on the good will of a rival producer, ITV plc; and
 - 4.22.3 Several considered that the system of producer choice incentivised the licensees to provide high quality compliance services.

Our response

- 4.23 Whilst we recognise the value which some independent producers place on retaining the choice of a compliance licensee, we are sceptical that choice of compliance licensee delivers greater competition benefits in terms of the quality of the compliance service provided or the price paid for it than a centralised system. As pointed out by ITV plc in its response to option 1, it is not clear to us, for example, that an independent producer has an incentive to secure an effective compliance service rather than a non-interventionist one, given that it is the broadcaster and not the producer which is subject to regulatory sanction in the event of a Broadcasting Code breach. And as we have already noted²⁴ competition in this context does not deliver cheaper prices given that it is ITV Network which pays the compliance fee not the producer choosing the compliance service.
- 4.24 Nevertheless, in our consultation document, we suggested that implementing this option without seeking a formal review and amendment to the relevant aspect of the merger undertakings carried a significant legal risk. Although we note ITV plc's arguments about the scope of the Undertakings, we remain unconvinced that, given the 90% share which ITV plc holds in ITV Network, a referral to the Competition Commission would not be necessary.
- 4.25 In addition, unlike the other options presented in our consultation document which retain the compliance licensee role, this option necessarily means that Channel would no longer be able to provide compliance services in respect of ITV1 commissioned programmes. On Channel's own evidence, it would no longer be able to discharge its public service obligations in this event, which would cause the modification to fall foul of Schedule 11, paragraph 8. While this may be an indirect effect, as ITV plc has argued, we are not satisfied that it thereby falls outside the scope of that provision.

Option 4 – Compliance Units reporting to ITV Network

- 4.26 Under this option, we envisaged that those licensees that wished to operate compliance centres – most probably ITV plc and Channel Television, and STV for their own-produced programmes – would continue to do so, while reporting into ITV Network. ITV Network would therefore hold the final responsibility for programme compliance. In our consultation we noted that this option would require the licensees acting as compliance centres to agree a Memorandum of Understanding as to the circumstances under which ITV Network would intervene.

Consultee comments

- 4.27 The licensees all rejected option 4:
- 4.27.1 ITV, STV and Channel considered that the proposed structure would lead to a lack of clarity over responsibility for compliance issues. They believed that this proposal would lead to an unwieldy and multi-layered sign off procedure that would inevitably prove inefficient;
- 4.27.2 UTV and Channel questioned whether this option created a conflict of interest for ITV Network in supervising Channel Television's compliance work, given that ITV Network's majority-owner, ITV plc, would be offering a competing service;

²⁴ See paragraph 3.23 above.

- 4.27.3 STV noted that this proposal relied on ITV Network reaching an agreement with compliance licensees on how to administer a system of network sign-off. STV and UTV questioned whether a Memorandum of Understanding could be agreed in these circumstances; and
- 4.27.4 Channel questioned whether under this option compliance fees would be cut to a level that made Channel Television's broadcasting business uneconomic.
- 4.28 PACT rejected this option on the grounds that it was likely to lead indirectly to the removal of producer choice.

Our response

- 4.29 In the consultation document, we made clear that a Memorandum of Understanding might be necessary to ensure the requirement of sign-off from ITV Network should not distort competition between the licensees offering compliance services. Given the opposition of all of the licensees to this proposal, we are sceptical that agreement over a Memorandum of Understanding is realistic. As a result, we consider this option is likely to prove unachievable under the current circumstances.

Other comments from consultees

- 4.30 STV and Channel argued that our analysis was inadequate because it did not examine the current use of premium rate telephony services ('PRS') in Channel 3 programming. The licensees considered this was particularly significant given that PRS was explicitly cited by us in the consultation document as one of the main reasons why we had revisited our sanctions practices. Channel went on to suggest that Ofcom should instruct ITV Network to cease to be the sole contracting party with telephony service providers. It suggested instead that such contracts should also be held by the Compliance Licensee with third party verification of PRS arrangements organised around them. They considered that this would clarify the lines of responsibility for programme compliance.
- 4.31 STV argued that revisions to the compliance regime were premature, given the likelihood of significant changes to Channel 3 during the period leading up to licence renewal. It said that such changes, including the possibility of an affiliate relationship, were likely to lead it to alter its compliance arrangements.
- 4.32 STV also called for an independent review of the tariff structure for compliance services, addressing how the cost of compliance for ITV plc's digital channels and PRS verification are allocated.

Our response

- 4.33 In the consultation document, we made clear that we were conducting a separate review of the ways in which UK licensed broadcasters have implemented the requirement for a system of third party verification for PRS services introduced by us following the inquiry by Richard Ayre.²⁵ The purpose of the current consultation is to consider whether the broader compliance structures in place across the Channel 3 Network incentivise licensees to ensure that programming does not breach the Broadcasting Code, rather than to assess whether the operational procedures are appropriate. It is the responsibility of the licensees, and not the regulator, to ensure

²⁵ See consultation document, para. 5.13-5.14.

that processes are adequate to secure that programming is compliant with broadcasting standards.

- 4.34 Further, as discussed in paragraph 3.11 above, we are quite clear that the law places the responsibility on the broadcaster to ensure that it does not transmit content which breaches the Broadcasting Code. The nature of the relationship that any particular licensee has with another broadcaster from whom it obtains content does not absolve it of that responsibility. As a result, we do not believe that possible changes to the structure of Channel 3 in future should delay our consideration of this issue.
- 4.35 In relation to the request for an independent review of compliance tariffs, we have already noted that the specific tariff structure for compliance, which is in Ofcom's view an intra-licensee matter, falls outside the scope of the NWA. We would expect any review of compliance tariffs, however, to reflect the general principles set out by us in our 2005 review statement.²⁶

Our conclusion on compliance arrangements

- 4.36 We have carefully considered the views of consultation respondents in making our assessment of the appropriate arrangements for Channel 3 going forward. Although we understand that licensees are reluctant to revise compliance arrangements which have been in place for more than 15 years, in light of the restated sanctions policy, it is our view that revisions to the system are necessary to ensure that the NWA do not breach Schedule 11 of the Act. In the absence of available insurance to back up the indemnity against statutory sanction currently given by the compliance licensee to the other licensees, the effect that a fine could have on the ability of smaller compliance licensees to meet their public service commitments means that a continuation of the status quo is not possible.
- 4.37 We consider that removing regulatory sanctions from the scope of the indemnities provided by the compliance licensee in the NWA, as outlined in option 2, eliminates this problem. The regulatory risk faced by the compliance licensee remains at the same level while each of the other licensees are incentivised to ensure compliance standards are high.
- 4.38 We therefore require the licensees to amend clause 10.9 of the Tripartite Agreement and clause 13.4 of the Network Programme Licence to exclude regulatory sanctions by Ofcom for a breach of the Broadcast Code.

²⁶ See 2005 review statement, para. 7.39.

Section 5

New Media Rights

Introduction

5.1 This section briefly summarises the issues we identified in the consultation document in relation to new media rights and our proposals to address those issues before moving on to set out responses to the consultation and our final recommendations.

Summary of the issues we identified in the Consultation document

- 5.2 In October 2008 we wrote to all the Channel 3 regional licensees to confirm the scope of the 2008 Review. In that letter we indicated that we wanted to ensure transparency and clarity between all the licensees over the rights that had been acquired by ITV Network – i.e. transparency over what has been acquired by ITV Network, who the rights have been acquired for, who has paid for them and how those rights can be used by the different licensees.
- 5.3 The key new media rights issue that was discussed in the consultation document was the position of ITV Network in the acquisition of additional content rights, i.e. content rights over and above what it might be expected to acquire as part of the bundle of primary rights in a standard programme commission. In light of the increased willingness and desire of consumers in the UK to access television programming via the internet and mobile services, we recognised that all the Channel 3 licensees, in common with other broadcasters, could be looking for opportunities to develop additional content services based on programming commissioned by ITV Network and to make them available to viewers. Given the central role of ITV Network in negotiations for the acquisition of additional content, we considered it appropriate to examine this issue in line with our obligation under the Act to satisfy ourselves that the NWA remained a satisfactory means of enabling regional Channel 3 services to compete effectively with other television programmes services provided in the UK.
- 5.4 In pre-consultation discussions, the NCLs had expressed concern that there was a lack of clarity/transparency about a number of issues in relation to the operation of ITV Network. They argued that there was a lack of clarity about:
- 5.4.1 The scope of the primary rights acquired by ITV Network;
 - 5.4.2 How they could ensure that ITV Network acted as an agent on their behalf in securing additional content; and
 - 5.4.3 How they could participate when ITV Network was acting as an agent for another licensee (e.g. ITV plc) to secure additional content rights.
- 5.5 The NCLs also wanted clarity about the agency role of ITV Network. In STV's view it could only act as an agent for the regional Channel 3 licensees collectively and could not act on behalf of individual licensees. The NCLs also wanted greater disclosure to the NCLs about the legal framework through which new media rights were being exploited on behalf of ITV plc.
- 5.6 For its part ITV plc argued that, although the acquisition of additional new media rights was not a "core function" of ITV Network, there was no restriction on ITV

Network acting on the behalf of the NCLs if the NCLs were prepared to contribute to the costs of additional rights on the basis of their Qualifying Revenue ('QR') share. However, ITV plc did indicate that where ITV Network was acquiring additional rights on its (ITV plc's) behalf they did not consider that it would be appropriate for information about those rights to be disseminated to the NCLs as a matter of course (e.g. if they were not participating in securing those additional rights).

Summary of Consultation proposals

- 5.7 Taking these different perspectives into account, our proposals were aimed at ensuring greater transparency about the role of ITV Network when it was acting as agent for all the licensees in the acquisition of rights for the ITV1 service. We therefore proposed that the NWA should be modified to make it clear that rights acquired by ITV Network on behalf of the network as a whole are available for use by all licensees on an equivalent basis. We also considered that all licensees should be informed as to which new media rights have been acquired by ITV Network as part of the bundle of primary rights. We suggested that this could be effected by means of changes to the Statement of Principles.
- 5.8 In addition, we also made clear that we did not necessarily see a problem with ITV Network securing additional rights on behalf of a single licensee or combination of licensees providing that:
- 5.8.1 there was a separate negotiation for those rights;
 - 5.8.2 information about the additional rights was shared equally between participating licensees; and,
 - 5.8.3 any conditions attached to the exploitation of those rights were also agreed among participating licensees.
- 5.9 We did not express any particular view about how the costs of additional rights should be apportioned. We also proposed that the additional rights acquired/any conditions attached should be a matter for those licensees participating in the acquisition of additional rights and that it was not necessary for that information to be reported more widely to the other non-participating regional Channel 3 licensees.

Summary of responses

ITV plc

- 5.10 ITV plc indicated that it believed that more clarity in respect of the acquisition of new media rights would be beneficial. ITV plc proposed that there should be discussions between itself and the NCLs with a view to agreeing a protocol for opting in to the acquisition of non-standard new media rights in connection with ITV1 commissioned programming. ITV plc was keen to ensure that there was:
- 5.10.1 an appropriate timeline for opting in;
 - 5.10.2 a clear understanding about the conditions/commitments attached to any rights acquired in this way; and,
 - 5.10.3 agreement on the cost sharing principles for such rights.

- 5.11 Where regional licensees did not explicitly opt-in within a specified timescale then, ITV plc suggested, ITV Network could still proceed to negotiate on behalf of those licensees that had opted in.
- 5.12 ITV plc also indicated that it wanted resolution of payment issues in relation to programming generally and going forward.
- 5.13 ITV plc argued that where new media rights were acquired as part of the bundle of primary rights they would form part of the licence fee paid by ITV Network and so the costs should be apportioned in line with the existing principles. However, the acquisition of additional rights would lie outside the bundle of primary rights and so the apportionment of these costs did not have to follow the same cost sharing principles. ITV plc again proposed QR share as the appropriate cost sharing rule for these additional rights.
- 5.14 ITV plc also proposed the principle that rights should be exploitable by each regional licensee exclusively in its own region except where it was not technologically or commercially possible or pragmatic to do so. ITV plc argued that that this meant that regional licensees would be required to implement geo-blocking of their respective websites to restrict access to those within the relevant licensed area.
- 5.15 Conversely, ITV plc suggested that it was **not** possible to provide regional exclusivity for rights such as mobile simulcast rights and “closed video on demand (CVOD) rights” because the platforms were not regionalised and there were no technical solutions that allowed regionalisation. In these instances ITV Network was the only entity that could exploit the rights and did so, and should do so, in the best interests of the Network as a whole. ITV plc argued that net profits from such collective exploitation should be divisible on the basis of QR.

UTV

- 5.16 UTV indicated that it had had engaged in a commercial relationship with ITV Consumer for access to all ITV programming. Although it had taken significant time and effort to set up this relationship, UTV indicated that there had been positive engagement on both sides.
- 5.17 UTV argued that in a cross-platform world there needed to be total transparency about the “primary new media rights” acquired on behalf of all licensees. It also argued that there should be greater transparency in relation to the acquisition of additional new media rights. UTV argued that all members of ITV Network should have the ability to benefit from additional content although it went on to recognise that not all members would necessarily decide to participate. UTV argued that there needed to be enough information about what content is available or being considered for commission at a sufficiently early juncture to enable members to make well informed decisions on these matters. It indicated that it was likely to be interested only in material related to major programming on the ITV Network.
- 5.18 UTV went on to state that it considered that the current Terms of Trade were too restrictive and that cross-platform rights should be re-aligned in favour of the commissioner. UTV also argued that cross-platform rights had a high-value in a digital environment and that all licensees should have the right to take advantage of these rights.
- 5.19 UTV stated that although it was possible to geo-block content delivery to an international audience, it was extremely challenging to put in place geo-blocking to

regionalise the content available through their web-site. It indicated that it did not have a problem with stv.tv and itv.com being available in Northern Ireland and hoped that the other licensees would have reciprocal views.

- 5.20 UTV argued that the cost of additional rights should be shared on the same basis as the costs of the Network Programme Budget, arguing that new media rights should not be a “bolt-on” to programme acquisition.

STV

- 5.21 STV argued that the aim of the 2008 Review – in relation to new media rights – should be to reach a position of clarity and transparency around rights and payments and a set of clear working practices and reporting obligations on ITV Network to achieve that.
- 5.22 There was for STV an over-riding principle that “PSB had to extend on-line”. STV argued that this principle was in line with a number of regulatory developments e.g. the AVMS Directive, European developments on PSB policy, Ofcom’s recent PSB review and the themes outlined in the Digital Britain interim report. It also went on to argue that if PSB content was to have reach and impact then all PSB broadcasters needed to be able to exploit their rights online and build an online presence that acted as a coherent extension to their on-air presence.
- 5.23 Based on this approach, STV argued that any material which had a link to a brand with a linear showing on Channel 3 had to be acquired, used, exploited and promoted in a fair, reasonable and non-discriminatory basis with equivalence across all platforms i.e. at the same time and in a way that enabled proper exploitation across all platforms.
- 5.24 STV also linked successful exploitation to promotion, arguing that promotion needed to take place in a way which did not undermine a multi-platform delivery principle. It argued that the online portals of the NCLs should be promoted on the same basis as itv.com and that itv.com should not be promoted exclusively on the ITV1 service. STV argued that the clean feed obligations from the merger undertakings should have been transposed into the NWA which would have provided for an annual review of their operation.
- 5.25 Around exploitation of new media rights, STV also argued that, given that ITV Network did not hold any rights itself, it could not proceed with deals on behalf of all the licensees on platforms that cannot be regionalised without their express consent.
- 5.26 In terms of regionalisation of online services, STV argued that regionalisation of the Internet was not practical. It argued that there had to be all licensee consent around use. It recognised, however, that if the NWA were construed as only permitting exploitation over the Internet by each regional licensee within its particular territory or region then that would effectively prevent exploitation of any new media rights. Consequently, with regard to each licensee’s online website portals, STV accepted co-existence within licensed areas .e.g. itv.com and u.tv would be available in Scotland.
- 5.27 STV disagreed with Ofcom’s view that licensees should be permitted to engage ITV Network to selectively acquire rights for them beyond the primary rights. STV argued that if ITV Network were to act otherwise than as agent for all licensees it would be doing so outside its remit under the NWA.

- 5.28 In order to address these issues, STV believed that a series of measures needed to be put in place: (i) effective timely reporting obligations; (ii) collaborative working practices aimed at facilitating exploitation; (iii) confirmation of the extension of the PSB remit to multi-platform; and, (iv) the acquisition of new media rights forming part of the “core functions” of ITV Network.
- 5.29 STV argued that where further payments – beyond the licence fee – are due from a licensee then they should be on a C1/C2 basis to the extent that such rights are referable to a brand with linear showing paid for out of the NPB.

Channel

- 5.30 Channel did not address these issues in its response.

Other respondents

- 5.31 Some of the other respondents did refer to rights issues. The response from Pact, the UK trade association for independent producers, expressed concern about the failure of ITV Network to implement the Terms of Trade that had been agreed in principle in 2006/07. Pact expressed the concern that without the implementation of the agreed Terms of Trade, ITV Network was effectively entering into a series of bespoke commissioning deals and that ITV Network was seeking to impose additional terms on producers which went beyond what was provided for in the Terms of Trade.

Ofcom’s conclusions

- 5.32 Under the network supply contract, each of the regional Channel 3 licensees grants ITV Network authority to “purchase, commission and administer a Network Schedule of Network Programmes to be available for inclusion ... in its Regional Channel 3 Service.” A Network Programme is defined as “films, programmes or other material for television broadcast.”
- 5.33 However, in the regulatory statement to the 2006 Review of the NWA, we stated that ITV Network was **not** constrained to securing just the linear broadcast rights on behalf of the regional C3 licensees. We made it clear that a recommendation to the contrary in 1993 by the Monopolies and Mergers Commission in its review of the NWA²⁷ had been superseded by market events and, in particular by other regulatory and statutory provisions, including our own review of the NWA. We went on to state: “Ofcom does not therefore consider that the recommendation in respect of limiting the sets of rights which ITV NWC may seek to acquire continues to bind ITV Network and ITV plc”.
- 5.34 This is reflected in the Code of Practice agreed following the 2006 Review which makes clear that the “primary rights” ITV Network generally acquires from a producer may include, in addition to linear broadcasting rights “the right to offer... interactive services and applications and support websites”.
- 5.35 In addition, the draft Statement of Principles prepared in 2006 recognises that ITV Network may negotiate rights on behalf of channels other than ITV1 where the channels are owned or controlled by one of the Regional Licensees. In such circumstances the draft Statement of Principles provides for ITV Network to:

²⁷ Channel 3 Networking Arrangements: A report on whether the arrangements satisfy the competition test contained in the Broadcasting Act 1990. (MMC: April 1993).

- 5.35.1 enter into separate contractual arrangements in relation to ITV1 and the other channel; or
- 5.35.2 where that is not practicable, disclose the terms of any joint contractual arrangements to all the regional Channel 3 licensees and ensure that they know in advance the principles by which costs are to be allocated between the two channels.
- 5.36 The provision for separate contracting of programming where rights are also acquired on behalf of other channels has also been incorporated into the Code of Practice.
- 5.37 There was general consensus among respondents that, notwithstanding these provisions, there was a need for greater transparency in relation to the acquisition of new media rights by ITV Network. Our assessment of how that should be achieved, taking account the consultation responses, is grouped under four main headings:
- The acquisition of primary rights;
 - The acquisition of additional content rights;
 - Payment for rights acquired; and
 - Restrictions on the exploitation of rights.

Acquisition of Primary Rights

- 5.38 In respect of the rights that are acquired as a matter of course by ITV Network when commissioning original content for the network Channel 3 service, Ofcom considers that the latest version of the Terms of Trade ("ToT") agreed and recently implemented between ITV Network and PACT provides an adequate definition of the scope of the bundle of primary rights. The primary rights outlined in the current ToT are:
- Channel 3 broadcast rights;
 - PRTS rights;
 - Interactive rights; and,
 - Initial on-demand rights.
- 5.39 Rights to any additional content in the commission would then be subject to a separate contractual arrangement between the producer and ITV Network.
- 5.40 Given the agreement between ITV Network and PACT, Ofcom considers that a number of the issues that have been raised about clarity and transparency of what ITV Network is acquiring should be addressed by the implementation of the ToT that have been agreed. At a minimum it will clarify the nature of the bundle of primary rights that ITV Network acquires on behalf of all the licensees as a matter of course when it commissions original UK content.
- 5.41 We recognise that ITV Network, licensees and independents are not restricted to contracting solely on the basis of the agreed ToT. The ToT will provide a set of standard contractual terms but, if both parties choose, ITV Network and the producer can agree to negotiate a different set of terms. However, the implementation of the

new ToT should provide the certainty that PACT is looking for in terms of providing a standard set of terms that producers should be able to rely on as a fall-back position when dealing with ITV Network.

- 5.42 UTV has argued that: “the current ToT are too restrictive and cross-platform rights should be re-aligned in favour of the commissioner”. The ToT have been negotiated within the framework of the ITV Network Code of Practice and our *Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers*.²⁸ We would point out that a key feature of this framework is that regional Channel 3 licensees cannot expect ITV Network to be able to acquire all rights in a programme commission as a matter of course. The purpose of the Code of Practice framework is to address the asymmetry of the bargaining position between individual producers and the commissioning PSB. The framework establishes that there should be a bundle of primary rights which the PSB acquires as part of the licence fee but then leaves open the option of further negotiation of the rights to additional content, making it clear that the acquisition of further rights needs to be the result of a bi-lateral commercial negotiation. We therefore do not accept UTV’s argument about the need for re-alignment.
- 5.43 In order to provide clarity to the licensees in cases where the rights that ITV Network has acquired - on behalf of all the licensees - are different from the bundle of primary rights defined in the standard ToT, we agree that there should be an obligation placed on ITV Network to draw this to the attention of the licensees.

Acquisition of additional content rights

- 5.44 In terms of rights for additional content – i.e. where ITV Network is being asked to negotiate additional packages of rights *beyond* the bundle of primary rights – it will not automatically be the case that all licensees will want to participate all the time in securing these additional rights. For example, licensees may look to develop different aspects of their additional service offerings and therefore have different requirements in relation to securing additional content rights. To take account of this, we consider that the licensees should agree a common framework for signalling that they wish to participate in the acquisition of rights for additional content. We leave the issue of payment for any additional content rights to the next section.
- 5.45 The responses of the licensees indicate that they accept this approach to content rights acquisition. Furthermore we understand from discussions with the licensees that in some areas there are already practical working level arrangements in place.
- 5.46 In order to encourage the exploitation of these additional content rights, we consider that this should be an opt-in rather than an opt-out system, that would be triggered when at least one of the licensees asks ITV Network to act on its behalf to secure additional rights. The other licensees should then be offered the opportunity to participate in the acquisition of additional content rights as well.
- 5.47 One important issue for such a system will be the frequency with which licensees should have to confirm their interest in participating in securing additional content rights. We consider that that there should be a degree of flexibility in the system: it would not be appropriate simply to assume that ITV Network should seek to acquire additional content rights in every commission even if in the form of a separate negotiation. One of the objectives of the framework created by the Codes of Practice for commissioning from independent producers is to encourage the exploitation of

²⁸ See <http://www.ofcom.org.uk/consult/condocs/cop/statement/statement.pdf>.

rights; the risk from a blanket approach to securing additional content rights is that rights would be acquired by default without any real thought as to how they would be exploited.

- 5.48 At the same time operating an opt-in system on a commission by commission basis is likely to be administratively complicated and time-consuming. We could suggest that licensees consider a genre by genre approach or opt-in arrangements that are reviewed periodically (e.g. every 3-6 months).
- 5.49 We consider that ITV plc's proposal of a protocol, whereby once ITV Network has been requested to negotiate the acquisition of additional content rights other licensees have to give a clear indication to ITV Network within a certain time period, is a constructive one.

Payment for Primary Rights/Rights in Additional Content

- 5.50 We note that there is acceptance on the part of the regional Channel 3 licensees that the bundle of Primary Rights acquired by ITV Network should be paid for on the basis of the C1/C2 formulae. That would be in line with current practice.
- 5.51 However, there is no clear agreement in respect of the payment terms for the rights for additional content. We do not have a strong view as to the basis on which the costs of those additional content rights should be apportioned between the licensees who wish to purchase them – we have concluded that this should be a matter for negotiation between the relevant licensees outside of the NWA. We do note that QR share is an accepted approach for cost-sharing in respect of other, non-core activities undertaken by ITV Network on behalf of the licensees and could therefore form the basis of cost sharing arrangements.
- 5.52 The key issue is that in the interests of transparency, licensees should be aware up front of the cost sharing mechanism to apply to additional content rights so that they have clarity over the basis for participating in securing additional content. To this end, we suggest that the licensees should establish agreed principles for such cost sharing.
- 5.53 We consider that the additional rights acquired/any conditions attached should be a matter for those licensees participating in the acquisition of additional rights and that it is not necessary for that information to be reported more widely to the other non-participating regional Channel 3 licensees. However, this would be subject to the proviso that if separate contracts are not possible for additional content rights then all terms should be disclosed to all licensees and the licensees should know the principles by which costs are allocated available between sets of rights. This would be in line with the provisions of the Statement of Principles for situations where ITV Network acts on behalf of ITV1 and another ITV plc owned channel.
- 5.54 Finally, ITV plc proposed that the operation of the opt-in system for rights acquisition may be dependent on the resolution of any existing disputes in relation to contributions to the costs of ITV1 core service. As set out above, we consider that the opt-in system should be incorporated into the NWA. However, in relation to disputes around contributions to the costs of the ITV1 service, we note that the NSC already makes specific provision for the termination and suspension of the rights of a licensee, and the release of ITV Network obligations in relation to that licensee under the NWA, where it is established that a licensee is not complying with their obligations to contribute to the costs of the ITV1 network service. We therefore do not consider that the additional condition proposed by ITV plc is required.

Restrictions on the exploitation of content rights

- 5.55 In addition to the issues around the *acquisition* of content rights, the responses to the consultation also raised a number of issues about the subsequent exploitation of those rights.
- 5.56 Given that the licensees hold the rights for their own licensed regions, they are in principle able to make their own arrangements for exploitation of those rights in those regions. They would not be able, however, to enter into third party agreements which resulted in the exploitation of those rights in other licensed regions. To do so without the agreement of the relevant licence holder for that region would infringe the rights of that licensee.
- 5.57 As indicated above, in its response ITV plc has made a distinction between rights where it should be possible to implement regional exclusivity over exploitation and rights where regional exclusivity would not be “technologically or commercially possible/pragmatic”.
- 5.58 Where it was not possible to secure regional exclusivity, ITV plc argued that ITV Network was the only entity that could exploit those rights on a UK-wide basis and that it should be charged with doing so in the interests of the network as a whole. In contrast, where it was possible to implement mechanisms to establish (and maintain) regional exclusivity, ITV plc has suggested that licensees would be free to choose to exploit the rights they held on a regional basis if they wished. Such an approach would necessarily involve all the licensees taking steps to implement regional exclusivity. As an example, ITV plc indicated that the exploitation of rights by means of licensees web-sites was an area where geo-blocking could be necessary i.e. each Regional Licensee would be required to implement geo-blocking of their respective web-sites to restrict access to those within the relevant licence area.
- 5.59 On the issue of exploitation, STV expressed the concern that ITV Network had already entered into certain arrangements for the UK-wide exploitation of content rights which were held by the licensees on a regional basis without the express consent of all the licensees. STV’s concern was therefore about the terms on which ITV Network might act as an agent to secure exploitation on a UK-wide basis.
- 5.60 Both UTV and STV have also expressed concerns about the technical and commercial feasibility of geo-blocking web-sites at the sub-national level. They have argued that it is not as effective as geo-blocking at the national level and would also involve additional costs. They have not indicated how significant these costs might be.
- 5.61 We note that, at present, the websites of the different licensees (i.e. itv.com, stv.tv and u.tv) are freely available to viewers across the UK. Thus, a viewer has, for example, the ability to access ITV1 content – whether streamed or as a catch-up service – by means of either the ITV player or the STV player regardless of the viewer’s location within the UK.
- 5.62 A concern here might be that this could both weaken the direct association of ITV1 content with the particular ‘local’ licensee and undermine the strength of regional branding. Such “leakage” could then affect the ability of licensees to monetise page impressions through their own websites if viewers chose to access ITV1 content via another licensee’s website.

- 5.63 Nonetheless, we note that the licensees appear to accept the current situation and what might be termed “reciprocal access” to ITV1 content via their respective websites. None of the licensees submitted evidence to suggest that the current arrangements for website access caused any particular problems. Indeed, we can see a benefit arising from consumers having access to different licensee websites. Both STV and UTV stated that they would accept the continuing availability of itv.com and other licensee websites in their own regions provided that their own websites are similarly available on a UK-wide basis.
- 5.64 However, we are aware that the position on such reciprocal arrangements could change if licensees choose to develop more commercial “syndication” policies, e.g. if licensees wanted to consider syndicating access to the ITV1 content which they own, through use of their websites and/or “players”.
- 5.65 In this context, we note that the responses of ITV plc and STV indicate that – at a high-level – both parties agree that no individual licensee has the right to enter into third party commercial agreements for the exploitation of ITV1 content on a UK-wide basis. At the same time, both parties seem to agree that ITV Network would be the appropriate vehicle to negotiate such UK-wide arrangements.
- 5.66 We note ITV plc’s comments in relation to the technical and commercial feasibility of implementing geographic exclusivity. We would observe, however, that this is an area which is developing rapidly and a concept of what is ‘technologically or commercially possible/pragmatic’ is not helpful as this will not only change over time, but may also differ for different licensees.
- 5.67 We consider that the commercial exploitation of ITV1 content rights via third party agreements is first and foremost a matter for the licensees to take forward. Taking into account the submissions and comments of licensees, it appears that there are elements of common ground and it is for the parties to build on these – and agree between themselves – a framework for the further commercial exploitation of new media content rights acquired as part of the primary rights package. As a general principle, however, any restrictions (such as geographic exclusivity) which ITV Network may develop as part of such a framework should be objective justified, proportionate and non-discriminatory.

Summary of conclusions

- 5.68 In the preceding paragraphs, we have concluded that the NWA should provide for the following:
- 5.68.1 ITV Network to acquire on behalf of the licensees primary rights as defined in the ToT, unless agreed otherwise by ITV Network and the producer. Where ITV Network acquires a bundle of primary rights that is different to the bundle of primary rights defined in the ToT, ITV Network is to draw this to the attention of the licensees;
- 5.68.2 ITV Network may acquire additional content rights on behalf of one or more of the licensees if it is requested to do so. Where such a request is made, the other licensees should be offered an opportunity to opt-in to the acquisition. Licensees should be advised of the cost-sharing mechanism that will be applied between participating licensees in advance; and
- 5.68.3 ITV Network is required to disclose the terms of the acquisition of additional content rights to the participating licensees.

- 5.69 The focus of this review has been on the role of ITV Network in the acquisition of rights on behalf of some or all of the Channel 3 licensees. However, it has become clear from the responses to the consultation that there is a related issue in respect of the exploitation of rights on a UK-wide basis via third party agreements where those rights are held individually by the licensees. These are complex issues, particularly given the rapid development of new avenues for exploitation. In our view, it is for the licensees to agree between themselves a framework in relation to third party agreements. As a general principle, any restrictions which ITV Network may develop as part of such a framework should be objectively justified, proportionate and non-discriminatory.
- 5.70 We consider the changes to the NWA we are proposing should enhance transparency for licensees as to the rights that are acquired on their behalf by ITV Network.
- 5.71 We do not propose at this stage to prescribe the modifications to the NWA that should be made in order to implement the changes in respect of rights acquisition. However, having regard to the fact that modifications to the NWA arising from previous reviews have still in some cases to be implemented, we will be monitoring closely the licensees' progress in making the changes and signing off agreements. We would remind licensees that failure to have in place approved Networking Arrangements would constitute a breach of their licences. We therefore intend to review progress on the implementation of our recommendations three months from the publication of this statement.

Annex 1

The statutory framework for reviewing the NWA

Introduction

- A1.1 The framework for this review is set out in Schedule 11 of the Act. Ofcom must not approve revised NWA (or propose modifications to the existing arrangements), unless it is satisfied that the revised arrangements (or proposed modifications) satisfy the competition test set out in paragraphs 6(3) and 6(4) respectively of Schedule 11 of the Act.
- A1.2 The Act sets out the three statutory tests - described below - that Ofcom must take into account, alongside its wider statutory duties, when carrying out this review. Ofcom reviews the ITV Networking Arrangements in this document from the perspective of these statutory tests and duties. In addition Ofcom must also be mindful of its wider statutory duties and public policy objectives. As a general rule, Ofcom must not propose, impose or approve arrangements or modifications to the arrangements unless it considers that such arrangements or modifications are satisfactory.
- A1.3 The statutory competition test is focused on restrictions of competition arising from the arrangements themselves, as opposed to restrictions of competition arising from the unilateral behaviour of one of the parties to the arrangements. When this test was conceived, the Channel 3 licensees were not so unevenly matched. ITV plc now owns 11 of the 15 licences, affording it a position of strength within the ITV network that creates different competition issues, which we believe are not covered by the statutory competition test, but which are nevertheless relevant to the arrangements between ITV licensees.

The “Competition Test”

- A1.4 The statutory Competition Test set out in paragraph 6 of Schedule 11 of the Act is in two parts:
- Arrangements satisfy the first Competition Test if they do not have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. If the arrangements satisfy this test, there is no need to consider the second test; and
 - Arrangements satisfy the second Competition Test if (a) they do have such an object or effect; but (b) they would satisfy the criteria set out in section 9 of the Competition Act 1998.
- A1.5 Before making a decision about whether a competition test is satisfied or not, Ofcom must consult the Office of Fair Trading. In determining whether arrangements or modified arrangements would satisfy either of the tests, Ofcom must ensure the principles it applies and the decisions it reaches are consistent with the EC Treaty and any relevant decisions of the European Court. In addition, it must have regard to any relevant decisions or statements of the European Commission.

A1.6 The NWA are excluded from the application of the Chapter I Prohibition under Schedule 2 to the Competition Act 1998 to the extent that they fulfil the relevant competition tests set out in Schedule 11 of the Act. However, the licensees are still prevented from engaging in any practice which is prejudicial to fair and effective competition (towards external parties and to each other) by conditions in their licences. The licensees also remain subject to the Chapter II prohibition in the Competition Act 1998.

The “Effectiveness Test”

A1.7 Ofcom must not approve, impose or propose arrangements and/or modifications unless Ofcom considers those arrangements / modifications to be satisfactory for the purpose of enabling regional Channel 3 services (taken as a whole) to be a nationwide system of services which is able to compete effectively with other television programme services provided in the United Kingdom.

The “Regional Programming Test”

A1.8 Ofcom must not approve, impose or propose arrangements and/or modifications unless Ofcom considers those arrangements/ modifications to be satisfactory, including the likely effect of the arrangements/ modifications on the ability of Channel 3 licensees to maintain the quality and range of regional programmes and other programmes which contribute to the regional character of the services.

A1.9 It should be noted that the second and third statutory tests relate to public policy rather than specifically to competition law.

A1.10 In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act states that Ofcom must not approve, impose or propose arrangements and/or modifications if such arrangements/modifications would be likely to be prejudicial to the ability of the Channel 3 licensees, or any of them, to comply with:

- a) their public service remits;
- b) their regional production obligations²⁹;
- c) their regional programming obligations; or
- d) conditions imposed on them following a change of control.

Ofcom’s other duties and objectives

A1.11 Section 3 of the Act sets out Ofcom’s general duties and the matters that Ofcom must take into account in performing its duties. These matters include:

- a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
- b) the desirability of promoting competition in relevant markets;

²⁹ In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act requires Ofcom to take into account the impact of the arrangements or modifications to the arrangements on the ability of the Channel 3 licensees to comply with certain of their licence obligations

- c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation; and
- d) the desirability of encouraging investment and innovation in relevant markets.

A1.12 Ofcom also has a general regulatory principle that it will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.

A1.13 Ofcom also believes that the following public policy objectives (as articulated in the 2005 Review) are appropriate guiding principles to follow when reviewing the NWA:

- the documents that together comprise the NWA should continue to reflect accurately the actual operational arrangements;
- organisational arrangements should be robust to changes in corporate ownership;
- all of the Channel 3 licensees should be able to continue to meet their specific licence obligations efficiently and effectively;
- the principles which underlie the relevant cost sharing arrangements should be transparent and clearly understood by all parties to the NWA; and

there should be an appropriate degree of non-discrimination between parties to the NWA and (where appropriate) any relevant third parties.