



The setting of access-related conditions upon Top Up TV Limited

Consultation

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Section 1

Introduction

Summary of the application of access-related conditions to TUTV

- 1.1 This consultation invites stakeholders to comment on Ofcom's proposal to set access-related conditions (the "Conditions") pursuant to section 75(2) of the Communications Act 2003 (the "Act") on Top Up TV 1 Limited, Top Up TV 2 Limited and Top Up TV 3 Limited, ("TUTV") requiring TUTV to provide, amongst other things, fair, reasonable and non-discriminatory ("FRND") access to its conditional access services on regulated terms.
- 1.2 Ofcom expects that it will publish a final statement setting out any conditions that will apply to TUTV in May 2007. Ofcom further expects that any Conditions will apply to TUTV from the publication of the final statement.
- 1.3 Section 75(2) of the Act, which implements Article 6 of, and Part 1 to Annex 1 of, the Directive 2002/19/EC (the "Access Directive"), imposes a duty on Ofcom to impose access-related conditions on persons who provide a conditional access system in relation to a protected programme service.
- 1.4 To date, access-related conditions have been imposed upon Sky Subscribers Services Limited ("SSSL") and any SSSL subsidiary or holding company, or any subsidiary of that holding company, which require it to provide, among other things, regulated access to its conditional access system.
- 1.5 Conditions set under section 75(2) of the Act cannot be amended or revoked until Ofcom has conducted a relevant market review. If the market review determines that a person to whom access-related conditions apply does not have significant market power, the access-related conditions may be amended or revoked, provided the provisions of section 76¹ of the Act are met.
- 1.6 In July 2006, Ofcom commenced a market review of wholesale digital television broadcasting platforms². Ofcom expects that the review will, among other things, determine which persons, if any, have significant market power in relation to access to digital television platforms. It is envisaged that the market review will be completed during the course of 2007 and a final statement made in or around December 2007.

Summary of Ofcom's approach to interpreting FRND

- 1.7 Ofcom sets out in section 5 the principles that it is proposing it would normally expect to apply to the proposed Conditions on TUTV, in relation to how it will normally interpret FRND (the "TUTV FRND principles"). The following provides a summary of those principles.
- 1.8 In drafting the TUTV FRND principles, Ofcom has, in part, considered previous Ofcom and Ofcom guidelines that relate to conditional access. However, for practical purposes, these guidelines have only ever applied to SSSL and any SSSL subsidiary or holding company, or any subsidiary of that holding company; they do not apply to

¹ Section 76 of the Act sets out the provisions that apply in order for Ofcom to give effect to a proposal to modify or revoke conditions set under section 75(2)

² <http://www.ofcom.org.uk/tv/ifi/marketreviews/wholesaledtvb/review.pdf>

TUTV. Moreover, Ofcom stated in its consultation document on the provision of technical platform services by SSSL, issued on 21 April 2006³:

“A1.6 If other operators were to be designated as regulated supplier of TPS [which include conditional access services] in the future, Ofcom would need to consider the appropriate guidelines to apply given the specific circumstances of the designated provider. Therefore these guidelines currently only apply to Sky’s provision of regulated TPS on the DSat platform”

- 1.9 Whilst previous guidelines issued by either Ofcom or Oftel provide useful context, Ofcom nevertheless considers that the starting point for the TUTV FRND principles is to determine what principles would be appropriate to TUTV in its own right.
- 1.10 In assessing whether a charge for TUTV’s conditional access services is fair and reasonable, Ofcom would normally expect that commercially negotiated prices should be consistent with those which would be expected in a competitive market and that, if technically feasible, unbundled services are offered so that the customer only pays for what it needs.
- 1.11 In assessing whether a price for TUTV’s conditional access services is non-discriminatory, Ofcom would normally expect a vertically integrated provider to offer services to third parties on no less favourable terms than those which it provides equivalent services to its own operations.
- 1.12 Ofcom considers that the TUTV FRND principles proposed in this consultation document are appropriate to TUTV because, as set out in section 5 of this document, TUTV can still be considered to be in an early phase of its platform business lifecycle and its bargaining position with broadcasters, who want to gain access to its platform, is likely to be reasonably balanced and not weighted in favour of TUTV. In addition, Ofcom considers that the TUTV FRND principles are appropriate for TUTV because the TUTV FRND principles:
 - allow for the scope for the terms of supply of TUTV’s conditional access to be tailored to the specific requirements and needs of broadcasters and to reflect the risk undertaken by broadcasters when gaining access to an emerging platform;
 - reflect the risk that TUTV, as a platform operator in a relatively early stage of its platform lifecycle, has in developing an emerging platform; and
 - allow for a reduction in the risk of overly burdensome, intrusive or prescriptive regulatory requirements that may disincentivise a platform in the early stages of development from developing and investing in its own conditional access system.

Status of the proposed TUTV FRND principles set out in this document

- 1.13 If the proposed TUTV FRND principles (as set out in this consultation) are confirmed in any subsequent statement, Ofcom intends normally to take the proposed TUTV FRND principles into account when applying the proposed Conditions. However, the TUTV FRND principles would not form part of the proposed Conditions and so would not affect the scope of those conditions. Ofcom cannot legally fetter its discretion and therefore retains the ability to depart from the TUTV FRND principles where the

³ <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/consultation.pdf>

circumstances warrant it. The TUTV FRND principles would therefore not be binding on Ofcom.

Application of the TUTV FRND principles set out in this document

- 1.14 If the proposed Conditions are set, Ofcom expects stakeholders who want access to TUTV's conditional access services to enter into commercial negotiations with TUTV in order to try to reach an agreement with TUTV for the provision of conditional access services on an FRND basis. In the event that either an agreement cannot be reached for the provision of conditional access services or that an agreement is reached but the stakeholder considers that it is not FRND within the meaning of the TUTV FRND principles, stakeholders would then be able to bring a dispute (in accordance with section 185 of the Act) or a complaint to Ofcom, which Ofcom would then consider accordingly.

The consultation process

- 1.15 Feedback on these proposals is welcomed. Please send your responses to matthew.marsh@ofcom.org.uk by 5pm on 27 April 2007. Further details on how to engage with this consultation and the timeframe for responses are set out in Annex 1.

Section 2

Background and legal framework

- 2.1 This section explains the background to this consultation, a summary of current access regulation, a summary of the legal framework in relation to the proposed access-related conditions, and a proposal that TUTV is providing a conditional access system for the purposes of section 75(2) of the Act.

Background to the application of access-related conditions on TUTV

- 2.2 During the course of 2006, Ofcom and British Sky Broadcast Ltd (“Sky”) were in correspondence about whether the regulation relating to conditional access services, as contained in section 75(2) of the Act, extended to cover TUTV.
- 2.3 TUTV offers subscription television services via the digital terrestrial television (“DTT”) platform. TUTV was launched in early 2004 and initially broadcast a number of channels as part of a monthly subscription package. More recently, TUTV began offering a video-on-demand service to its subscribers. In addition to its subscription packages, TUTV also offers programming that may be viewed on a pay-per-view basis.
- 2.4 TUTV subscription packages include channels provided by third party broadcasters. Where a third party broadcaster’s channel is included in a TUTV package, the third party does not need to purchase conditional access services from TUTV. This is because TUTV (as the package provider) will make any necessary arrangements.
- 2.5 Where a third party broadcaster wants to supply encrypted programming to designated digital terrestrial viewers outside a TUTV package, the broadcaster will need to reach an agreement with TUTV for conditional access services in order to protect that programming.
- 2.6 On a digital TV platform, access to specific encrypted channels and content is only provided to viewers who have paid (or committed to pay) for the content. Conditional access systems typically employ content scrambling and encryption technologies along with an end user authorisation system and decryption technologies operating within the digital receiver (a digital receiver could be a set top box with an active viewing card).
- 2.7 Until recently, TUTV had not agreed to provide conditional access services to third party broadcasters. In early September 2006, TUTV reached an agreement with Setanta Sports which allows Setanta to broadcast premium content to viewers using TUTV’s conditional access system to protect its programming from unauthorised viewing.
- 2.8 Ofcom proposes that it is appropriate for Ofcom to set access-related conditions on TUTV in accordance with the Act, and in particular with section 75(2) of the Act.

Current access regulation

- 2.9 Under the access regime, Ofcom is required to set access-related conditions on persons providing conditional access services irrespective of the market power of the conditional access provider. Any conditions that are set on a provider of conditional access can only be removed following a market assessment. Under the access

regime there is therefore a presumption of conditions applying before a market assessment is undertaken, which determines whether there is a person with significant market power in the relevant market. The access regime therefore displays unusual characteristics of process, because usually significant market power needs first to be identified before conditions are imposed.

- 2.10 The obligation to provide conditional access services on a fair, reasonable and non-discriminatory basis stems from the Advanced Television Standards Directive (95/47/EC). The Directive was implemented in the UK by the Advanced Television Services Regulations 1996 (SI 1996 No. 3151) and the Advanced Television Services (Amendment) Regulations 1996 (SI 1996 No. 3197). As a result, Oftel, the predecessor telecommunications regulator, regulated the provision of conditional access services.
- 2.11 In July 2003, the new EU regulatory framework for electronic communications networks and services (the EU communications directives) was implemented in the UK through the Act.
- 2.12 In July 2003, Oftel imposed certain regulatory conditions (the “Sky Platform Conditions”) on the digital TV platform operator SSSL, requiring it to offer third parties regulated access to certain technical services, including conditional access. Since 29 December 2003, Ofcom has been responsible for regulating the communications sector in the UK. Ofcom is now therefore responsible for interpreting the meaning of the Sky Platform Conditions.
- 2.13 The Sky Platform Conditions require SSSL to provide, among other things, conditional access on FRND terms.
- 2.14 On 21 September 2006⁴, Ofcom adopted guidelines setting out Ofcom’s approach to considering how it would normally interpret the Sky Platform Conditions (the “2006 Guidelines”). The 2006 Guidelines set out, among other things, the principles that Ofcom would normally apply in assessing whether SSSL has complied with the Sky Platform Conditions. The Sky Platform Conditions and 2006 Guidelines do not apply to TUTV. As Ofcom stated in its consultation into the provision of technical platform services⁵:
- “A1.6 If other operators were to be designated as regulated supplier of TPS [which include conditional access services] in the future, Ofcom would need to consider the appropriate guidelines to apply given the specific circumstances of the designated provider. Therefore these guidelines currently only apply to Sky’s provision of regulated TPS on the DSat platform”
- 2.15 Whilst the Sky Platform Conditions and 2006 Guidelines provide useful context, they are not directly relevant to the proposed Conditions. However, Ofcom considers that the use of principles to interpret FRND is helpful for stakeholders in understanding how Ofcom may interpret access-related conditions. Ofcom has therefore set out, in section 5 of this consultation document, the TUTV FRND principles.

⁴ <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/statement/statement.pdf>

⁵ <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/consultation.pdf>

Legal framework for the implementation, modification and revocation of access-related conditions

- 2.16 The current obligation to provide conditional access services, and the legal framework for access to a communications network, stems from the Access Directive.
- 2.17 Article 6 (1) of the Access Directive specifically requires Member States to ensure that, in relation to conditional access to digital television broadcast to viewers, the conditions laid down in Annex I, Part I of that Directive apply. Article 6 (1) states that:

"Member States shall ensure that, in relation to conditional access to digital television and radio services broadcast to viewers and listeners in the Community, irrespective of the means of transmission, the conditions laid down in Annex I, Part I apply."

- 2.18 Annex I, Part I of the Access Directive states that:

"(a) conditional access systems operated on the market in the Community are to have the necessary technical capability for cost-effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using such conditional access systems;

(b) all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to:

- offer to all broadcasters, on a fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters' digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Community competition law,
- keep separate financial accounts regarding their activity as conditional access providers.

(c) when granting licences to manufacturers of consumer equipment, holders of industrial property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. Taking into account technical and commercial factors, holders of rights are not to subject the granting of licences to conditions prohibiting, deterring or discouraging the inclusion in the same product of:

- a common interface allowing connection with several other access systems, or
- means specific to another access system, provided that the licensee complies with the relevant and reasonable conditions ensuring, as far as he is concerned, the security of transactions of conditional access system operators."

2.19 The access obligations set out above have been implemented in the UK by sections 45(5), 73(5), 75(2) and 76 of the Act. It is section 75(2) of the Act that imposes a duty on Ofcom to impose access-related conditions on persons who provide a conditional access system in relation to a protected programme service (i.e. programmes that cannot be viewed except by the use of that conditional access system).

2.20 Section 75(2) of the Act states that:

"It shall be the duty of OFCOM to ensure –

(a) access-related conditions are applied to every person who provides a conditional access system in relation to a protected programme service; and

(b) that those conditions make all such provision as is required by the provision contained from time to time in Part I of Annex I to the Access Directive (conditions relating to access to digital programme services)"

2.21 A conditional access system, and a protected programme service, are defined in the Act at section 75(3):

"In this section-

"conditional access system" means any system, facility, arrangements or technical measure under or by means of which access to programme services requires -

(a) a subscription to the service or to a service that includes that service; or

(b) an authorisation to view it, or to listen to it, on a particular occasion;

"protected programme service" means a programme service the programmes included in which cannot be viewed or listened to in an intelligible form except by the use of a conditional access system."

2.22 Ofcom's power to set access-related conditions on various persons is derived from section 45 of the Act, which allows Ofcom to set *ex ante* conditions, including 'access-related conditions'.

2.23 An access-related condition is defined in section 45(5) of the Act as a condition which contains only provisions authorised by section 73 of the Act.

2.24 Section 73 (2) of the Act states that:

"Access-related conditions may include conditions relating to the provision of such network access and service operability as appears to OFCOM appropriate for the purpose of securing –

(a) efficiency on the part of communications providers and persons making associated facilities available;

(b) sustainable competition between them; and

(c) the greatest possible benefit for the end-users for public electronic communications services."

- 2.25 The Act therefore details to whom access-related conditions may apply. In addition to this, the Act provides, at section 76, that Ofcom shall not give effect to a proposal to modify or revoke a condition made under section 75(2) until such time that Ofcom has carried out a market review to determine whether the person providing conditional access services under section 75(2) has significant market power. Ofcom may not therefore modify or revoke the proposed Conditions until it has completed a market review, which determines, among other things, that TUTV does not have significant market power.
- 2.26 Ofcom is currently undertaking a market review of wholesale digital television broadcasting platforms and expects that its market analysis will, among other things, include a determination of which persons, if any, have significant market power in relation to access to digital television platforms. It is envisaged that the market review will be completed during the course of 2007 and a final statement made in or around December 2007.

Proposal that TUTV is providing a conditional access system in relation to a protected programme service

- 2.27 In early September 2006, TUTV reached an agreement with Setanta Sports which allows Setanta to broadcast premium content to viewers using TUTV's conditional access system to protect its programming from unauthorised viewing.
- 2.28 TUTV set-top boxes have an embedded conditional access technology which is controlled by TUTV. The conditional access technology used by TUTV is *Mediaguard*, from a company called Nagra. Ofcom understands that TUTV will use *Mediaguard* to ensure Setanta Sports programming cannot be viewed or listened to without authorisation.
- 2.29 Also, Ofcom understands that DTT set-top boxes / digital televisions that are not embedded with TUTV's conditional access technology can also receive TUTV's programming if a TUTV conditional access module and a TUTV viewing card is inserted into the common interface module of the set-top box / digital television. Where this is done, Ofcom understands that TUTV is then technically able to provide conditional access services to these set-top boxes / digital televisions. If a broadcaster wants access to the TUTV platform, either through TUTV set-top boxes or through DTT set-top boxes / digital televisions that are not embedded with TUTV's conditional access technology, the broadcaster will need to have a commercial arrangement in place with TUTV for that access.
- 2.30 Therefore, Ofcom considers that TUTV is a provider of a conditional access system in relation to protected programme services. As such, Ofcom proposes to set the proposed Conditions on TUTV, including any of its subsidiaries or holding companies, or any subsidiary of such holding companies.
- 2.31 Ofcom considers it appropriate to prevent a person to whom a condition is applied which is part of a group of companies, exploiting the principle of corporate separation. That is to say, a person to whom the conditions are intended to apply should not use another member of its group to carry out activities or to fail to comply with a condition, which would otherwise render that person in breach of its

obligations. Accordingly, Ofcom considers it appropriate that the proposed Conditions, set out at Annex 4 of this consultation document shall apply to: TUTV, whose registered company numbers are 05636002, 05635994, 05643663, including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989.

Remaining structure of this document

2.32 The remainder of this consultation document is laid out as follows:

- Section 3 sets out a summary of the proposed Conditions.
- Section 4 sets out the statutory duties Ofcom has had regard to in drafting the proposed Conditions.
- Section 5 outlines the TUTV FRND principles that Ofcom will normally apply when applying the proposed Conditions and Ofcom's consultation questions in relation to the setting of access-related conditions on TUTV.
- Annex 1 provides details on how to respond to this consultation.
- Annex 2 provides details of Ofcom's consultation principles.
- Annex 3 contains a cover sheet for responses to this consultation.
- Annex 4 contains the notification of the proposed Conditions and the proposed Conditions.

Section 3

Summary of the proposed Conditions

Summary of the proposed Conditions

- 3.1 Ofcom proposes to set the following conditions for TUTV:
- 3.1.1 requirement to provide conditional access services;
 - 3.1.2 requirement to ensure that conditional access services have the necessary technical capability for cost effective transcontrol;
 - 3.1.3 requirement to keep separate financial accounts;
 - 3.1.4 requirement to grant intellectual property licences to conditional access products and systems on fair, reasonable and non-discriminatory terms;
 - 3.1.5 obligation not unduly to discriminate in the provision of conditional access services; and
 - 3.1.6 obligation to publish charges, terms and conditions.
- 3.2 **Proposed Condition 1 – Requirement to provide conditional access services** – proposes to implement, in part, the obligation contained within the first bullet point of Part I(b) of Annex I to the Access Directive to provide conditional access services on fair and reasonable terms where a broadcaster reasonably requests such services in writing.
- 3.3 Under proposed condition 1, in accordance with section 45(10)(a) of the Act, Ofcom has the power to make directions. This power could be used to deal with issues relating to specific forms of access or the particular terms and conditions on which access is provided – for example to clarify whether a particular service being requested is in fact a reasonable request. Proposed conditions 5 and 6 also implement the first bullet point of Part I(b) of Annex I to the Access Directive and these are discussed below.
- 3.4 **Proposed Condition 2 – Transcontrol requirements imposed on the provider of conditional access services** – proposes to implement the obligation contained within Part I(a) of Annex I to the Access Directive to ensure that conditional access systems marketed in the Community are to have the necessary technical capability for cost effective transcontrol allowing the possibility for full control by network operators at local or regional level of the services using conditional access systems. This means that, where a protected programme service is initially encrypted using one platform's conditional access service (e.g. TUTV's for DTT), it will be possible for it to be retransmitted by another platform (such as cable) using its own conditional access system.
- 3.5 **Proposed Condition 3 – Obligation to keep separate financial accounts** – proposes to implement the obligation contained within the second bullet point of Part I(b) of Annex I to the Access Directive upon providers to keep separate financial accounts regarding their activities as conditional access providers. Moreover, proposed condition 3 has been drafted in a more detailed manner than the other

proposed conditions in order that it can give effective practical application to the overarching principles set out in the other proposed conditions.

- 3.6 From the date the proposed Conditions are set on TUTV, TUTV will be required to comply with the provisions of any directions issued by Ofcom from time-to-time in relation to the format and disclosure of the Accounting Documents. The proposed condition also deals with the appointment of a Regulatory Auditor, and provides for that auditor to owe a duty of care to Ofcom under the Contracts (Rights of Third Parties) Act 1999.
- 3.7 TUTV will be required to ensure that certain of the provisions relating to its accounting and reporting arrangements are put in place from a date 5 months after the proposed Conditions are set on TUTV.
- 3.8 **Proposed Condition 4 – Intellectual property rights** – proposes to implement the obligations contained within Part I (c) of Annex I to the Access Directive to ensure that when granting licences to manufacturers of consumer equipment, holders of intellectual property rights to conditional access products and systems are to ensure that this is done on fair, reasonable and non-discriminatory terms. Ofcom has included the power for it to give a direction in order, among other things, to address any specific intellectual property rights issues that arise in relation to the implementation and application of this proposed condition.
- 3.9 **Proposed Condition 5 – Requirement not unduly to discriminate** – proposes to impose an obligation not unduly to discriminate in the provision of conditional access services. The obligation contained within the first bullet point of Part I(b) of Annex I to the Access Directive states that conditional access services must be offered to all broadcasters on a non-discriminatory basis. However, it is Ofcom’s understanding that the use of the word “non-discriminatory” in the Annex is not intended to suggest that there can be no differentiation at all. Instead, any differences should be objectively justifiable, for example, by differences in the underlying costs of supplying services to different undertakings. Ofcom has therefore drafted this proposed condition to implement the first bullet point of Part I(b) of Annex I to the Access Directive to reflect the view that the Directives prohibit discrimination which is undue.
- 3.10 **Proposed Condition 6 – Publication of charges, terms and conditions** – proposes to impose an obligation relating to the publication of charges, terms and conditions. This implements, (with proposed conditions 1 and 5) the obligation contained within the first bullet point of Part I(b) of Annex I to the Access Directive). Ofcom proposes that, where access to a conditional access system is provided after the date the proposed Conditions are set on TUTV, a copy of the notice containing the charges and terms and conditions should be sent to Ofcom within 28 days of the conditional access system being provided. In the event that any charges, terms or conditions are amended, a notice of such amendments must be provided to Ofcom not less than 90 days prior to their introduction, unless otherwise consented to by Ofcom.
- 3.11 Ofcom considers that the publication of charges helps to ensure stability in markets and, without such a notice period, incentives to invest might be undermined and opportunities for market entry may therefore be less likely. Publication of charges, terms and conditions also assists both Ofcom and the broadcasters in judging the state of the market and enables broadcasters to make a judgement as to whether the terms they are offered are likely to be fair, reasonable and non-discriminatory. It is thus a necessary complement to that requirement.

Section 4

Statutory duties

Ofcom's statutory duties

- 4.1 Section 3(1) of the Act states that Ofcom's principal duty in carrying out its functions is to further the interests of citizens in relation to communications matters; and, to further the interests of consumers in relevant markets, where appropriate by promoting competition.
- 4.2 Sections 3(2) of the Act states that, in carrying out its functions, Ofcom is required to secure amongst other things:
 - 4.2.1 the availability of a wide range of electronic communications services throughout the United Kingdom (s3(2)(b));
 - 4.2.2 a wide range of television and radio services to be available (duty to secure range) which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (s3(2)(c)) (duty to secure high quality and appeal); and
 - 4.2.3 the maintenance of a sufficient plurality of providers of different television and radio services (s3(2)(d)) (duty to maintain sufficient plurality).
- 4.3 In performing those duties, Ofcom must also have regard to, amongst other things:
 - 4.3.1 the extent to which its activities are transparent and proportionate (s3(3)(a) of the Act);
 - 4.3.2 the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom (s3(4)(a) of the Act);
 - 4.3.3 the desirability of promoting competition in the relevant markets (s3(4)(b) of the Act); and
 - 4.3.4 the desirability of encouraging investment and innovation in relevant markets (s3(4)(d) of the Act).
- 4.4 Section 4 of the Act requires Ofcom to act in accordance with the six European Community requirements of Article 8 of the Framework Directive. In summary these requirements are to:
 - 4.4.1 promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories (s4(3) of the Act);
 - 4.4.2 contribute to the development of the European internal market (s4(4) of the Act);
 - 4.4.3 promote the interests of all persons who are citizens of the European Union (s4(5) of the Act);

- 4.4.4 not favour one form of, or means of, providing electronic communications networks or services, i.e. to be technologically neutral (s4(6) of the Act);
- 4.4.5 to encourage the provision of network access and service interoperability for the purpose of securing (s4(7) and (8) of the Act):
 - i) efficient and sustainable competition; and
 - ii) the maximum benefit for customers of communications providers;
- 4.4.6 to encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of communications providers (s4(9) of the Act).
- 4.5 Section 47(2) of the Act states, among other things, that Ofcom must not set a condition under section 45 of the Act unless that condition is:
 - 4.5.1 objectively justifiable (s47(2)(a));
 - 4.5.2 not such as to discriminate unduly against particular persons or against a particular description of persons (s47(2)(b));
 - 4.5.3 proportionate (s47(2)(c)); and
 - 4.5.4 transparent (s47(2)(d)).

Impact assessment

- 4.6 The analysis presented in sections 2 and 5, when read in conjunction with the rest of this document, represents an impact assessment, as defined in section 7 of the Act, on the proposed setting of the access-related conditions on TUTV and the proposed TUTV FRND principles.
- 4.7 Impact assessments provide a valuable way of assessing different options for regulation and showing why the preferred option was chosen. They form part of best practice policy-making. This is reflected in section 7 of the Act, which means that generally Ofcom has to carry out impact assessments where its proposals would be likely to have a significant effect on businesses or the general public, or when there is a major change in Ofcom's activities. However, as a matter of policy Ofcom is committed to carrying out and publishing impact assessments in relation to the great majority of its policy decisions.
- 4.8 For further information about Ofcom's approach to impact assessments, see the guidelines, Better policy-making: Ofcom's approach to impact assessment, which are on the Ofcom website: http://www.ofcom.org.uk/consult/policy_making/guidelines.pdf.
- 4.9 In setting the proposed Conditions on TUTV, Ofcom has minimal discretion. This is because Ofcom is under a statutory duty to apply access-related conditions to every person who provides a conditional access system in relation to a protected programming service. As Ofcom considers that TUTV provides such a system, Ofcom does not consider that it is appropriate to do nothing.
- 4.10 The fundamental obligations which must be applied to a provider of conditional access systems in relation to a protected programme service are specified in Annex I Part I of the Access Directive. Ofcom considers that the proposed Conditions

represent the appropriate set of conditions necessary to implement the requirements of the Access Directive, in particular that services should be made available on fair and reasonable terms while providing a reasonable degree of clarity and regulatory certainty to all the relevant market players.

- 4.11 Ofcom has given consideration to the impact of the proposed Conditions and TUTV FRND principles upon TUTV and other stakeholders. The effect of the proposed Conditions is that TUTV will be required to provide regulated access to its conditional access system on FRND terms. Stakeholders will therefore be able to gain access to TUTV's conditional access system on regulated terms. The effect of the TUTV FRND principles is that stakeholders and TUTV will gain additional certainty in relation to how Ofcom would normally interpret FRND in relation to the proposed Conditions.
- 4.12 Interested parties should send any comments on this impact assessment to Ofcom by the closing date for this consultation. Ofcom will consider all comments before deciding whether to implement its proposals.

Consideration of relevant duties

- 4.13 In drafting the proposed Conditions, Ofcom has in particular considered its duties in carrying out its functions to secure a wide range of services, which are of high quality and appeal, and to maintain sufficient plurality. In particular, Ofcom considers that the proposed Conditions will ensure that TUTV provides conditional access services on FRND terms to ensure that broadcasters are able to access and provide services to viewers through TUTV. This is likely to ensure, among other things, that a wide range of services, of potentially high quality and appeal, are provided through the DTT platform.
- 4.14 Ofcom considers that the proposed Conditions contained at Annex 4, satisfy all of the tests set out in section 47(2) of the Act, given that Ofcom is under a duty to impose access-related conditions on TUTV, namely, they:
- 4.14.1 are **objectively justifiable**, in that they will ensure that end users (in this case, viewers) are provided with optimum choice through potentially being able to view more programme services through TUTV, as a result of TUTV's conditional access system being regulated through the proposed Conditions;
 - 4.14.2 **do not discriminate** against TUTV because Ofcom considers that TUTV currently provides conditional access systems in relation to protected programme services;
 - 4.14.3 are **proportionate** as they represent the minimum set of conditions necessary to implement the requirements of the Access Directive, in particular that services should be made available on fair and reasonable terms while providing a reasonable degree of clarity and regulatory certainty to all the relevant market players; and
 - 4.14.4 are **transparent** as they will enable broadcasters to access TUTV's conditional access system on regulated terms in accordance with the proposed Conditions, which are clearly set out in Annex 4.

Section 5

TUTV FRND principles

- 5.1 Previously, both Ofcom and Oftel have adopted access-related guidelines to set out how conditional access conditions set for SSSL will be interpreted. These previous guidelines do not apply to TUTV.
- 5.2 As Ofcom previously stated on 21 April 2006⁶:
- “A1.6 If other operators were to be designated as regulated supplier of TPS [which include conditional access services] in the future, Ofcom would need to consider the appropriate guidelines to apply given the specific circumstances of the designated provider. Therefore these guidelines currently only apply to Sky’s provision of regulated TPS on the DSat platform”
- 5.3 Whilst previous guidelines issued by either Ofcom or Oftel provide useful context, Ofcom nevertheless considers that the starting point for the TUTV FRND principles is to determine what principles would be appropriate to TUTV in its own right.
- 5.4 Ofcom has set out below the proposed appropriate TUTV FRND principles, which it would normally apply in interpreting the proposed Conditions.
- 5.5 However, before setting out the TUTV FRND principles, Ofcom has set out a brief summary of previous conditional access guidelines to provide an idea of the type of broad principles that may be relevant to TUTV.

Previous and current access guidelines

1998 guidelines and 2002 guidelines

- 5.6 In February 1998, Oftel published a policy statement entitled “*Conditional access charges for digital television*”⁷ which included a first set of guidelines setting out the approach it would normally take in carrying out its responsibilities to ensure that the prices charged for conditional access services for digital television were FRND.
- 5.7 In 2002, Oftel published the following two ‘guidance’ documents that primarily relate to the regulation of access to conditional access, electronic programme guides and access control services:
- 5.7.1 “*The pricing of conditional access services and related issues – a statement by the Director General of Telecommunications*” (8 May 2002)⁸
- 5.7.2 “*Terms of supply of conditional access, Oftel guidelines*” (22 October 2002)⁹

⁶ <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/consultation.pdf>

⁷ http://www.ofcom.org.uk/static/archive/Oftel/publications/1995_98/broadcasting/ca298.htm

⁸ <http://www.ofcom.org.uk/static/archive/Oftel/publications/broadcasting/2002/cast0502.pdf>

⁹ <http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/cagu1002.htm>

- 5.8 The purpose of the 1998 and 2002 guidelines was to enable parties to a conditional access agreement to understand the principles that Oftel would normally apply if it received a complaint that the prices offered were not FRND.
- 5.9 In assessing whether terms offered for conditional access or access control services were FRND, Oftel stated, in 2002, that it would apply the following general charging principles:
- Oftel would consider whether the terms offered were consistent with those which would be expected in a competitive market;
 - There should be no cross-subsidy between different categories of service provided by the provider;
 - In assessing prices, a broadcaster's willingness to pay for the services required was one of the factors that should be taken into account;
 - The conditional access and access control provider should be able to recover its efficiently and necessarily incurred costs over a reasonable period and should be allowed a risk-adjusted return on its investment that was neither inadequate nor excessive; and
 - A vertically integrated provider must offer services to third parties on terms that are no less favourable than those on which it provides equivalent services to its own operations.
- 5.10 Neither the 1998 nor the 2002 guidelines apply to TUTV.

2006 guidelines

- 5.11 On 21 September 2006, Ofcom published a statement entitled "*Provision of technical platform services: guidelines and explanatory statement*"¹⁰ containing a revised set of guidelines setting out how Ofcom would normally interpret the requirement on SSSL to ensure that its terms, conditions and charges for technical platform services ("TPS") are FRND. Ofcom decided to review and update the 2002 Oftel guidelines for a number of reasons, including the need to:
- provide greater certainty and transparency to current and future TPS customers of SSSL for them to determine whether the TPS terms and conditions they are offered would be considered FRND by Ofcom in the event of a complaint or dispute; and
 - address a changing digital satellite platform moving closer to maturity and reflect the likely shift in the balance of negotiations between SSSL and TPS customers and the change in the risk profile of costs and revenues associated with the operation of the digital satellite platform.
- 5.12 The 2006 guidelines reflect the shift in the balance of negotiations between Sky and broadcasters (wanting access to the Sky platform) as Sky's platform moved closer to maturity.
- 5.13 The 2006 guidelines do not apply to TUTV.

¹⁰ <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/statement/statement.pdf>

- 5.14 Ofcom has therefore considered afresh what principles would be appropriate for TUTV and these are set out below.

Ofcom's proposed approach to the TUTV FRND principles

- 5.15 As discussed above, one of the rationales for reviewing the 2002 Oftel guidelines was to reflect the fact that Sky is now an established platform, which is moving towards maturity. When the 2002 Oftel guidelines were published, Sky had around 6 million retail customers on its digital satellite platform. At the end of Q3 2006, Sky had 8.5 million retail customers signed up to its digital satellite platform.¹¹ By contrast, TUTV's customer base for its retail pay-TV services is estimated to be 200,000-250,000. In addition, only 19 channels are broadcast on TUTV. While Sky's digital platform business has been in commercial operation since 1998, TUTV launched its DTT based retail pay-TV service in 2004 and is likely still to be in a relatively early stage of its platform business lifecycle.
- 5.16 A conditional access provider in the early stages of its platform lifecycle is, to some degree, dependent on attracting, securing and retaining attractive content onto its platform from broadcasters in order to stimulate take up and usage of its retail pay-TV services and grow the size of its retail customer base to achieve scale. Due to the high fixed costs of acquiring content and the relatively low marginal costs of distributing content to viewers, broadcasters are normally incentivised to distribute and make their content available as widely as possible across as many platforms as possible. Broadcasters are therefore also likely to have an interest in purchasing conditional access services from a platform in the early stages of development, in order to reach its retail customer base (particularly if these consumers can not currently be reached via any alternative digital TV broadcasting platform).
- 5.17 We would expect the outcome of the commercial negotiations between broadcasters and a conditional access provider in the early stage of its platform lifecycle to lie between the incremental cost to conditional access provider of providing the conditional access service to that customer and the stand-alone costs of the service. Given the potentially large range between incremental costs and stand-alone costs, an important factor in determining the outcome of the commercial negotiation will be the broadcaster's willingness to pay to secure access to the platform. In the absence of market power, we would normally expect the level of the price to reflect the relative benefits to each party accruing as a result of the agreement.
- 5.18 The underlying purpose of the TUTV FRND principles is to help to engender an outcome which most closely reflects the outcome that would be expected in a competitive market. Such an approach should reduce the risk of overly burdensome, intrusive or prescriptive regulatory requirements. In addition, this approach should:
- allow for the scope for the terms of supply of TUTV's conditional access to be tailored to the specific requirements and needs of broadcasters and to reflect the risk undertaken by broadcasters when gaining access to an emerging platform;

¹¹ The Communications Market: Digital Progress Report, Digital TV Q3 2006 (http://www.ofcom.org.uk/research/tv/reports/dtv/dtu_2006_q3/dtu_2006_q3.pdf). BSkyB digital satellite pay TV subscriber figures include commercial premises and also TV over ADSL households that subscribe to Sky packages. There is therefore an element of overstatement in these areas. Ofcom also estimates the number of viewers using satellite equipment to receive the free-to-view channels.

- reflect the risk that TUTV, as a platform operator in a relatively early stage of its platform lifecycle, has in developing an emerging platform; and
 - allow for a reduction in the risk of overly burdensome, intrusive or prescriptive regulatory requirements that may disincentivise a platform in the early stages of development from developing and investing in its own conditional access system.
- 5.19 Given that TUTV is likely to still be in a relatively early stage of its platform business lifecycle, TUTV's incentives to attract new channels to its platform are likely to be higher than those of the more established platforms.
- 5.20 In a competitive market, an agreement between TUTV and broadcasters to add additional channels to TUTV is likely to reflect the relative benefit to each party. However, given the incentives that TUTV has to attract additional channels, Ofcom considers that the bargaining position between TUTV and broadcasters is likely to be relatively balanced and not weighted in favour of TUTV.
- 5.21 The price of access in this case is likely to lie between the floor of the incremental cost of providing the conditional access service and the ceiling of the stand-alone costs of the services. Given the potentially large range that may exist between the floor and the ceiling, Ofcom considers that one of the factors that will be of particular importance in reaching the price of access will be a broadcaster's willingness to pay to secure access to TUTV's DTT-based platform (which will enable the broadcaster to retail its service to TUTV's retail customer base).
- 5.22 Ofcom notes that if the proposed Conditions are set on TUTV, this will result in a change in the competitive environment for the provision of conditional access services within the UK.
- 5.23 If the proposed Conditions are set on TUTV, there will be two persons who are regulated by access-related conditions, namely Sky and TUTV. Sky is an established platform with a large customer base and is moving to maturity, whereas TUTV is likely still to be in a relatively early stage of its platform lifecycle and has a far smaller customer base.

Proposed principles

- 5.24 In assessing whether a price for TUTV's conditional access services is fair and reasonable, Ofcom proposes that it would normally expect that commercially negotiated prices should be consistent with those which would be expected in a competitive market (this includes, as previously mentioned, a customer's willingness to pay for access to TUTV's conditional access system) and that, if technically feasible, unbundled services are offered so that the customer only pays for what it needs.
- 5.25 In assessing whether a price for TUTV's conditional access services is non-discriminatory, Ofcom proposes that it would normally expect a vertically integrated provider to offer services to third parties on no less favourable terms than those which it provides equivalent services to its own operations, for example it must, among other things, offer services to third parties:
- to at least the same quality,
 - within the same timescales, and

- at the same prices,
as it does to itself or its subsidiaries or partners.

- 5.26 The non-discriminatory TUTV FRND principles aim to ensure that TUTV offers products in such a way that broadcasters seeking services are placed in an equivalent position to TUTV's own broadcast channels. This includes the information they receive about products and the terms and conditions under which they are made available.
- 5.27 Non-discrimination does not necessarily mean that there should be no differences in treatment between broadcasters, rather that any differences should be objectively justifiable.

Consideration of relevant duties

- 5.28 Ofcom has considered its statutory duties in relation to the TUTV FRND principles. Ofcom considers that the TUTV FRND principles are objectively justifiable, proportionate, transparent, and do not unduly discriminate. Ofcom considers that they will help stakeholders to reach agreement with TUTV for the provision of conditional access services on a FRND basis and therefore assist in an increased range of services being available throughout the UK. In addition, Ofcom further considers that the TUTV FRND principles comply with Ofcom's statutory duties because they:
- allow for the scope for the terms of supply of TUTV's conditional access to be tailored to the specific requirements and needs of broadcasters and to reflect the risk undertaken by broadcasters when gaining access to an emerging platform;
 - reflect the risk that TUTV, as a platform operator in a relatively early stage of its platform lifecycle, has in developing an emerging platform; and
 - allow for a reduction in the risk of overly burdensome, intrusive or prescriptive regulatory requirements that may disincentivise a platform in the early stages of development from developing and investing in its own conditional access system.
- 5.29 Ofcom also considers that it would not be appropriate to have more detailed guidelines as TUTV is currently in the early stage of its platform lifecycle and, in addition, the proposed TUTV FRND principles should be sufficient to engender an outcome which most closely reflects what would be expected in a competitive market.
- 5.30 For the reasons given above, Ofcom considers that the TUTV FRND principles are appropriate for TUTV.

Questions for stakeholders

1. Are the proposed Conditions the appropriate access-related conditions for TUTV?

2. Are the TUTV FRND principles sufficient to enable stakeholders to agree FRND terms for the supply of conditional access services from TUTV?

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 27 April 2007**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/tutv/howtorespond/form>, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email matthew.marsh@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Matthew Marsh
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3333
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Section 5. It would also help if you can explain why you hold your views and how Ofcom's proposals would impact on you.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Matthew Marsh on 020 7981 3000.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether

all of your response should be kept confidential, and specify why. Please also place such parts in a separate annex.

- A1.9 If someone asks us to keep part or all of a response confidential, we will treat this request seriously and will try to respect this. But sometimes we will need to publish all responses, including those that are marked as confidential, in order to meet legal obligations.
- A1.10 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in May 2007.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.13 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.14 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk . We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.15 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 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

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 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.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 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 organizations 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.

A2.7 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

A2.8 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 3

Consultation response cover sheet

- A3.1 In the interests of transparency and good regulatory practice, we will publish all consultation responses in full on our website, www.ofcom.org.uk.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality where appropriate.
- A3.3 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 coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any parts of your response you consider should be kept confidential in a separate annex to your response and include your reasons why this part of your response should not be published. 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

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

If you want part of your response, your name or your organisation not to be published, can Ofcom still publish a reference to the contents of your response (including, for any confidential parts, a general summary that does not disclose the specific information or enable you to be identified)?

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response that Ofcom can publish. However, in supplying this response, I understand that Ofcom may need to publish all responses, including those which are marked as confidential, in order to meet legal obligations. 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 4

Notification pursuant to section 48(2) of the Communications Act 2003

Proposals for the setting of access-related conditions under section 45 of the Communications Act 2003 as authorised by section 73(5) of the Communications Act 2003

WHEREAS

- (A) The Office of Communications ('OFCOM') hereby make the following proposal for setting access-related conditions to apply to the Provider as defined in the Schedule to this Notification who provides a Conditional Access System in relation to a Protected Programme Service as set out in the Schedule to this Notification.
- (B) The effect of the Conditions would be to impose all such provisions as required by Part I of Annex I of the Access Directive on to the Provider as defined in the Schedule to this Notification who provides Conditional Access Systems in relation to Protected Programme Services as required by section 75(2) of the Communications Act 2003 (the 'Act').
- (C) The effect of, and OFCOM's reasons for making, the proposals to set the access-related conditions set out in the Schedule to this Notification are contained in the accompanying explanatory statement published with this Notification.
- (D) For the reasons set out in the accompanying explanatory statement published with this Notification, Ofcom are satisfied that they have acted in accordance with the six Community requirements set out in section 4 of the Act and their duties in section 3 of the Act;
- (E) In particular, OFCOM considers that the proposed access-related conditions referred to in paragraph 4 above comply with the requirements of sections 45 to 50, 73 to 76 of the Act as appropriate and relevant to each of such access-related conditions.
- (F) By virtue of section 48(5) of the Act, OFCOM may give effect to any proposals set out in this Notification, with or without modification, where OFCOM:
 - a. has considered every representation about the proposals made to him within the period specified in the First Notification; and
 - b. has had regard to every international obligation of the United Kingdom (if any) which has been notified to him for this purpose by the Secretary of State;
- (G) Representations may be made to OFCOM about any of the proposals set out in this Notification and the accompanying explanatory statement by 27th April 2007.
- (H) Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State for Trade and Industry in accordance with section 50 (1) (a) of the Act, the European Commission, and to the regulatory authorities of every other member State in accordance with section 50 (3) of the Act.

- (I) Except as otherwise defined in this Notification, words or expressions shall have the same meaning as they have been ascribed in the Act.
- (J) For the purpose of interpreting this Notification:
 - a. headings and titles shall be disregarded; and
 - b. the Interpretation Act 1978 shall apply as if this Notification were an Act of Parliament.

Steve Unger

Director of Competition Policy

Schedule proposed access-related conditions applicable to Top Up TV Limited

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

Definitions

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

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

“Accounting Policies” means the manner in which the requirements of the Companies Act 1985 as amended by the Companies Act 1989, the accounting standards and the accounting policies whenever not superseded by the Regulatory Accounting Principles, that would be applied in the preparation of each of the Financial Statements, as produced and delivered to Ofcom by a date 5 months after these conditions are set on TUTV and as amended from time to time in accordance with Condition 3 as the case may be;

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

“Accounting Separation Attribution” means, in relation to Conditional Access Services, the totality of all apparatus, data, procedures and activities which the Provider uses or holds for use to determine the costs, revenues, assets and liabilities to be attributed to Conditional Access Services and activities related to Conditional Access Services, either based upon data recorded by an Accounting Separation Measuring System or otherwise;

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

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

“Act” means the Communications Act 2003;

“Attribution Methods” means the practices used to attribute revenue, costs, assets and liabilities to Conditional Access Services, or activities related to Conditional Access Services, as produced and delivered to Ofcom by a date 5 months after these conditions are set on TUTV and as amended from time to time in accordance with Condition 3 as the case may be;

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

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

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

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

(i) Encryption Services that is to say –

(A) any encryption or scrambling of signals for Protected Programme Services; and

(B) the conveyance by the Electronic Communications Network of encryption or scrambling information;

(ii) Subscriber Authorisation Services that is to say –

(A) the actuation or control or the remote actuation or control of decoders; or

(B) the initial transmission of messages connected with (ii)(A) above;

(iii) Subscriber Management Services, that is to say –

(A) the preparation or preparation and supply to viewers of Essential Components;
or

(B) the preparation from viewers orders of instructions for authorisation signals for transmission to decoders, or both;

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

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

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

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

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

"Ofcom" means the Office of Communications;

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

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

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

"Provider" means Top Up TV 1 Limited, Top Up TV 2 Limited and Top Up TV 3 Limited, whose registered company numbers are 05636002, 05635994, 05643663, and any Top Up TV 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;

"Regulatory Accounting Principles" means the high level general principles and rules to be followed in meeting the reporting requirements of Condition 3 as produced and delivered to Ofcom by a date 5 months after these conditions are set on TUTV and as amended from time to time in accordance with Condition 3 as the case may be;

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

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

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

"Transfer Charge System Methodology" means methodologies used in deriving and accounting for transfer charges from and to the Provider's activities as a provider of Conditional Access Services as produced and delivered to Ofcom by a date 5 months after these conditions are set on TUTV.

1. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them in this Notification and otherwise any word or expression shall have the same meaning as it has in the Act.

2. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.

3. For the purpose of interpreting the conditions set out in Part 2 the headings and titles shall be disregarded.

PART 2: The Conditions

Condition 1 – Requirement to provide Conditional Access Services

- 1.1 Where a Broadcaster reasonably requests in writing Conditional Access Services in relation to the provision of Protected Programme Services, the Provider shall provide those Conditional Access Services. The Provider shall also provide such Conditional

Access Services in relation to the provision of Protected Programme Services as Ofcom may from time to time direct.

- 1.2 The provision of Conditional Access Services in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as Ofcom may from time to time direct.
- 1.3 The Provider shall comply with any direction Ofcom may make from time to time under this Condition.

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

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

Condition 3 – Obligation To Keep Separate Financial Accounts

- 3.1 Except in so far as Ofcom may consent otherwise in writing, the Provider shall keep separate financial accounts regarding its activities as a provider of Conditional Access Services in the manner set out below.
- 3.2 Ofcom may from time to time make such directions as he considers appropriate with respect to the Provider's obligations to maintain a separation for accounting purposes under this Condition.
- 3.3 The Provider shall comply with any direction Ofcom may make from time to time under this Condition.
- 3.4 The Provider shall prepare Accounting Documents for the purpose of this Condition and produce and deliver them to Ofcom as soon as reasonably practicable but not later than a date 5 months after these conditions are set on TUTV.
- 3.5 The Provider shall comply with Conditions 3.6 to 3.18 from a date 5 months after these conditions are set on TUTV as appropriate.
- 3.6 The Provider shall ensure that its accounting and reporting arrangements (including Accounting Separation Systems) are sufficient to enable the Provider, at all times, to be capable of preparing in relation to any period a financial statement in accordance with the Accounting Documents. These accounting and reporting arrangements shall be, in the opinion of Ofcom, suitable and sufficiently transparent to demonstrate at any, or over, time and in relation to any period that the Provider's charges for Conditional Access Services are, or have been, non discriminatory, fair and reasonable.

- 3.7 The Provider shall maintain a separation for accounting purposes of Accounting Separation Activities from other activities, so as to:
- (a) identify all elements of revenue, cost, assets and liabilities, with the basis of their calculation and the Detailed Attribution Methods used, related to the Accounting Separation Activities including an itemised breakdown of fixed assets; and
 - (b) ensure that Accounting Separation Activities are identified and are recorded at an appropriate amount in accordance with the Accounting Documents.
- 3.8 The Provider shall maintain accounting records in a form which, on a historic cost basis and on a current cost basis:
- (a) enables each of the Accounting Separation Activities to be separately identified and the revenues, costs, assets and liabilities of the Accounting Separation Activities to be separately attributable; and
 - (b) which shows and explains the transactions of each of the Accounting Separation Activities.
- 3.9 The accounting records referred to in paragraph 3.8 and all associated documentation shall be:
- (a) maintained in accordance with the Accounting Documents;
 - (b) maintained in order to ensure compliance with this Condition;
 - (c) sufficient to enable the Financial Statements to have expressed upon them a Standard Audit Opinion; and
 - (d) sufficient to ensure that charges for Conditional Access Services can be shown to be fair and reasonable and not to be unduly discriminatory.
- 3.10 The Provider shall,
- (a) prepare in accordance with the Accounting Documents, which shall be identified in the Financial Statements by reference to their date, the Financial Statements identified in any direction Ofcom may make from time to time;
 - (b) secure, in accordance with paragraph 3.14 (or, if Ofcom so consents, paragraph 3.15) the expression of an audit opinion upon the Financial Statements as identified in any direction Ofcom may make from time to time;
 - (c) deliver to Ofcom the Financial Statements and any corresponding audit opinion identified for delivery in any direction Ofcom may make from time to time;
 - (d) publish the Financial Statements and any corresponding audit opinion identified for publication in any direction Ofcom may make from time to time;
 - (e) ensure that any Financial Statements and any corresponding audit opinion are fit for such purpose, or purposes, if any, as notified by Ofcom in writing; and
 - (f) deliver to Ofcom a report detailing any changes in the Accounting Documents, any Process and any other methodology which caused any figure presented on any one of the Financial Statements to change by more than 5% from the figure that would have been presented had such a change not been made. Any such report

shall include details sufficient to render transparent such changes in accordance with any direction Ofcom may make from time to time.

- 3.11 The Provider shall publish and deliver to Ofcom copies of Financial Statements and any corresponding audit opinion each and all of which shall be in the form in which they are ultimately to be published, as directed by Ofcom. The Provider shall publish with the Financial Statements a written statement made by Ofcom and provided to the Provider commenting on the data in, the notes to or the presentation of any or all of the Financial Statements and/or the Accounting Documents.
- 3.12 The Provider shall make such amendments to the form and content of the Financial Statements as are necessary to give effect fully to the requirements of this Condition. The Provider shall provide to Ofcom particulars of any such amendment, the reasons for it and its effect, when it delivers the Financial Statements to Ofcom.
- 3.13 Where Ofcom has reasonable grounds to believe that any or all of the Financial Statements and/or Accounting Documents are deficient and/or where the Provider has been found to be in breach of one of its Conditions, the Provider shall, where directed by Ofcom:
- (a) amend the Accounting Documents in order to remedy the deficiencies identified by Ofcom;
 - (b) restate the Financial Statements identified by Ofcom as requiring restatement in accordance with the Accounting Documents which have, where necessary, been amended pursuant to paragraph 3.13(a);
 - (c) secure in accordance with paragraph 3.14 (or where Ofcom so consents, 3.15) the expression of an audit opinion on the restated Accounting Separation Financial Statements;
 - (d) deliver to Ofcom the restated Financial Statements and corresponding audit opinion.
- 3.14 The Provider shall secure in respect of each Financial Statement an expression of an audit opinion by the Regulatory Auditor, which shall conform to Auditing Standards and to the requirements as directed by Ofcom from time to time for this Standard Audit Opinion.
- 3.15 To the extent Ofcom is satisfied that the requirement to secure an audit opinion on a specific Financial Statement is not proportionate, the Provider shall secure an audit opinion by the Regulatory Auditor which shall conform to Auditing Standards and to the requirements as directed by Ofcom from time to time for this lesser audit opinion.
- 3.16 The Provider shall use its best endeavours to obtain from the Regulatory Auditor any further explanation and clarification of the reports required under Condition 3.14 and/or 3.15 and any other information in respect of the matters which are the subject of those reports as Ofcom shall reasonably require.
- 3.17 The Regulatory Auditor that the Provider from time to time appoints shall at all times be satisfactory to Ofcom having regard to such reasonable matters as Ofcom considers appropriate. The Provider shall notify Ofcom in writing of the Auditor appointed to secure compliance with this Condition before the Auditor carries out any work for that purpose. The Provider shall notify Ofcom of any proposed change of Regulatory Auditor 28 days before effect is given to that change.

- 3.18 The Provider's letter of engagement appointing the Regulatory Auditor shall:
- (a) include an express obligation on the Regulatory Auditor that, in forming and/or expressing any audit opinion pursuant to this Condition, the Regulatory Auditor shall owe a duty of care to Ofcom (but not directly or indirectly to any other third party) subject only to such qualifications or limitations as are set out by the Regulatory Auditor to Ofcom in writing and acknowledged by him in writing prior to the expression of any audit opinion pursuant to this Condition; and
 - (b) shall give effect to such duty of care by expressly acknowledging Ofcom's interest pursuant to the Contracts (Rights of Third Parties) Act 1999 and dis-applying any provision, term or condition of the Provider's letter of engagement that could otherwise exclude his interest.
- 3.19 The Provider shall secure that sufficient checks, controls and reconciliations are performed between figures contained in the Financial Statements and the accounting records to enable the Financial Statements to be audited and an audit opinion expressed upon them in accordance with paragraphs 3.14 (or where Ofcom so consents, 3.15).
- 3.20 The Provider shall comply with any direction made by Ofcom pursuant to this Condition.

Condition 4 – Intellectual Property

- 4.1 Where it appears to Ofcom that any Relevant Intellectual Property Right has been, is being or is likely to be exercised (whether by the Provider or by any other person in pursuance of an agreement, arrangement or concerted practice to which the Provider is a party) so as to prevent:
- (a) any Conditional Access System, Electronic Communications Network, Essential Component which may lawfully be connected to any part of the Conditional Access System, from being so connected either at all or on reasonable charges, terms and conditions; or
 - (b) any Conditional Access Service which may lawfully be in association with the Conditional Access System, from being so provided or obtained either at all or on reasonable charges, terms and conditions;
- he may direct the Provider in accordance with paragraph 4.2 or 4.3.
- 4.2 Where the exercise of the Relevant Intellectual Property Right prevents a Product from being made available either at all or on reasonable charges, terms and conditions to the person wishing to make such a connection or to provide or obtain a Conditional Access Service, Ofcom may direct the Provider to take such steps as are within the power of the Provider and are, in the opinion of Ofcom, reasonable and necessary in all the circumstances to secure that the Product is made available to that person on charges, terms and conditions acceptable to that person or which (in default of agreement) are, in the opinion of Ofcom, reasonable to enable such connection to be made or such service to be provided or obtained.
- 4.3 Where paragraph 4.1 applies in circumstances other than those described in paragraph 4.2, Ofcom may direct the Provider to take such steps as are within the power of the Provider and are, in the opinion of Ofcom, reasonable and necessary in all the circumstances to secure that the person wishing to make such a connection

or to provide or obtain such a Conditional Access Service is enabled to make use of the Relevant Intellectual Property Right for the purpose of making the connection or of providing or obtaining the service, upon charges, terms and conditions acceptable to that person or which (in default of agreement) are, in the opinion of Ofcom, reasonable for such purpose.

- 4.4 The Provider shall comply with any direction made by Ofcom pursuant to this Condition.

Condition 5 – Requirement not to unduly discriminate

- 5.1 The Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with the provision of Conditional Access Services.
- 5.2 In this Condition, the Provider shall be unduly discriminating where the discrimination has a material adverse effect on competition and has no objective justification.

Condition 6 – Publication Of Charges, Terms And Conditions

- 6.1 The Provider shall except in so far as Ofcom may otherwise consent in writing:
- (a) publish in the manner and at all times specified in paragraph 6.2(a) a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and condition on which it offers:
 - (i) to provide each Conditional Access Service, or package of such Services;
 - (ii) to connect to any part of the Conditional Access System in accordance with an obligation imposed by or under these conditions; or
 - (iii) to grant permission to connect Electronic Communications Networks to or to provide Conditional Access Services by means of any of the Conditional Access Systems; and
 - (b) where it does any of the things mentioned in paragraph 6.1(a)(i) to 6.1(a)(iii), do those things at the charges and on the other terms and conditions so published.
- 6.2 Publication of the notice shall be effected in the following way:
- (a) where the Provider provides a Conditional Access System, by sending a copy thereof to Ofcom not than later than 28 days after the Provider first provides a Conditional Access System; and
 - (b) thereafter, 90 days before the date on which any proposal to amend any charge, term or conditions or the method of determining the same is to become effective, and, in any and all of these circumstances, by:
 - (c) placing a copy of the said notice on any relevant website operated or controlled by the Provider; and
 - (d) sending a copy thereof to any person who may request such a copy at that person's written request (or such parts which have been requested).