



# Provision of Managed Transmission Services to Public Service Broadcasters

**Proposal to give a Direction setting must-carry  
obligations on the terrestrial transmission network**

**Consultation document**

**Issued:** 28 February 2005  
**Closing date for responses:** 31 March 2005

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## Section 1

# Proposals for must-carry obligations

## Introduction

- 1.1 This document sets out Ofcom's proposals to impose must-carry obligations on the transmission of specific public service television broadcasting content in a digital form over the terrestrial transmission network.
- 1.2 In November 2004, Ofcom made proposals to require ntl and Crown Castle to provide wholesale access to their transmission masts and sites<sup>1</sup>. Consultation closed on 28 January 2005 and Ofcom is currently considering responses. Proposals in this document are predicated on the assumption that Ofcom will broadly confirm those earlier proposals.
- 1.3 At the same time, Ofcom also made proposals in relation to the provision of managed transmission services ("MTS") by ntl and Crown Castle. However Ofcom is now withdrawing its proposals in that respect. Its statement may be found at [http://www.ofcom.org.uk/consult/condocs/bcast\\_trans\\_serv/](http://www.ofcom.org.uk/consult/condocs/bcast_trans_serv/).
- 1.4 In the light of that withdrawal, Ofcom has considered afresh the case for regulatory intervention to promote a degree of certainty amongst the market players concerning the provision of MTS. Taking into account Ofcom's wider statutory duties, this document focuses on the terms under which MTS will be made available in relation to the transmission of public service television broadcasting content.

## Basis for proposed obligations

- 1.5 Article 31 of the Universal Service Directive<sup>2</sup> ("USD") sets out the basis on which Member States may impose must-carry obligations. Article 31(1) says that Member States can impose reasonable must-carry obligations, for the transmission of specified television broadcast channels and services, on undertakings providing networks used for the distribution of television broadcasts to the public where a significant number of end-users of those networks use them as their principal means to receive television broadcasts. The must-carry obligations must be necessary to meet clearly defined general interest objectives and must be proportionate and transparent. Article 31(2) allows Member States to determine appropriate remuneration in respect of must-carry obligations and, where remuneration is provided for, Member States must ensure that it is applied in a proportionate and transparent manner.
- 1.6 Article 31 should be read in the context of recitals 43 and 44 of the USD. Recital 44 makes it clear that networks used for the distribution of television broadcasts to the public include terrestrial broadcasting networks.

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<sup>1</sup> Broadcasting transmission services: a review of the market, 11 November 2004. Subject to scrutiny of responses to that document, Ofcom is maintaining its proposals in relation to the upstream mast and site markets referred to in that consultation. The November consultation document should be read in conjunction with this consultation.

<sup>2</sup> Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services.

- 1.7 In the United Kingdom, Article 31 has been transposed by section 64 of the Communications Act 2003 (“the Act”). Section 64 allows Ofcom to set general conditions of entitlement in relation to must-carry obligations. In particular section 64(1) provides that “*general conditions may include conditions making any provision that OFCOM consider appropriate for securing that particular services are broadcast or otherwise transmitted by means of the electronic communications networks described in the conditions*”.
- 1.8 Section 64(2) makes it clear that general conditions can only impose must-carry obligations in relation to a specified list of services and in relation to networks of a certain type.

### **Specified networks and services**

- 1.9 The specified services are set out in section 64(3) of the Act. The current list is:

- any service of television programmes provided by the BBC so far as it is provided in digital form and is a service in relation to which Ofcom have functions;
- the Channel 3 services so far as provided in digital form;
- Channel 4 so far as provided in digital form;
- Channel 5 so far as provided in digital form;
- S4C Digital; and
- the digital public teletext service.

- 1.10 For the remainder of this document these services shall be referred to as the Must-carry Services. The effect of these proposals is that those digital TV multiplexes which carry Must-carry Services (the “public service television multiplexes”) will benefit from regulatory protection.

- 1.11 Section 64(2)(b) of the Act says that the effect of the must-carry requirement should be confined to networks by means of which public electronic communications services are provided that are used by a significant number of end-users as their principal means of receiving television programmes.

- 1.12 Ofcom considers that the terrestrial transmission network provided by ntl and Crown Castle is an appropriate network for these purposes as it is used by a significant number of end-users. At present approximately 5.0 million households in the United Kingdom have digital terrestrial receivers.<sup>3</sup> Approximately 1.1 million of these receivers are used on second television sets in households which already have digital reception (via cable or satellite). Therefore it can be estimated that approximately 3.9 million households

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<sup>3</sup> Ofcom: Digital Television Update – Q3 2004.

presently use digital terrestrial transmission as their principal means of receiving television broadcasts. This number has been growing sharply and it is likely that the number of households using digital terrestrial reception will increase further in connection with digital switchover.

- 1.13 For the reasons set out in the November consultation, Ofcom considers that appropriate regulatory and commercial arrangements are already in place to give the necessary level of assurance that carriage of public service content on satellite and cable platforms can be secured on reasonable terms. In addition, in preparing these proposals, Ofcom has taken into account the existence of specific regulatory obligations on the providers of PSBs to secure transmission on the digital television platform. There are no similar obligations on the providers of PSB to secure transmission on other platforms. Accordingly, the proposals in this document are limited only to terrestrial transmission.
- 1.14 General Condition 7 has been set under section 64 of the Act and provides a framework for imposing must-carry obligations by means of a direction<sup>4</sup>. General Condition 7 is set out in Annex 4. That condition requires a communications provider of an appropriate network to broadcast or otherwise transmit certain specified services as directed by Ofcom. The specified services referred to are the Must-carry Services and the appropriate network is equivalent to that described in section 64(2)(b) of the Act.
- 1.15 Ofcom is proposing in this document to give a Direction under General Condition 7 imposing must-carry obligations on the terrestrial transmission providers, ntl and Crown Castle, to provide MTS. In the context of this document, MTS refers to the broadcast or transmission of the Must-carry Services by ntl or Crown Castle through using equipment installed and operated by them for that purpose. The Direction will not duplicate the regulation of access to masts and sites proposed in the November consultation.
- 1.16 The draft Direction is set out in Annex 3.

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<sup>4</sup> General Condition 7 (must-carry obligations) is set out in Part 2 to the Schedule to the Notification setting general conditions under section 45 of the Communications Act 2003, issued by the Director General of Telecommunications on 22 July 2003..

## Section 2

# Public service television broadcasting

- 2.1 As mentioned above, Article 31(1) says that Member States can impose must-carry obligations where they are necessary to meet clearly defined general interest objectives. Ofcom considers that diversity of programming for citizen-consumers within the United Kingdom is an important issue and that to ensure diversity there needs to be a sufficient plurality of providers of television content. As is clear from section 264 of the Act the purposes of public service television broadcasting in the United Kingdom includes ensuring a diversity of content. Section 264(4) sets out that the purpose of PSB is the provision of services which:
- secure that programmes dealing with a wide range of subject-matters are available for viewing;
  - meet the needs and satisfy the interests of as many different audiences as practicable;
  - are balanced, in their nature and subject matter, for meeting the needs and satisfying the interests of the available audiences; and
  - maintain high general standards with respect to content of the programmes and quality, and to the professional skill and editorial integrity applied in making the programmes.
- 2.2 Section 264(6) of the Act sets out a manner of fulfilling the purposes of PSB in the United Kingdom, a key aspect of which is the need for a diversity of programming.

## Ofcom's PSB review

- 2.3 Section 264 of the Act provides part of Ofcom's remit in relation to PSB. That section imposes a duty on Ofcom to keep PSB under regular review. Ofcom has recently undertaken such a review.
- 2.4 Phase 1 of Ofcom's PSB review<sup>5</sup> explains that the Act, on behalf of consumers, requires the main terrestrial television channels to deliver programmes and services which cover a wide range of subject matters and which meet the needs and interests of many different audiences. Those channels are expected to meet high standards, to educate, to inform, to entertain and to support cultural activity in the United Kingdom. They are also expected to reflect the lives and concerns of different communities in the United Kingdom.
- 2.5 The review identifies two key aims of PSB. First, to help the broadcasting market work more effectively to deliver programmes that consumers want to

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<sup>5</sup> See of Ofcom review of public service television broadcasting, Phase 1 - Is television Special? – published 21 April 2004. In particular, see pages 4 and 10 of the executive summary and paragraphs 145 to 148.

watch or want to have an option to watch. Second, to provide the programming that as citizens we want to be widely available for as many people as possible to watch. Such programming secures the wider social objectives of United Kingdom citizens by making available television that has broad support across the United Kingdom.

- 2.6 The consumer focused objectives have been to ensure amongst other things that broadcasters deliver a sufficient range and balance of programmes and programmes which cater for minorities as well as mass audiences. The citizen objectives can be seen as those measures needed to make sure television delivers sufficient positive externalities and merit goods, by giving all citizens access to programming of wider social value.
- 2.7 To meet these broad social purposes, Ofcom considers that PSB should be widely available to all citizens and that public service television broadcasters must achieve reach and impact to be effective. As mentioned above, Ofcom considers that to achieve this there is also a need for a sufficient plurality of providers.

### **Ofcom's general interest objective**

- 2.8 In the UK there is a public policy objective to complete a switchover from analogue broadcasting to broadcasting only in digital mode ("digital switchover") by 2012.
- 2.9 The Government is of the view that "completing the switch to digital will bring significant benefits to consumers, to broadcasters and to the UK economy as a whole:
- It will bring digital terrestrial television signals to the 25% of the population who live in areas that cannot currently receive them because of spectrum limitations;
  - It will give increased quality and choice for viewers;
  - Broadcasters will no longer have to incur the costs of transmitting signals in both formats, releasing resources for investment in programming and other services for consumers; and
  - Spectrum will be released to allow the development of more television and other services for consumers.<sup>6</sup>
- 2.10 Work done by Ofcom, DTI and DCMS has however underlined the lengthy and complex nature of the digital switchover project. Switchover will be implemented on a region-by-region basis with the first region completing the switch to digital around four years before the last. This regional progression would allow the necessary technical preparations to be undertaken steadily. The Government has also indicated that there would need to be at least two years notice for viewers in each region. The construction of new infrastructure will require negotiation of contracts between broadcasters and transmission

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<sup>6</sup> [www.digitaltelevision.gov.uk](http://www.digitaltelevision.gov.uk)

companies together with time allowed to build-out transmission infrastructure. Manufacturers will also need time to prepare, e.g. to manufacture new equipment that is required to upgrade the digital transmission network. Retailers and television platform providers will also need time to prepare so they can ensure adequate stocks of equipment are available. In addition, adequate time will be needed to provide consumers with information about how to ensure they can receive digital television.

- 2.11 Ofcom is responsible for the licensing of commercial broadcasters and digital terrestrial multiplex operators under the Broadcasting Acts 1990 and 1996 and the Communications Act 2003. Under the provisions of the Communications Act, Ofcom issued new licences (Digital Replacement Licences, “DRLs”) to Channel 3, Channel 4 and Channel 5 licensees and to the Public Teletext provider at the end of 2004. These licences include an obligation for the holders of the DRLs to complete digital switchover in each of their licence areas by 31 December 2012. The licences also included provisions, as required by the Communications Act, requiring the licensee to secure digital terrestrial coverage that is equivalent to, or substantially the same as, existing analogue coverage. The DRLs also include obligations requiring the licensees to secure transmission from the 1,154 transmitters and relay sites currently used for analogue broadcasting. The rationale for these obligations relating to DSO has been discussed in detail in Ofcom's consultation document on DRLs.<sup>7</sup>
- 2.12 In order to complete DSO by the end of 2012, it is essential that there is timely and effective preparation. A number of key steps are required to this end. These include the negotiation of contracts between broadcasters, multiplex licensees and transmission companies and the communication of important changes to television reception to all households in the UK. In particular, Ofcom's view is that completion of negotiation of the transmission contracts for the public service television multiplexes by the end of 2005 is on the critical path to achievement of the 2012 deadline.

### **Securing Ofcom's general interest objective**

- 2.13 Ofcom considers that it is unacceptable, for public policy reasons, for there to be uncertainty regarding the availability of carriage for the public service television multiplexes via digital terrestrial transmission. This reflects the importance of PSB provision to citizens and consumers, for reasons discussed briefly above, and in more detail in the PSB review.
- 2.14 Ofcom also considers that the need for certainty on this point is increased by the proximity of DSO, the complexity of this project, and the substantial benefits to citizens and consumers that are expected to flow from DSO. Given the importance of the DSO project, as outlined above, and the fact the completion of negotiations concerning transmission contracts are on the critical path, Ofcom believes that it is essential that there is certainty regarding the availability of digital terrestrial transmission to the public service television multiplexes. In the absence of a very high level of certainty, progress towards achievement of the multiple and inter-related tasks required may falter. This

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<sup>7</sup> “Digital replacement licences to be offered to channels 3, 4, 5 and public teletext”, Ofcom, September 2004

may lead to a delay in achievement of the overall timetable, resulting in reduced benefits to citizens and consumers.

- 2.15 Moreover, Ofcom believes that the certainty that is required for the public service television multiplexes can, in practice, only be supplied if the licensees of those multiplexes are also assured of the availability of transmission on reasonable terms. In this context, reasonable terms includes, in particular, a reasonable level of charges. Certainty regarding merely the availability of digital terrestrial transmission to the public service television multiplexes – without any assurance as to terms – risks being devoid of meaning, as it would in itself provide no assurance that the terms would not be prohibitive of reasonable use.
- 2.16 Ofcom's view is that, given the general interest objectives that it has identified, it is not appropriate to take a risk that transmission services will not be available on reasonable terms. In this context, Ofcom has also taken into account the risk that the setting of unreasonable terms by the providers of Must-carry services may lead to a depletion in the funding available for PSB programming, thereby undermining the purpose of provision of PSB and the objective to secure near-universal availability of that content. The adverse effect of any unreasonable terms on PSB services is likely to be material in particular given that transmission contracts tend to be on a long term basis (contracts of up to 12 years are common).
- 2.17 Further, in line with its general duty to act in a proportionate manner, Ofcom has considered whether this important general interest objective could in practice be assured in the absence of regulation. Ofcom notes that there have historically been only two providers of MTS for television. It considers that there are likely to be high barriers to entry for other potential suppliers as credible competitors for the contracts expected to be awarded later this year. Taking into account these points and other characteristics of the transmission industry, Ofcom does not believe that regulation to secure the general interest objective would be disproportionate.
- 2.18 For these reasons, Ofcom's view is that, at this time, ex ante measures are required to provide the necessary level of assurance and certainty. The "Must-carry" obligations proposed by Ofcom and discussed in detail in section 3 would provide the necessary level of assurance at this time. In the longer term, it may be that ex-ante regulation is not necessary to provide the necessary level of assurance. Ofcom is committed to keeping under periodic review the circumstances surrounding the proposed regulation, to assess whether it remains necessary going forward.

### Section 3

## Scope of proposed obligations

### Requirement to broadcast or transmit

- 3.1 Ofcom is proposing that ntl and Crown Castle as the current providers of the terrestrial transmission broadcasting network on which PSB services are presently carried, be required to provide MTS on fair and reasonable terms, conditions and charges. The requirements will only apply to reasonable requests for MTS submitted in writing.
- 3.2 At the current time these proposals only relate to ntl and Crown Castle as these are presently the only providers of MTS in respect of PSB services in the UK. If, other providers are in future awarded contracts for the provision of MTS in respect of the Must-carry Services, Ofcom will consider whether the obligations on ntl and Crown Castle remain necessary and whether similar obligations should apply to other providers.

### Proposals about charges

- 3.3 Article 31(2) of the USD recognises that Member States should be able to determine appropriate remuneration, if any, in respect of must-carry obligations.
- 3.4 Historically, across Europe, “must-carry” obligations have sometimes been imposed without any provision being made for recompense for the costs incurred in carriage. Ofcom notes that the cost of providing MTS is considerable, both in terms of investment in upgrades to existing infrastructure, new transmission equipment and in ongoing costs. Ofcom believes it to be entirely appropriate for transmission service providers to charge for MTS that they provide, so as to allow them a reasonable opportunity to recover their costs, including a reasonable level of profits. These should properly reflect the levels and nature of the investments they are required to make, the innovation they have undertaken and the risks they have borne. Such arrangements should allow the transmission providers to make a commercial rate of return on the services they supply. Ofcom therefore considers that the option of imposing “must-carry” obligations with no provision for payment should be rejected.
- 3.5 Ofcom is not proposing to specify the basis on which MTS charges should be set. However, Ofcom remains able to investigate any complaints it might receive in the context of the must-carry obligations. Proper investigation of any such complaint would be time-consuming. Ofcom’s expectation is that the public service television multiplex licensees will engage in a commercial process to procure their future transmission needs. Consistent with its general desire to limit the extent of regulation, Ofcom will encourage the relevant parties to reach commercial agreement on terms without reference to Ofcom as regulator. However, Ofcom recognises that if a complaint is made, resolution of the matter may be on the critical path to the timely achievement of DSO.

- 3.6 Ofcom therefore considers that it is appropriate to conduct some preparatory analysis into the potential methodologies for costing digital terrestrial transmission services. Ofcom expects to do further work in this area in coming months.

### Providers of PSB services

- 3.7 Recital 44 of the Universal Service Directive makes it clear that the must-carry obligations are intended to include satellite, cable and terrestrial transmission networks. Section 64 of the Act could be read as implying a direct relationship between the broadcaster providing the services listed in section 64(3) and the transmission operator. In practice, in the UK, ntl and Crown Castle enter into arrangements with the multiplex operators rather than directly with the broadcasters. In light of the way that MTS is provided, Ofcom considers that the legislation needs to be read in a way that encompasses this as it cannot have been the intention of Parliament in approving the Act to apply the must-carry provisions in a non-technology neutral way<sup>8</sup>.

### Communications Act tests

- 3.8 In proposing the must-carry obligations Ofcom has considered its general and specific duties under the Act. It has considered the following duties under section 3 of the Act:
- the need for Ofcom to secure the availability throughout the United Kingdom of a wide range of television services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (section 3(2)(c) of the Act);
  - the need for Ofcom to secure the maintenance of a sufficient plurality of providers of different television and radio services (section 3(2)(d) of the Act);
  - the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom (section 3(4)(a) of the Act); and
  - when furthering the interests of consumers, the need for Ofcom to have regard to the interests of consumers in respect of choice, price, quality of service and value for money (section 3(5) of the Act).
- 3.9 Ofcom has also considered the Community requirements set out in section 4 of the Act. In particular, it has had regard to the requirement to promote the interests of all persons who are citizens of the European Union (section 4(5) of the Act).

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<sup>8</sup> It is well-established that a court will give a purposive construction to a statute so as to ensure consistency with the Directive which it seeks to implement, even if this requires rewriting some of the wording of the legislation in question. See *Litster v Forth Dry Dock & Engineering Co. Ltd.* [1990] 1 AC 546 (House of Lords).

- 3.10 For all of the reasons set out in Section 2 of this document, Ofcom considers that its proposals are in accordance with these duties.
- 3.11 In addition to Ofcom's general duties, it is required to comply with the requirements of section 49(2) of the Act when giving a Direction for the purposes of a general condition. Section 49(2) requires that Ofcom must be satisfied that the proposal is:
- objectively justifiable in relation to the networks, services, facilities apparatus or directories to which it relates;
  - not such as to discriminate unduly against particular persons or against a particular description of persons;
  - proportionate to what it is intended to achieve; and
  - in relation to what it is intended to achieve, transparent.
- 3.12 Ofcom's objective justifications for the proposals are set out in Section 2 of this document. Ofcom considers that the proposed obligations do not unduly discriminate given that the Ofcom is restricted by section 64(3) of the Act in its application of must-carry obligations to the Must-carry Services. Further, Ofcom is proposing that the obligations should apply in relation to each of those services.
- 3.13 Ofcom is also required to ensure that its proposals are proportionate. Consistent with guidance provided by the European Commission<sup>9</sup> on the question of remuneration, Ofcom is proposing that MTS providers should be entitled to reasonable remuneration for MTS services. Further, as mentioned above, Ofcom is proposing to require that MTS be provided on fair and reasonable terms, conditions and charges. It is not proposing the specific terms of MTS. Ofcom considers that these proposals taken together represent a proportionate approach.
- 3.14 Ofcom considers that the proposed obligations are transparent given that the draft Direction is set out in Annex 3 and the proposals are described in this accompanying consultation document.

### **Analogue television broadcasting and radio broadcasting by PSBs**

- 3.15 The proposals in this document apply to a much more limited range of services than those in Ofcom's November consultation. Ofcom is aware that a number of other broadcasters may be concerned that they will be denied appropriate regulatory protection. Ofcom's proposal is however limited by the scope of its powers. The Secretary of State is empowered, following consultation with

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<sup>9</sup> See paragraph 1.2.2.2 of the European Commission Working Document – Subject “Must-carry” obligations under the 2003 regulatory framework for electronic communications networks and service, 22 July 2002.

Ofcom and interested parties and on the basis of criteria set out in section 64(10) (including the public benefit to be secured by the addition of the service to the list), to review the section 64(3) list from time to time and make appropriate changes by Order. In that event, Ofcom would consider whether to similarly extend the scope of the must-carry rules proposed in this document. Ofcom would co-operate fully with DCMS in any review of the section 64(3) list.

- 3.16 In the event of a complaint relating to the provision of transmission services outside the scope of this proposal, Ofcom would consider whether it would be expedient to use its existing powers under the Competition Act 1998 or the Communications Act 2003.

### Final steps

- 3.17 The Notification under section 49(2) of the Act setting out the draft Direction is at Annex 3. Stakeholders may make representations within the period ending on 31 March 2005 to [margaret.doherty@ofcom.org.uk](mailto:margaret.doherty@ofcom.org.uk). As required by section 50 of the Act, the draft Direction is being sent to the Secretary of State.

- 3.18 When Ofcom has considered any representations made within the period to 31 March 2005, it may give effect to the proposals, with or without modifications. Ofcom will do this by giving a final Direction accompanied by a final Explanatory Statement. In determining that the appropriate consultation period should be some 5 weeks (including Easter), Ofcom has in particular taken into account:

- the extensive informal discussions it has held with stakeholders on the issues surrounding transmission over the last few months and;
- the urgent need to achieve certainty concerning the regulatory regime to avoid the risk of delay to the DSO timetable.

## Annex 1

# Ofcom's consultation principles

Ofcom has published the following seven principles that it will follow for each public written consultation:

### Before the consultation

1. Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

### During the consultation

2. We will be clear about who we are consulting, why, on what questions and for how long.
3. We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.
4. We will normally allow ten weeks for responses, other than on dispute resolution.
5. There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organisations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.
6. If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

### After the consultation

7. We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

## Annex 2

# Consultation response cover sheet

- A2.1 In the interests of transparency, we will publish all consultation responses in full on our website, [www.ofcom.org.uk](http://www.ofcom.org.uk), unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A2.2 We have produced a cover sheet for responses (see below) and would be very grateful if you could send one with your response. This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed cover sheets confidential.
- A2.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their cover sheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A2.4 We strongly prefer to receive responses in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- A2.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your cover sheet only so that we don't have to edit your response.

## Cover sheet for response to an Ofcom consultation

### BASIC DETAILS

Consultation title:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

### CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

Name/address/contact  
details/job title

Whole response

Organisation

Part of the response

If there is no separate annex, which parts?

Note that Ofcom may still refer to the contents of responses in general terms, without disclosing specific information that is confidential. Ofcom also reserves its powers to disclose any information it receives where this is required to carry out its functions. Ofcom will exercise due regard to the confidentiality of information supplied.

### DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

## Annex 3

# Draft Direction

### **Notification of proposals under section 49 of the Communications Act 2003**

#### **Proposal for making a direction under section 49 of the Communications Act 2003 and General Condition 7 imposing must-carry obligations**

1. Ofcom hereby makes, in accordance with section 49 of the Communications Act 2003 ('the Act'), the following proposal for a Direction to be given under General Condition 7.
2. The draft Direction is set out in the Schedule to this notification.
3. The effect of the draft Direction, and the reasons for making the proposal, are set out in the accompanying consultation document.
4. Representation may be made to Ofcom about the proposed draft Direction by 31 March 2005.
5. In accordance with section 50 of the Act, a copy of this notification has been sent to the Secretary of State. A copy has also been sent to the European Commission for information as Ofcom considered it appropriate to do so.



**Jim Niblett**

**A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002**

**28 February 2005**

## Schedule

### **Draft Direction under section 49 of the Communications Act 2003 and General Condition 7 imposing must-carry obligations**

#### **Whereas:**

- (A) section 64 of the Act allows for general conditions to include conditions making any provision that Ofcom consider appropriate for securing that particular services are broadcast or otherwise transmitted by means of electronic communications networks described in the conditions;
- (B) the Director set General Condition 7 pursuant to section 64 of the Act;
- (C) by virtue of the Transitional Provisions, General Condition 7 set by the Director is to have effect as if set by Ofcom;
- (D) General Condition 7 is a condition which has effect by reference to directions and Ofcom are proposing to give a direction as set out in the Annex to this Schedule so as to effect that condition's operation;
- (E) The Communications providers are providers of an Appropriate Network for the purposes of General Condition 7;
- (F) for the reasons set out in Section 3 of the consultation document accompanying this draft Direction Ofcom is satisfied that, in accordance with section 49(2) of the Act, this Direction is:
  - (i) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
  - (ii) not such as to discriminate unduly against particular persons or against a particular description of persons;
  - (iii) proportionate to what it is intended to achieve; and
  - (iv) in relation to what it is intended to achieve, transparent.
- (G) for the reasons set out in Section 3 of the consultation document accompanying this Direction Ofcom is satisfied that it has acted in accordance with the relevant duties set out in Sections 3 and 4 of the Act;
- (H) on 28 February 2005 Ofcom published a notification of the proposed Direction in accordance with section 49 of the Act;
- (I) Ofcom has considered every representation about the proposed Direction duly made to it; and

**NOW, therefore, pursuant to section 49 of the Act and General Condition 7, Ofcom gives the following Direction:**

1. Requirement to broadcast or transmit the Must-carry Services on reasonable request
  - 1.1 Where a Third Party reasonably requests in writing broadcast or transmission of services which include the Must-carry Services, the Communications Provider shall broadcast or transmit the Must-carry services as requested. The Communications Provider shall also provide such broadcast or transmission of the Must-carry Services as Ofcom may from time to time direct.
  - 1.2 The provision of broadcast or transmission of the Must-carry Services in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.
2. For the purpose of interpreting this Direction the following definitions shall apply:
  - “Act” means the Communications Act 2003;
  - “Communication Provider” means each of:
    - (a) National Transcommunications Limited whose registered company number is 02487597 (including any change of company name under the same company number) and any National Transcommunications Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989; and
    - (b) Crown Castle UK Limited whose registered company number is 03196207 (including any change of company name under the same company number) and any Crown Castle UK Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
  - “Director” means the Director General of Telecommunications;
  - “General Condition 7” means general condition 7 (must-carry obligations) set out in Part 2 of the Schedule to the Notification setting general conditions under section 45 of the Communications Act 2003, issued by the Director on 22 July 2003;
  - “Must-carry Services” means:
    - (a) any service of television programmes provided by the BBC so far as it is provided in digital form and is a service in relation to which Ofcom have functions;
    - (b) the Channel 3 services so far as provided in digital form;

- (c) Channel 4 so far as provided in digital form;
- (d) Channel 5 so far as provided in digital form;
- (e) S4C Digital; or
- (f) the digital public teletext service.

“Ofcom” means the Office of Communications as established pursuant to section 1(1) of the Office of Communications Act 2002;

“Third Party” means a person who is providing any of the Must-carry Services;

“Transitional Provisions” means sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003;

3. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act, or if it has no meaning there, in General Condition 7.
4. For the purpose of interpreting this Direction:
  - (i) headings and titles shall be disregarded; and
  - (ii) the Interpretation Act 1978 shall apply as if this Direction were an Act of Parliament.
5. This direction shall take effect on the day it is published.

**[Signature]**

**Jim Niblett**

**A person authorised under paragraph 18 of the Schedule to the Office of Communications Act 2002**

**[Date]**

## Annex 4

# General Condition 7

## 7. MUST-CARRY OBLIGATIONS

- 7.1 The Communications Provider shall, on a direction of [Ofcom<sup>10</sup>] made from time to time for the purposes of this Condition, broadcast or otherwise transmit any service specified in that direction which is also set out in section 64(3) of the Act as modified from time to time by the Secretary of State pursuant to section 64 of the Act.
- 7.2 The Communications Provider shall comply with any order made by the Secretary of State from time to time under section 64(11) of the Act with respect to the terms on which such services must be broadcast or otherwise transmitted.
- 7.3 In this Condition,
- (a) "Appropriate Network" shall have the meaning ascribed to it by section 272(7) of the Act; and
  - (b) "Communications Provider" means a person who provides an Appropriate Network.

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<sup>10</sup> Inserted by virtue of the transitional provisions, namely sections 408 and 411 of the Act, Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003 and Article 3(2) of the Office of Communications 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003.

## Annex 5

## Impact assessment

A5.1 Ofcom has identified four options that it has considered in relation to the imposition of must-carry obligations on ntl and Crown Castle. These are:

- A Imposition of must-carry requirements with no provision for remuneration to be paid to ntl and Crown Castle;
- B Imposition of must-carry requirements on reasonable terms (in particular, with provision for remuneration to be paid on reasonable terms);
- C Imposition of must-carry requirement (silent on terms);
- D No must-carry obligations.

A5.2 Ofcom has considered these options with regard to the costs associated with them, the risks represented and the impact on citizens and consumers (especially with regard to the DSO project:

	Costs	Benefits	Impact
Option A	<p>Burden upon ntl and Crown Castle would be very considerable, given the costs they would be required to incur.</p> <p>Strong risk that ntl and Crown Castle might exit the industry, with insufficient incentive for any other player to enter</p>	<p>Savings in transmission costs by broadcasters might in principle be used to boost funds available for production of public service content. In principle, benefit of certainty in connection with availability of carriage of PSB services via terrestrial transmission. However, this benefit would be illusory if providers were to exit market.</p>	<p>Potentially highly detrimental impact on citizen-consumers. The digital switchover project would be placed at considerable risk - no commercial incentive for ntl and Crown Castle to take any action to progress switchover. Therefore, universal availability of Must-carry Services would be placed in jeopardy.</p>
Option B	<p>Some compliance costs to transmission providers, especially in the event of a complaint about unreasonable terms. However, these are unlikely to be materially greater than the equivalent costs they</p>	<p>Provides certainty of availability of PSB services on digital terrestrial transmission platform. Benefits of certainty likely to be especially great in connection with planning and</p>	<p>Should provide appropriate incentives to ntl and Crown Castle to offer MTS necessary to facilitate switchover as they would have a reasonable opportunity to earn a</p>

	would face in order to assure compliance with the Competition Act.	<p>preparation for digital switchover, which requires co-ordinated action by broadcasters, multiplex operators, large numbers of consumers, and other parties (such as retailers and manufacturers).</p> <p>Addresses the risk that no credible alternative transmission is available on reasonable terms, thus preventing potential erosion of funding available for PSB programming.</p> <p>Broadcasters and other stakeholders can continue with their plans for implementation of DSO with confidence.</p>	commercial rate of return which reasonably reflects their investment and risks undertaken.
Option C	<p>A requirement to broadcast or transmit must-carry services which did not make any comment on terms would lack meaning. It would not confirm for ntl and Crown Castle that they could expect to receive a commercial rate of return. It would not provide the necessary confidence to broadcasters and other stakeholders to obviate delays to the DSO timetable.</p> <p>Risks potentially as Option A above and Option D below.</p>	Apparent reduction in extent of regulation compared to Options A, B. However, this would be at cost of increased uncertainty.	<p>Potential delays to DSO timetable and therefore to universal availability of Must-carry content.</p> <p>Possible reduction in funds available for production of public service programming.</p>
Option D	Risk of unreasonable terms and excess pricing being charged to		Potential delays to DSO timetable and therefore to universal

	<p>broadcasters, (who are now obliged (in case of DRL licensees) to effect have now made commitments to switchover by 31 December 2012.</p> <p>Lack of confidence by broadcasters and other stakeholders to continue with their plans for implementation of DSO. Consequential delays to DSO timetable.</p>		<p>availability of must-carry content.</p> <p>Possible reduction in funds available for production of public service programming.</p>
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A5.3 Ofcom's preliminary conclusion is that option A would represent a very significant burden on ntl and Crown Castle; to a degree that might make investment by them (or others) in the transmission network to secure digital switchover commercially infeasible. Option D, while limiting the costs to ntl and Crown Castle, would leave broadcasters exposed to unreasonable terms (for example, excess pricing) which could either delay negotiations to a degree that would place digital switchover at risk or, were excess prices to be charged, diminish the funds available for programming to the detriment of citizens. Option C would offer certainty neither to ntl and Crown Castle, nor the broadcasters and other stakeholders and potentially gives rise to the risks associated with Option A and Option D.

A5.4 Option B appears to offer an appropriate balance between the costs and benefits and to give reasonable assurance of meeting the public service objective set out in Section 2 – providing a framework which offers a reasonable return to ntl and Crown Castle which should offer an incentive on them to provide services; while offering sufficient certainty confidence to the broadcasters and other stakeholders to enable them to progress with plans for digital switchover.