



Review of ITV Networking Arrangements 2008

Consultation

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Section 1

Summary

Ofcom's role in reviewing the ITV Networking Arrangements

- 1.1 The ITV Networking Arrangements (the 'NWA') are the set of arrangements entered into between ITV Network Ltd ('ITV Network') and the 15 regional Channel 3 licensees. Although there continue to be 15 regional licences, there are now only four licence holders as a result of consolidation: ITV Broadcasting Limited (a wholly owned subsidiary of ITV plc) which holds 11 licences; stv group plc ('stv') which holds two licences; Ulster Television plc ('UTV') holder of one licence; and Channel Television Ltd ('Channel') which also holds one licence.
- 1.2 The NWA, which currently comprise five main documents, are intended to coordinate the provision of a national television service that is capable of competing effectively with other broadcasters in the UK.
- 1.3 Ofcom has a statutory duty under section 293 of the Communications Act 2003 (the 'Act') to carry out a general review of the NWA from time to time. Ofcom cannot give its approval to the NWA or modifications to it nor propose modifications if:
 - 1.3.1 it is not satisfied that the NWA (or modifications) meet either the first or second competition test in Schedule 11 to the Act; or
 - 1.3.2 it appears that the NWA (or modifications) would be likely to be prejudicial to the ability of any of the Channel 3 licensees to comply with its public service remit or other statutory obligations specified in Schedule 11.
- 1.4 In addition, Ofcom's review of the NWA must include consideration of the following factors:
 - 1.4.1 whether the NWA is a satisfactory means of enabling regional Channel 3 services to be a nationwide system that can compete effectively with other UK television programme services; and
 - 1.4.2 the likely effect of the arrangements on the ability of the regional Channel 3 licensees to maintain the quality and range of regional programmes and other programmes contributing to the regional character of the services.
- 1.5 Ofcom must conduct such a review no more than a year after the previous review. Ofcom published its final recommendations on the 2007 NWA review in March 2008. This consultation document is part of the 2008 review of the NWA.

The Review Process

- 1.6 In August 2008 Ofcom wrote to the regional Channel 3 licensees to invite proposals as to the scope of the 2008 review. Licensees responded in a series of submissions during the course of September. We took into account the issues that were put forward in those submissions and, following further correspondence, wrote to the parties in November to confirm the scope of the 2008 review. The two main issues that we proposed to focus on were:
 - 1.6.1 the arrangements for compliance of ITV network programming, and

- 1.6.2 the arrangements for ensuring transparency in relation to new media rights acquired by ITV Network on behalf of all the licensees.
- 1.7 As anticipated in the 2007 review statement, compliance issues have risen to the fore following a series of Broadcasting Code (the 'Code') breaches resulting in financial sanctions on some Channel 3 regional licensees. Ofcom's principal duty under section 3(1) of the Act in carrying out its functions is to further the interests of citizens in relation to communication matters and consumers in relevant markets. Specifically it is required to secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material in such services. In light of this, we aim to ensure through this current review that there are both effective compliance systems in place, and, in the event of serious Code breaches, appropriate financial sanctions, which can be levied on the licensees for the resulting breach of their licence conditions.
- 1.8 In relation to new media rights, we have been concerned to ensure that there is transparency for all licensees about the packages of rights obtained by ITV Network on their behalf when programmes are commissioned or acquired. We believe that transparency will assist licensees in formulating their plans for the delivery of public service content across a range of platforms in the future.
- 1.9 We have had a number of discussions with licensees on these issues and they have also provided additional written submissions. Set out below are our proposals in relation to these two sets of issues.

Ofcom's Proposals

- 1.10 In terms of compliance and sanctions, we are using this consultation document to restate our sanctions policy to make clear that all Channel 3 regional licensees may be liable for a sanction when they have transmitted a network programme which breaches the Code and not solely the licensee appointed to carry out compliance for the programme. We may, however, choose to sanction some licensees more heavily than others, depending on where culpability for the breach lies.
- 1.11 We examine four potential options for the NWA to ensure compliance arrangements in the NWA are in line with this sanctions policy:
- Option 1: retain the role of the compliance licensee and the existing indemnities in the compliance arrangements. Should all licensees be sanctioned in the event of a breach, the non-compliance licensees may seek to recover the cost from the compliance licensee under the indemnity.
 - Option 2: retain the role of the compliance licensee but modify the NWA to remove Ofcom sanctions from the scope of the indemnity provided by the compliance licensee to the other licensees. All licensees would potentially be liable for a sanction in the event of breach.
 - Option 3: modify the NWA to give ITV Network responsibility for compliance in place of the appointment of an individual licensee to that role. All licensees would potentially be liable for a sanction in the event of breach.
 - Option 4: modify the NWA to give ITV Network ultimate responsibility for compliance of a programme, but maintain the producer's right to choose a

compliance licensee. All licensees would potentially be liable for a sanction in the event of breach.

- 1.12 We recognise that there are pros and cons with each of these options: e.g. as regards the impact on smaller licensees, on competition for provision of compliance and their compatibility with other regulatory requirements. However, we look to engage the licensees in considering how to overcome any potential issues. We would also welcome any alternative proposals that parties may wish to put forward.
- 1.13 We note that our ability to make recommendations for changes in this area is constrained by a regulatory regime for the ITV1 service that is still geared towards a federal structure for Channel 3 licensees. Our target is to provide for an effective compliance-sanctions system for the networked ITV1 service. However, in the event that none of the options available within the current regulatory regime achieve this, then it is possible that there will be a need to seek an amendment to legislation.
- 1.14 In relation to new rights issues, we propose that the NWA are modified to make it clear that rights acquired by ITV Network on behalf of the network as a whole are available for use by all licensees on an equivalent basis. We also consider that all licensees should be informed as to which primary new media rights have been acquired by ITV Network.

Next Steps

- 1.15 We invite interested parties to make submissions on the issues set out in this document by **30 April 2009**. As indicated above, we would expect the regional Channel 3 licensees in particular to engage constructively with the options set out and to discuss with us what may need to be done to make the different options work effectively. Following the consultation period, and after a full consideration of the responses that we receive, we will consult with the Office of Fair Trading and publish a statement listing any and all changes that we decide need to be made to the NWA to deal with the issues outlined above.

Section 2

Introduction

Background to the Networking Arrangements

- 2.1 Channel 3 is a free-to-air, commercially funded national television broadcast channel. Channel 3 is made up of 15 regional licensed areas, the licences for which are currently held by four companies: ITV Broadcasting Ltd (11 licences), stv group plc ('stv') (two licences), Ulster Television plc ('UTV') and Channel Television Ltd ('Channel'). Throughout this document, stv, UTV and Channel are referred to collectively as the 'non-consolidated licensees'.
- 2.2 A key public policy objective for Channel 3 has been to provide competition to other national broadcasters. The Channel 3 licensees were mandated under section 39 of the Broadcasting Act 1990 to conclude a set of arrangements known as the ITV Networking Arrangements ('NWA') that would enable them to work together to produce a national television service. However, the Broadcasting Act 1990 did not dictate the structure or content of the arrangements.
- 2.3 ITV Network Ltd ('ITV Network') is a key organisation in the administration of the NWA although it is not itself an Ofcom licensee. ITV Network is a company limited by guarantee, with a membership composed of the 15 licensees. The board of ITV Network is known as the Network Council and was set up to agree the ITV strategy and budget. A separate management structure known as the ITV Network Centre ('NWC') was created as a result of the initial NWA as the body that would execute the instructions of the Network Council and run the Channel 3 network on behalf of all the licensees. The NWC exists within ITV Network.
- 2.4 The Networking Arrangements currently comprise five documents:
 - 2.4.1 Network Supply Contract ('NSC') – specifies each regional licensee's share of contribution to the Network Programme Budget ('NPB');
 - 2.4.2 Network Centre Statement of Principles ('Statement of Principles') – deals with the control of network policy by the licensees, the implementation of that policy by the NWC, the selection of programmes, and the budget and the supply of a network schedule. It also provides for the NWC to be organised within the management structure of ITV Network; and
 - 2.4.3 Network Centre Code of Practice ('Code of Practice') – ensures that information about commissioning is disseminated fully to guarantee an even-handed treatment of in-house and external (independent) producers with respect to programme commissioning. The Code of Practice also sets out the process by which licensees are appointed for programme compliance and production monitoring.
 - 2.4.4 Network Programme Licence ('NPL') – is the standard form of contract for use by the NWC when it commissions a programme from a regional licensee;
 - 2.4.5 Tripartite Commissioning, Production and Compliance Agreement ('TA') – is the contractual arrangement used by the NWC when it commissions a programme from an independent producer;

ITV Network activities and governance

- 2.5 There are three broad areas of activity in the ITV Network “supply chain”. These were set out in some detail in the 2005 Consultation and Statement on the NWA,¹ but in brief they are:
- 2.5.1 Programme commissioning and acquisition. Content for ITV1 is sourced from new commissions and acquisitions (of programmes already made). New commissions (or programme production) can be purchased from both the licensees’ in-house production divisions and external sources. There is a safeguard in commissioning in that the Code of Practice sets out the principles to be applied by ITV Network when agreeing terms for the commissioning of independent productions. The NPL and the TA are based on this Code of Practice;
 - 2.5.2 Channel operation services. These arrangements - either between the licensees, and/or between the licensees and third parties - are the ‘nuts and bolts’ of producing a national schedule and broadcasting it. They cover areas such as marketing, outsourced services (e.g. support services), interactive and on-line services, and transmission; and
 - 2.5.3 Airtime sales and sponsorship. The ITV1 channel is broadcast on a nationwide basis with relatively minor differences in schedule resulting from specific obligations for hours of regional programming. Licensees earn revenue from selling airtime to advertisers, and from programme sponsors who pay to sponsor national networked programmes. ITV plc sells the network’s airtime and network programme sponsorship on behalf of all licensees.
- 2.6 The involvement of the NWC in the above activities is relevant to assessing the potential competition and policy concerns that could arise with the NWA. The core activities of the NWC (also set out in more detail in the 2005 review publications – see footnote 1) are:
- 2.6.1 Commissioning and acquisition of programmes: decisions are made centrally on behalf of all licensees, and processes and contracts are governed by the NWA;
 - 2.6.2 Scheduling: the NWC schedules ITV1. The ITV2-4 channel management, who are housed within ITV Network, also have access to ITV1 schedule data which enables them to create complementary schedules. So that non-consolidated licensees can meet their regional programming obligations they are able to opt out of the national schedule at any time in order to schedule regional programmes. Currently there is limited coordination of the scheduling of regional programming between licensees, and in particular the higher volumes of regional programmes shown in the devolved nations as compared with the English regions are scheduled independently by the three bodies holding Channel 3 licences in the devolved nations (stv, UTV and ITV Broadcasting Ltd (part of ITV plc)); and
 - 2.6.3 Rights and Business affairs: this team negotiates the terms of commissions and acquisitions for ITV1 on behalf of all licensees. It is important to note

¹ See <http://www.ofcom.org.uk/consult/condocs/itv1/main/itv.pdf> and <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/>

that programme rights are then held collectively by the licensees and that ITV Network holds no rights itself. This team is also responsible for negotiating sports rights and film acquisition deals, which may be shared between ITV1 and ITV2-ITV4. It also negotiates the terms for programmes commissioned by ITV2-ITV4 and the contracts and commercial arrangements associated with ITV's online activities and interactivity.

Purpose of the Annual Reviews

- 2.7 Although the NWA were introduced under the 1990 Broadcasting Act, the Communications Act 2003 (the 'Act') introduced a requirement for periodic reviews of the NWA. Section 293 of the Act requires Ofcom to carry out from time to time a general review of the NWA, including whether the NWA continue to satisfy one of the two competition tests set out in Schedule 11 of the Act and summarised in Annex 5. Schedule 11 also requires that in carrying out a review, we consider, alongside our wider statutory duties, the following factors:
- 2.7.1 whether the arrangements represent a satisfactory means of enabling the regional Channel 3 services to be a nationwide system that can compete effectively with other UK television programme services; and
 - 2.7.2 the likely effect of the arrangements on the ability of the regional Channel 3 licensees to maintain the quality and range of regional programmes and other programmes contributing to the regional character of the services.
- 2.8 We are also required to consider whether the arrangements would be likely to be prejudicial to the ability of any of the Channel 3 licensees to comply with their public service remits and other statutory obligations specified in Schedule 11.
- 2.9 We have reviewed the NWA in this document from the perspective of these statutory tests and duties. We are also mindful of our wider statutory duties and public policy objectives, such as our principal duty in section 3(1) of the Act to further the interests of citizens in relation to communication matters and consumers in relevant markets, and our obligation under section 3(2)(e) of the Act to secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of the public from the inclusion of offensive and harmful material. In addition, we have paid particular attention to the undertakings given by ITV plc's predecessors Carlton Communications plc and Granada plc to the Secretary of State for Trade and Industry in 2003. These include requirements that limit the contributions of the non-consolidated licensees to the NPB, oblige ITV plc to provide the other licensees with a clean broadcast feed and, of particular importance within the current review, ensure that ITV plc does "not make the commissioning or broadcasting of a programme conditional on using Carlton and/or Granada for Programme Compliance for that programme".²
- 2.10 Such reviews are required to be carried out no more than a year after the previous review and consider whether any modifications to the arrangements are required. Ofcom may also, at any other time, carry out a review of the NWA if prompted to do so by a licensee.
- 2.11 The first general NWA review under the provisions of the Act was concluded in June 2005 ("the 2005 review"), with a further statement in October 2005 on matters

² The full text of the merger undertakings can be found at <http://www.adjudicator-crr.org.uk/undertakings.htm>.

relating specifically to UTV.³ In those documents, we set out our recommendations on how the NWA should be revised in order to address the concerns we had identified. Before the 2005 review, the NWA had been largely unchanged since 1993.

Summary of Earlier Annual Reviews

- 2.12 The 2005 review considered both arrangements in relation to external third-parties ('external arrangements') and arrangements or agreements between the ITV licensees ('intra-ITV arrangements') although it focussed primarily on the latter. This was because issues relating to the arrangements between ITV Network and independent producers had recently been addressed through another statutory requirement.⁴
- 2.13 Following our Television Production Sector Review ('TPSR')⁵ and broad agreement between ITV Network and the Producers' Alliance for Cinema and Television ('PACT'), the trade body representing independent producers, about new Terms of Trade, the 2006 review focused on the need to update the NWC Code of Practice to take into account changes to our Guidance to broadcasters for drawing up Codes of Practice relating to the commissioning of independent producers.
- 2.14 The 2006 review also indicated that the NPL and the TA would need to be amended in the light of the changes made to the NWC Code of Practice, but noted that there might be scope to remove these documents from the NWA once those changes had been made and approved.
- 2.15 In light of the outstanding issues in implementing the recommendations of the 2005 and 2006 reviews, we confined the scope of the 2007 review to a general assessment of the overall operation of the NWA.
- 2.16 An assessment of outstanding issues from earlier annual reviews follows in section 5 below.

Scope of the 2008 Review

- 2.17 In August 2008 we wrote to the regional Channel 3 licensees to invite proposals on the scope of the 2008 review, highlighting a number of issues that we considered were likely to be of importance to licensees, including compliance arrangements, the acquisition of new media rights and the future of the ITV1 networked service.
- 2.18 Further to a series of submissions which we received from licensees during the autumn of 2008, we decided to focus specifically on issues relating to compliance and new media rights. In light of the particular importance of compliance, we decided not to use the streamlined process adopted in the 2007 review. We did, however, decide that a broader consideration of the network's governance and future structure was premature in light of the concurrent PSB review. We intend to return to such matters in the next review.

³ For these statements, see <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/> and http://www.ofcom.org.uk/consult/condocs/itv1/further_statement/further_statement.pdf

⁴ Section 285 of the Act had put in place a framework for each public services broadcaster ('PSB') to have a code of practice for commissioning programmes from independent suppliers. ITV Network Limited produced its own Code of Practice in 2004, covering qualifying independent producers. A revised, but not approved version has been in use since 2006. A qualifying independent producer is one whose programming counts towards fulfilment of the independent production quota.

⁵ See http://www.ofcom.org.uk/consult/condocs/tpsr/statement/review_tv.pdf

- 2.19 Further to our decision to focus on the areas of compliance and new media rights, we sent a detailed information request to the licensees at the end of October. We have also engaged in regular discussions with the licensees about a number of other issues raised during the pre-consultation period, which we have chosen to consider briefly in section 5 below.

Structure of this document

- 2.20 The rest of this document comprises the following:

- Section 3 restates Ofcom's sanctions policy towards Channel 3 licensees, describes the compliance arrangements which apply to the ITV Network and sets out options for amending them.
- Section 4 describes the arrangements for new media rights.
- Section 5 considers other issues relevant to the governance of the ITV Network including outstanding issues from earlier reviews.
- Annexes 1-4 cover the consultation process, including details of how to respond.
- Annex 5 describes that statutory framework for reviewing the NWA.

Section 3

Compliance Arrangements

- 3.1 Parliament has charged Ofcom with setting a Broadcasting Code (the “Code”) to provide among other things protection for viewers from offence or harm in programming. Every programme broadcast on television services licensed by Ofcom is required to comply with the rules set out in the Code as part of the terms of their licence.⁶ The process by which broadcasters ensure that their content meets the terms of the Code before being broadcast is known as compliance. This is a matter of particular importance to broadcasters in that, if a programme they have broadcast is found to have breached the Code, then they risk sanction, including potentially, a fine of up to 5% of their qualifying revenue.⁷ In addition to this specific regulatory function, compliance teams also have other responsibilities relating to the oversight of the programme production process. For example, compliance teams ensure that in-house and external producers have the necessary funding arrangements in place; have sought approval for the use of copyrighted material; and, if appropriate, have arranged for subtitling or other accessibility requirements.
- 3.2 This section described how the compliance arrangements for the ITV1 service have developed; how they operate at present; and where particular issues have arisen. We restate our sanctions policy towards the Channel 3 licensees and then set out for discussion a series of alternative models for the compliance of network programming going forward.

The Broadcasting Act 1990

- 3.3 Under the Broadcasting Act 1990, the 15 regional Channel 3 licensees were required to develop a set of networking arrangements to be approved by the Independent Television Commission (the ‘ITC’, Ofcom’s predecessor as the regulator responsible for broadcast television services in the UK) to ensure the smooth running of the Channel 3 network. The NWA initially proposed by the licensees were approved by the ITC in 1992 and then referred to the Director General of Fair Trading (the ‘DGFT’) so that the DGFT could assess whether the arrangements satisfied the competition test set out in Schedule 4 of the Broadcasting Act 1990.⁸
- 3.4 The NWA approved by the ITC required independent producers to enter into production agreements with one of the regional Channel 3 licensees rather than directly with the NWC. In the ITC’s view, it was important that a specific licensee should assume responsibility for carrying out programme compliance because licensees were broadcasters, and therefore directly obliged to comply with the ITC’s regulatory rules, whereas the NWC, which compiled the network programme schedule, was not:

“Compliance with the terms of the licence was a fundamental aspect of broadcasting regulation and the ITC was not willing to allow

⁶ The Code also applies to services provided by Sianel Pedwar Cymru (‘S4C’) and, in most aspects, to services provided by the BBC which are funded by the licence fee.

⁷ ‘Qualifying revenue’ is the revenue generated from primary broadcasting activities including advertising and sponsorship. A full definition of qualifying revenue can be found in *Qualifying Revenue and Multiplex Revenue: Statement of Principles and Administrative Arrangements*. See: http://www.ofcom.org.uk/tv/ifi/codes/multiplex/qualifying_revenue.pdf.

⁸ Unlike Ofcom, the ITC did not have concurrent competition powers with the DGFT.

licensees to delegate these responsibilities to others whose activities it did not regulate and against whom it had no sanction, such as... network centre.”⁹

- 3.5 The arrangements for independent productions were, however, different to those for licensees’ own productions, which were commissioned directly by the NWC.
- 3.6 In his report of 3 December 1992, the DGFT concluded that the proposed NWA breached the competition test set out in the Broadcasting Act. The DGFT stated that the requirement for independent producers to contract with a licensee rather than the NWC could restrict competition. It considered those producers could face difficulties in finding a licensee which, as a programme maker itself, may have a conflict of interest that was likely to distort commissioning decisions. The DGFT also expressed concern that the compliance fee might be higher for independently produced programmes than for those produced by the licensees themselves.
- 3.7 The DGFT also concluded that the standard terms of contract, including the acquisition of rights in perpetuity from independent producers - which differed from the fixed term licence arrangements for programmes produced by a Channel 3 licensee - would restrict the ability of those producers to compete in the production of programmes and deny competing broadcasters access to secondary transmission rights. The DGFT proposed that the NWA should be modified to allow independent producers to enter into programme contracts with the NWC directly, while the NWC agreed a separate contract with a regional Channel 3 licensee to ensure programme compliance.

The 1993 Monopolies and Mergers Commission Inquiry

- 3.8 Following the DGFT’s report, the 15 licensees and the ITC referred the DGFT’s proposal to the Monopolies and Mergers Commission (‘MMC’) for further investigation under Schedule 4 of the Broadcasting Act 1990. The ITC considered that the DGFT’s modifications served to distance the licensees from their responsibilities as broadcasters. The ITC argued to the MMC that:

“Although in law if there was a licence breach in a network programme all the licensees broadcasting the programme would be responsible, the ITC did not regard collective responsibility as an adequate basis for compliance. Most network programmes were broadcast simultaneously by 14 of the 15 licensees... and it was simply not practicable for every programme to be monitored for compliance in advance of broadcasting, and modified where necessary, by all the licensees either separately or collectively. The ITC required that for every programme there should be one named licensee who had undertaken to carry out the full range of compliance work and accepted responsibility for what was passed to the transmitters for broadcasting.”¹⁰

- 3.9 In its report, the MMC endorsed the DGFT’s view that requiring the independent producer to enter into a contract with a licensee, and not the NWC, was likely to have the effect of distorting competition between in-house and independent producers. The MMC recommended therefore that independent producers should be allowed to negotiate directly with the NWC for the price to be paid for a programme and the

⁹ MMC, *Channel 3 Networking Arrangements*, April 1993, para 4.10-4.11.

¹⁰ *ibid.*

package of rights to be acquired. It envisaged that the role of the licensee would be limited to supervising programme production, verifying the financing for the project and carrying out the programme compliance function. The licensee would receive a fee for undertaking the compliance work and the whole arrangement would be agreed in a tripartite agreement entered into by the NWC, the independent producer and the licensee. Although the NWC could commend a compliance licensee to an independent producer, the choice of licensee was up to the producer.

- 3.10 This contractual system, involving a specific licensee responsible for programme compliance, has in effect operated since the MMC published its report in 1993. Although the ITC and Ofcom have during this time retained the option to sanction all of the Channel 3 licensees for breaches of programme compliance on network programming, custom and practice has been to hold responsible the compliance licensee alone.

Market Consolidation

- 3.11 Consolidation amongst the Channel 3 licensees during the 1990s meant that by 2002 only four Channel 3 regional licensees played an active role in complying programming for the ITV network: Carlton, Granada, SMG and Channel. In October 2002, Carlton Communications plc and Granada plc, the two largest licence holding companies, announced a proposed agreed merger. This merger was then referred by the Secretary of State for Trade and Industry to the Competition Commission in March 2003.
- 3.12 In its report in October 2003, the Competition Commission recommended that the merger should be allowed, subject to undertakings intended to protect the position of the non-consolidated licensees in relation to the operation of the NWA and competition in the TV advertising market. Following negotiation, the Office of Fair Trading obtained undertakings from Carlton and Granada. This included a commitment that the merged company would not “make the commissioning or broadcasting of a programme conditional on using Carlton and/or Granada for Programme Compliance for that programme”.
- 3.13 Subsequently, in our 2005 review of the NWA, we required a change to the Code of Practice to give effect to the merger undertakings. The 2004 Code of Practice had stated that “ITV will commend a Compliance Licensee to the Producer to carry out compliance and production monitoring in respect of that programme.” We were concerned that this process could act to restrict competition between the Channel 3 licensees for such compliance work and obliged NWC to amend the code so that the choice of compliance licensee was made by the producer without any influence from NWC.

The current network compliance framework within the NWA

- 3.14 Although the nature of Ofcom’s role in reviewing the NWA is different to that of the ITC, we have not made any significant changes to the compliance system that was in operation under the previous regulator. The framework for compliance of programming for the ITV1 network, therefore, has remained broadly unchanged since the MMC’s report in 1993. It is encapsulated in two documents: the NPL for programmes commissioned by NWC from regional licensees, and the TA for programmes commissioned by NWC from independent producers. Both the NPL and the TA are supplemented by General Terms and Conditions documents. There are no differences between the obligations placed in the NPL and the TA on the

compliance licensee, whose role, among other matters, is to ensure programming complies in full with the Ofcom Broadcasting Code.

- 3.15 Under the General Conditions to the TA, the Compliance Licensee agrees to:

“...indemnify and hold harmless (i) [ITV Network Limited]; (ii) the sponsors ... and their advertising agencies (if any); (iii) [ITV Network Limited’s] parent and subsidiary companies (if any); (iv) all other Regional Licensees broadcasting the Programme... against any and all claims, damages, liabilities, losses and expenses ... arising out of any breach by the Licensee of any term of this Agreement. ... The [Compliance] Licensee shall at its expense assume the defence of any such claim or litigation.”

- 3.16 The NWA therefore currently provide that it is the specific responsibility of the compliance licensee to indemnify both ITV Network and the non-compliance licensees against any errors it makes in compliance. Should the complied programme be found to breach the Code, this indemnity would, in theory, make the compliance licensee liable for any sanction imposed by Ofcom on the non-compliance licensees. This has never been tested since, as detailed below, Ofcom has, to date, only imposed sanctions on the compliance licensee.

- 3.17 ITV plc has explained to us, “in each case, Network (and the other Channel 3 licensees) relies fully on the compliance licensee to ensure the compliance of the programme on their behalf when [it] is broadcast as part of the Network Schedule”. We do not think this is an entirely accurate reflection of the position of ITV Network, which appears to have a residual role in relation to compliance issues under the NWA. For example, the General Terms and Conditions of the TA state that ITV Network is able to require changes at any stage of pre- or post-production in order to ensure that programme meets the specified standards, including compliance with the Code. We note also that programme producers who wish to use premium rate telephony services (‘PRS’) do so at the “absolute discretion” of ITV Network. Additionally, it is ITV Network which assesses the accounting by the producer for the relevant PRS revenues, rather than the compliance licensee. Furthermore, ITV Network gives an indemnity to the producer and Compliance Licensee in respect of:

“...any and all claims, damages, liabilities, losses and expenses....arising out of any addition, deletion, or other act of omission of [ITV Network Limited] in connection with the Programme, other than the exercise by [ITV Network Limited] of the Rights in accordance with the terms of this Agreement”.

- 3.18 Therefore, if the compliance licensee were sanctioned for a Code breach that was a direct result of action (or inaction) by ITV Network, it appears that ITV Network would be liable for that under this indemnity. These provisions suggest there is currently a backstop role for ITV Network in terms of ensuring that network programmes meet regulatory standards. We understand that the indemnity by ITV Network in favour of the compliance licensee has never been called upon.
- 3.19 For the work of carrying out compliance on a programme, the compliance licensee is paid a set fee by ITV Network which is calculated as a percentage of the fee paid to the producer. The level of the fee is dependent on the genre of the programme and varies from 1% for children’s programming to 3.5% for news and current affairs under a tariff structure known informally as the Walmsley tariff.

How compliance is carried out by the licensees

- 3.20 By the time of the Carlton/Granada merger, only four Channel 3 regional licensees complied programming for ITV1 network: Carlton, Granada, Channel Television and stv, then known as SMG plc (the owner of the two Scottish Channel 3 licences). Broadly speaking, stv only complies the programming it has produced for ITV1; licensees within the ITV plc group comply both the programming produced within the group and some programming supplied by independent producers; and Channel only complies programming supplied by independent producers.
- 3.21 Each of the companies currently undertaking programme compliance for the Network operate a different structure, which is described in more detail below.
- 3.22 It is worth noting that each regional licensee complies its own regional programming.

ITV plc compliance

- 3.23 Since the Carlton-Granada merger, the newly formed ITV plc has created a single ITV Programme Compliance department.
- 3.24 ITV Programme Compliance complies all programmes produced by ITV Studios for the ITV1 network schedule, about two thirds of total commissioned programme hours, as well as approximately 40% of ITV1 programmes produced by independent producers. The requirement for compliance to be undertaken by a specified Channel 3 licensee remains in place, however, and so, until recently, the majority of compliance by ITV plc licensees was conducted under the auspices of LWT. Productions made in the North of England were complied by Granada Television or Yorkshire Television. All eleven of the ITV plc licenses are now held by one company, ITV Broadcasting Ltd.¹¹
- 3.25 ITV Programme Compliance consists of 31 full-time employees ('FTEs') plus additional part-time and freelance staff divided into separate teams for programme compliance, compliance of acquired programming and films, and legal compliance.
- 3.26 ITV plc has explained to us that as soon as notification of a commission by Network is received, programmes are assigned to compliance executives who are responsible for compliance of that programme until it is delivered for broadcast. Programmes with potential legal issues, predominantly factual and current affairs programming, are also assigned to a programme lawyer.
- 3.27 The compliance executive will discuss and review compliance issues at various stages of production and may provide input to scripts, the recording and editing processes as well as advice on scheduling, sponsorship and continuity. If appropriate, programme lawyers will provide legal and regulatory advice to compliance executives and to the programme makers. Acquired programming is managed by a separate team who will view and oversee any editing required. All compliance staff ultimately report to the Director of Programme Compliance.
- 3.28 As the role of the compliance licensee is to assess the suitability or otherwise of programming for the ITV Network, ITV plc has explained to us that its compliance

¹¹ As a result of this change, there do not seem to us to be regional compliance licensees for network programming within the ITV plc structure any longer. If a financial sanction were imposed on ITV Broadcasting Ltd, it would be calculated on the basis of its qualifying revenues across all eleven of its licenses.

unit “work[s] closely with the Network” and that “compliance issues on specific programmes are... routinely discussed between ITV Programme Compliance and ITV Network Limited editorial commissioners and business affairs personnel.”

- 3.29 ITV plc has in recent months undertaken a full review of its compliance procedures, developing an end-to-end compliance manual and ensuring that all compliance work contains a full audit trail.

Channel Television compliance

- 3.30 Channel complies approximately 60% of the programmes produced by independent producers for the ITV1 network schedule, although it does not make any programmes for the network itself. Its compliance business is an important contributor to the profits of the Channel licence – without this revenue stream its viability could be called into question. Channel employs four FTEs to comply programming with legal support from both retained and freelance solicitors. Overall responsibility for compliance rests with the Chief Executive to whom the Head of Compliance reports.
- 3.31 Channel has stated that “ITV Network Limited... has no oversight of the compliance role”. Its compliance officers do consult commissioning editors at the network on editorial matters which are relevant to compliance, but “matters relating to content compliance are not dealt with by ITV [Network]”.

stv compliance

- 3.32 stv Central complies all programming produced by stv Productions for the ITV1 network schedule, currently between 10 and 20 hours per year. Although it complied some programming by independent producers in the past, this was limited to one or two programmes a year and it has not complied any since 2006. stv employs one full-time Compliance Manager to review scripts and provide compliance input for stv’s network programming. The compliance manager works closely with stv’s legal department, including its Head of Legal who ultimately signs-off on completed programming. stv has described ITV Network’s role in compliance as “hands off”.

ITV Network

- 3.33 Our understanding is that ITV Network does not have a central compliance function. From the information provided by the licensees, the level of contact between ITV Network and compliance licensees on compliance issues seems to vary. While the ITV plc compliance unit appears to have a close working relationship with ITV Network on compliance issues, that does not seem to be the case for stv, which has described ITV Network’s position as “hands off” while liaison between Channel and ITV Network appears to be ad hoc.

Interaction between Channel 3 compliance and Ofcom’s policy on sanctions

- 3.34 Compliance of programming on Channel 3 is unique among the television services licensed by Ofcom, in that licensees, unless they have acted as the compliance licensee for the programme in question, do not take an active role in ensuring compliance with the Code.
- 3.35 Under the regulatory regime which applies to all of the Channel 3 licensees, the broadcast of a programme in breach of the Code puts the licensee in breach of its licence conditions and, thus, leaves it potentially liable to a financial sanction. Indeed,

licensees have been aware of the broad scope of the regulator's authority to fine since the ITC regime. The 1993 *Guidance Note for Channel 3 Licensees on Sanctions* (published in 1993) states:

"Responsibility for the breach could rest, for example, with the licensee who clears the programme for transmission or with the licensees who transmit it, or both... Depending on the circumstances, the ITC could impose a sanction on an individual licensee or licensees collectively, with individual licensees paying according to their share of total qualifying revenue... All licensees share responsibility for taking reasonable steps to ensure that proper procedures are in place for achieving compliance with the licence conditions."¹²

3.36 However, custom and practice has been such that any sanctions by either Ofcom or the ITC (Ofcom's predecessor) issued as a result of breaches in the Code by ITV network programmes have only been imposed on the compliance licensee. The scale of any financial sanction is limited by the cap on share of qualifying revenue.

3.37 The table below shows all of the financial sanctions imposed by the ITC and Ofcom on Channel 3 regional licensees:

Fining Body	Licensee sanctioned	Amount fined	Programme	Reason
ITC	Granada	£500,000	<i>This Morning</i>	undue prominence of commercial products
ITC	Central	£2,000,000	<i>The Connection</i>	faked material in a factual programme
ITC	LWT	£100,000	<i>Club @vision</i>	product placement
Ofcom	Granada	£1,200,000	<i>Soapstar Superstar</i>	misleading viewers in relation to PRS
Ofcom	LWT	£3,000,000	<i>Ant & Dec's Saturday Night Takeaway</i>	unfair conduct of competitions and misuse of PRS
Ofcom	LWT	£1,200,000	<i>Ant & Dec's Gameshow Marathon</i>	unfair conduct of competitions
Ofcom	ITV plc licensees*	£220,000	n/a	Breaches of quotas for 'Out of London' production
Ofcom	stv group licensees*	£10,000	n/a	
Ofcom	UTV*	£5,000	n/a	
Ofcom	Channel*	£5,000	n/a	

Note: The sanctions imposed in cases marked with an asterisk in the table above were for breaches of conditions in the Channel 3 licences relating to Out of London production quotas rather than the Broadcasting Code. As such, there was no compliance licensee in these cases.

3.38 For the most part, the interaction of the compliance process and the sanctions process has worked effectively since 1993 to prevent the broadcast of material likely

¹² This specific guidance note for Channel 3 licensees was replaced by a more general guidance note which applied to all broadcasters, *Outline Procedure for Application of Statutory Sanctions: Notes for the Guidance of Licensees*, issued by the ITC in January 2001.

to be in serious breach of the Code. The financial sanctions imposed on ITV to date have in most cases been levied on a compliance licensee that also happened to be the producer. This has therefore retained a direct link between the producer and the entity that has taken responsibility for the sanction.

- 3.39 However, recent developments have exposed a number of issues with the current approach to sanctions. As a result, we are no longer satisfied that it provides a sufficiently effective incentive for licensees to ensure compliance with broadcasting standards. First, we are conscious that there is the potential for a situation to arise in which two similar breaches of the Code could result in very different financial sanctions depending on the entity which carried out compliance, rather than on the seriousness of the offence. For instance, if one independently produced programme was complied by the largest licensee and another by the smallest licensee then the maximum scale of any financial sanction could differ by several tens of millions of pounds, even though the programmes were broadcast across the network at a similar time to similar audiences. It does not seem appropriate to us that the repercussions of serious breaches of the Code should differ on this basis.
- 3.40 Second, we are concerned that the current practices may compound concerns we have about a lack of clarity about the division of responsibility for compliance issues between the compliance licensee and ITV Network. For example, the use of PRS has been a prominent factor in recent cases where we have imposed a financial sanction on Channel 3 licensees. We understand that, in most if not all cases where PRS are used in network programming, the PRS contracts with telephony providers are managed and held by ITV Network. ITV Network therefore plays a more active role in aspects of the actual content of programming than may hitherto have been the case and should be in a position to contribute to an effective compliance regime. A sanction which is imposed solely on the compliance licensee may not incentivise ITV Network (which acts as an agent on behalf of the Channel 3 licensees) to exercise the compliance controls it has.
- 3.41 We are also concerned, in light of the recent sanction imposed on Channel 3 licensees as a result of their Out of London Quota ('OOL') arrangements, that the current approach may have weakened the engagement of non-compliance licensees with their regulatory obligations. That does not mean that we would expect all licensees to start duplicating the processes of programme compliance, but rather that we expect them to take a more proactive role in seeking assurances that regulatory obligations on the ITV1 service are being complied with.
- 3.42 Our examination of the compliance structure across the ITV Network has also highlighted an additional issue. We understand that ITN continues to comply national Channel 3 news programming subject to its news supply arrangements. Although we note that compliance of ITN programming has not raised any significant regulatory concerns, the role of ITN's compliance function and ultimate responsibility for any Code breaches in news broadcasts appears to be unclear. We return to this issue below.

Ofcom's policy on sanctions

- 3.43 Given our duty to ensure that the members of the public receive adequate protection through our codes, and to ensure that the Channel 3 licensees are correctly incentivised to ensure high standards apply in programme compliance, we consider we need to restate our sanctions policy to make it clear that Channel 3 licensees have a collective responsibility for programming which is broadcast on the ITV1

service. We consider it is appropriate to make clear that going forward our starting position on sanctions for Code breaches by Channel 3 licensees is that:

- All Channel 3 regional licensees who broadcast material that is in breach of the Code will be liable for a sanction.

3.44 However, we recognise that we need to take into account the facts of individual cases. In addition, therefore:

- We may choose to fine some licensees more significantly than others depending on where culpability for the breach lies.

3.45 In light of this restatement of our position on sanctions, we also need to consider what (if any) adjustments to the compliance arrangements in the NWA are appropriate going forward.

Options for compliance in the future

3.46 We wrote to the licensees on 6 August 2008 to invite proposals to how the NWA could be modified if our approach to sanctions were to be restated to reflect more fully the role and functions of ITV Network as the body responsible for the commissioning, acquiring and scheduling of programming for the ITV1 network service. We reminded the licensees that any proposals should take into account the requirements of the Carlton/Granada merger undertakings and the fact that we are required under Schedule 11 of the Act to take into account the ability of regional licensees to continue to fulfil their regional obligations. We also made it clear that the scale of any sanctions against individual licensees would still need to take into account their culpability for the licence breach.

3.47 The non-consolidated licensees submitted a joint response on 2 September 2008. They stated that, while they noted Ofcom's re-iteration of its discretion to impose sanctions on all licensees, they were not convinced more detailed analysis of the compliance regime was necessary and were broadly satisfied with the existing arrangements.

3.48 ITV plc, in its response of 12 September 2008, welcomed Ofcom's proposal to review the compliance structure and suggested that ITV Network should be permitted to shape compliance arrangements as appropriate, without any regulatory restrictions. On 24 November 2008, ITV plc put forward a more detailed proposal outlining how compliance by ITV Network could replace the current compliance licensee system. ITV plc suggested that a Network Programme Compliance team, which would be the single point of contact for Ofcom in relation to all compliance issues, take responsibility for all Channel 3 programme compliance except news and regional programming.

3.49 In addition to the approaches initially suggested by the licensees we have also developed two other options which illustrate other approaches. We outline below the principles of four alternative approaches that we believe the Channel 3 compliance framework could be based on in future. We have not indicated a preferred option as, subject to both our statutory obligations and our concern that the compliance arrangements in the NWA should secure an effective compliance regime and work with the grain of our approach to sanctions, we are neutral as to the manner those arrangements take.

Option 1: Status Quo

- 3.50 Under option 1, the current compliance arrangements remain in place, with a regional licensee continuing to act as the compliance licensee and providing an indemnity to the other Channel 3 licensees in relation to any loss or damage they may suffer if it fails to fulfil its compliance role. As before, independent producers would retain the right to select which licensee complies its programming.
- 3.51 Given our restated sanctions policy, the indemnity could be more likely to be called upon than has been the case to date, since all licensees would be potentially at risk of a sanction in the event of a Code breach. On the one hand, there is a view that indemnity arrangements which exist between the Channel 3 licensees are purely a matter for the licensees themselves and not for Ofcom. On the other hand, we are aware that there is a risk that the smaller licensees, such as Channel, may not be able to meet the costs they would face should they be called upon to indemnify the other licensees for sanctions imposed on all of them. Channel has already informed us that its experience is that such a financial risk is uninsurable given its turnover.
- 3.52 This raises the issue as to whether maintaining the current compliance arrangements in the NWA in light of our restated sanctions policy would fall foul of our duties under Schedule 11 of the Act not to approve arrangements which would be likely to be prejudicial to the ability of any Channel 3 licensee to meet its public service remit.
- 3.53 Therefore, in order to assess the appropriateness of this option, we invite respondents to comment on whether there is scope for the Channel 3 licensees to secure appropriate indemnity insurance, either in the market or by modifying the compliance fee to enable the compliance licensee to self-insure.

Option 2: Amendment to indemnity provisions

- 3.54 Our second option addresses the indemnity issue identified above. As before, a regional licensee would continue to act as the compliance licensee for network programming and independent producers would retain the right to select which licensee does so. However, under this option we would seek to amend the scope of the indemnity in the NPL and TA so that it did not cover any sanctions that we might impose on the licensees for broadcasting a programme which did not meet the requirements of the Code. In light of our desire to implement collective responsibility on all Channel 3 licensees for the material broadcast by them, the compliance licensee would provide a compliance service for the other licensees, but regulatory liability would continue to sit with each of the licensees.
- 3.55 There is a view that this would cause all the licensees to carry out their own compliance process to ensure that all programmes they transmitted complied with the Code. The duplication of compliance activity, it has been further argued, would undermine the effectiveness and competitiveness of the Channel 3 network and thereby undermine the purpose of the NWA.
- 3.56 However, we consider that this option is broadly comparable to the model for advertising compliance employed by the Channel 3 licensees. In that case, a separate company, Clearcast, provides pre-clearance of advertising, including scheduling restrictions, for each of the UK's major broadcasters, including the commercial PSBs. These broadcasters collectively own and fund the business, but remain individually responsible for the content shown on licensed services. We therefore do not accept that this proposal would have to lead to a duplication of compliance processes.

- 3.57 As with option 1, this proposal could also lead to a review of the existing compliance tariff structure to reflect the amended regulatory risk faced by the compliance licensee. Although we envisage this will require some negotiation among the licensees, in previous reviews we have indicated that we would not oppose a move to a tariff structure which was more reflective of actual costs incurred and risks taken on.¹³

Option 3: Compliance by ITV Network

- 3.58 This is the option put forward by ITV plc.
- 3.59 Under Option 3, the specific role of the compliance licensee disappears as ITV Network takes on responsibility for compliance on behalf of all of the licensees. In this scenario, independent producers would therefore lose the freedom to choose a compliance licensee as all compliance would be conducted by a single unit at NWC. Although ITV Network acts as the agent of all the regional licensees, they would still all be liable for any sanctions on an individual basis.
- 3.60 In our view this proposal has attractions given ITV Network's role as agent for each of the 15 licensees. It offers consistency with the other PSBs, simplicity in relation to information gathering and ensures that responsibility for Code breaches rests clearly with the network.
- 3.61 ITV plc has contended that such an arrangement would not be in breach of its 2003 merger undertaking discussed in paragraph 3.12 above. ITV plc's view is that, since ITV Network would always be responsible for compliance, it would never be necessary to make the commissioning and broadcast of a programme conditional on its appointment. Channel has taken the contrary view. Although the OFT has expressed the preliminary view that it may be possible to implement the option without seeking review and amendment to this aspect of the merger undertakings by the Competition Commission, we consider that doing so may not be free from legal risk. We would invite respondents to set out their views on the legal position in detail.
- 3.62 In addition, the option may also raise issues under Schedule 11 of the Communications Act. Given it would entail the replacement of the three existing providers of compliance services with a single provider, we would need to consider whether there would be an impact on competition which would fail to satisfy the first and second competition tests in Schedule 11. Furthermore, as noted above, we are obliged by the Act to consider the impact which changes to the NWA have on the ability of Channel 3 broadcasters to meet their public service commitments. As was noted in our PSB Review, "Channel Television's business model is based on supplementing income from its Channel 3 licence with income from complying... programmes from independent producers shown on the network. The public service licence currently makes a small profit but this is declining with pressure on the advertising revenue delivered by the Channel 3 service. If Channel TV's compliance income were to reduce significantly, the viability of the licence could be under threat."¹⁴ Given the potential impact on Channel if it were to lose its compliance business outright, the compatibility of this option with our duties under Schedule 11 would require careful consideration. Respondents are invited to identify any proposals to address those concerns.

¹³ See, Ofcom, *Review of ITV Networking Arrangements – Statement* (9 June 2005), para. 7:39-7:40.

¹⁴ *Ofcom's Second Public Service Broadcasting Review: Putting Viewers First*, A3:8

Option 4: Compliance Units reporting to ITV Network

- 3.63 Our final option is a hybrid, which takes account of our responsibilities under the Act while making ITV Network accountable for compliance. As with Option 3, ITV Network would take over general responsibility for compliance on behalf of all licensees, but independent producers would still be able to choose the compliance unit carrying out the day-to-day duties. ITV Network would, however, take responsibility for final sign-off for compliance if carried out by a licensee's compliance unit. As responsibility will ultimately lie with ITV Network, our starting point would be that all licensees would be liable for sanctions imposed.
- 3.64 This option is likely to be more complex to implement than the other options, in that it would rely on ITV Network and any licensee running a compliance unit¹⁵ to reach agreement on how to administer the system of network sign-off on programming for which the licensee has carried out the primary compliance role. It would also require close links between the compliance licensee and ITV Network. As noted above, the level of interaction between compliance licensees and commissioning editors is mixed. These arrangements would need to be formalised in order to enhance consistency and collaboration, potentially with appropriate changes to the role and responsibilities of the NWC. The existing level of interaction between ITV Network and the ITV plc compliance unit could provide a model for other licensees to follow in this regard.
- 3.65 In addition, it is important that the requirement of sign-off from ITV Network did not distort competition between the licensees offering compliance services. We anticipate therefore that this option might require a formal recognition of the way in which parties will interact by, for example, a Memorandum of Understanding between ITV Network and those licensees. As with Option 2, we anticipate that a review of the compliance tariff structure might also prove necessary.

Network News

- 3.66 As noted in paragraph 3.42 above, we understand that national Channel 3 news programming is in effect self-complied by ITN. Although we have no particular concerns about the standard of ITN news compliance, ITN is not a Channel 3 licensee. We therefore consider that the position in relation to network news is analogous to that for advertising and so, separate to the options listed above for non-news programming, we consider that ultimate responsibility for compliance of news broadcasts rests collectively with the regional licensees who would all be liable for any sanctions imposed as a result of Code breaches in national ITN programming.

Future Amendments to Compliance

- 3.67 In determining the options outlined above, we are conscious that our options for recommending an effective compliance regime for a federalised Channel 3 service are limited by statute. It is our view that further changes to Channel 3 compliance may be necessary in due course and that revisions to the relevant legislation may be required to take account of the many significant changes to the UK's broadcasting framework since the Communications Act (2003) was drafted.

Q1. Which option (or variation of an option) for the ITV1 compliance framework in the future do you prefer, and why? Please include within your response details of any

¹⁵ In practice, we consider that only two compliance units are likely to take on such a role, one at ITV Network itself and one at Channel.

regulatory and/or statutory changes that may be necessary. In particular, please explain:

- a) whether and how your preferred option or options are compatible with our duties under Schedule 11 of the Act;*
- b) whether, in your view, there is scope for the Channel 3 licensees to secure appropriate indemnity insurance, either in the market or by modifying the compliance fee to enable the compliance licensee to self-insure.*
- c) whether a review of the tariff structure for compliance is necessary and, if so, how you believe such a review should be conducted.*

Section 4

New Media Rights

- 4.1 Since the Communications Act came into force, there has been a radical change in the way in which broadcast media is consumed by audiences. Broadcasters now frequently complement the traditional linear analogue stream with other distribution mechanisms including digital channels, online catch-up services and mobile. Within this converging environment, the ability of broadcasters to make use of newer methods of delivery continues to increase in importance. One upshot of this is that the scope of the rights packages acquired can be critical in enabling broadcasters to develop new services so as to maintain audience reach and sustain advertising revenues.
- 4.2 When it commissions new programming, ITV Network acquires a broad package of new media rights to allow for continued exploitation of content by licensees around and after first transmission on ITV1. This section examines what rights are acquired by ITV Network, sets out the representations we have received on this issue and proposes a framework to ensure that the NWA offer sufficient transparency to all licensees so that they are clear about the rights acquired on their behalf and how they might be exploited.

How new media rights are acquired by ITV Network

- 4.3 As part of its review of the NWA in 1993, the Monopolies and Mergers Commission required that the Statement of Principles stated that “The network centre will not acquire any rights other than UK broadcasting rights and non UK-simultaneous re-transmission rights needed for the programme to be shown on Channel 3.”¹⁶
- 4.4 In response to a request from ITV Network in 2006 as to whether this requirement could still be considered binding, we confirmed that this specific obligation could be deemed no longer to apply as it had been “superseded by market events and, in particular, by other regulatory and statutory provisions” including our annual review of the NWA. We anticipated, therefore, that the Code of Practice would be updated to take into account this position as well as the new terms of trade agreed with PACT in 2006 and our *Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from independent producers*¹⁷ which were published subsequently.
- 4.5 As explained in more detail in Section 5 below, the updated Code of Practice is still to be finalised. Nevertheless, it is our understanding that the principle that ITV Network acquires *packages* of rights under the NPL and TA on behalf of all of the licensees has been accepted.
- 4.6 We understand that the draft Code of Practice, which has been in use since July 2006, following the agreement of new terms of trade with PACT, states that ITV Network will “normally only acquire... primary rights” which are defined as:

“... the transmission or broadcast of the programme on ITV1 on all platforms and delivery systems in the UK. ITV [Network] may also acquire the right to offer, in return for a share for the Producer of ITV

¹⁶ MMC, *Channel 3 Networking Arrangements*, April 1993, para 10.7.6.

¹⁷ See, <http://www.ofcom.org.uk/consult/condocs/cop/statement/>

[Network's] net profits (unless otherwise agreed to by the parties), interactive services and applications and support websites around the broadcast of the programme and to sub-contract the production of such interactive services to a third party".¹⁸

- 4.7 Primary rights will, therefore, always provide the licensees with the opportunity to simultaneously transmit programming through online or mobile services. Beyond these, however, a number of additional rights, listed within the TA and NPL, can be obtained by ITV Network including clips and catch-up Video on Demand rights. The exact package of rights obtained by ITV Network, therefore, can vary from programme to programme.
- 4.8 In addition to rights purchased by ITV Network on behalf of all of the licensees, ITV Network has also on occasion purchased additional rights specifically for use on the itv.com website and its mobile service or for ITV2-4. ITV plc has told us that "the cost of acquisition of such rights, including both the fee paid for the rights and the Network staff costs incurred in negotiating and obtaining them, is borne entirely by ITV plc". ITV plc has also explained that where non-standard rights packages are acquired by ITV Network, licensees "have to make enquiries of Network" to discover "precisely which digital rights have been acquired in respect of specific programmes".

Issues raised by the licensees

- 4.9 The non-consolidated licensees have raised concerns about the basis on which additional new media rights are acquired by their agent, ITV Network, on behalf of ITV plc. In particular, both stv and UTV, which now offer online services including catch-up programming, have expressed a concern that their ability to support their own broadcast services has been hampered by a lack of clarity over the way in which ITV Network has acquired packages of new media rights on ITV plc's behalf.
- 4.10 The non-consolidated licensees have individually proposed a range of options to us during the pre-consultation period including that:
- 4.10.1 Ofcom should confirm that the NWA currently prevent ITV Network from acting on behalf of individual licensees to secure additional rights rather than for the Channel 3 licensees as a whole;
 - 4.10.2 ITV Network should be required to seek additional new media rights on behalf of all of the regional licensees as part of its core functions when it negotiates rights packages with content providers, given the growing importance of such rights to broadcasters; and
 - 4.10.3 the terms under which new media rights are acquired by ITV Network on behalf of ITV plc should be disclosed to the other licensees so that they can negotiate with independent producers to obtain similar rights or seek that ITV Network negotiate such rights on their behalf.
- 4.11 ITV plc has argued that:
- 4.11.1 although the acquisition of new media rights is not a "core function" of Network, if it is willing to pay ITV Network to do so, there is no restriction within the NWA preventing ITV Network from acting on its behalf;

¹⁸ This wording was carried forward into the 2006 draft of the Code of Practice from the January 2004 version which was formally approved by Ofcom.

- 4.11.2 because new media rights are acquired by ITV Network on behalf of ITV plc it would not be appropriate for information about those rights to be disseminated to the non-consolidated licensees;
- 4.11.3 digital rights acquired by ITV Network on behalf of Channel 3 licensees should only be exercisable by the licensees which have paid for those rights and in accordance with any commitments given to rights holders;
- 4.11.4 payment for additional digital rights should be apportioned in accordance with licensees' qualifying revenue shares; and that
- 4.11.5 in light of concerns which rights holders may have about the robustness or otherwise of digital rights management by licensees, all digital exploitation should be in accordance with principles established by ITV Network.

Assessment of revisions to the management of new media rights under the NWA

- 4.12 We are required by the Act to ensure that the NWA enable the regional licensees to offer a Channel 3 service which is able to compete effectively with other television programme services in the UK. In light of the increasing willingness and desire of consumers in the UK to access television programming via the internet and mobile services, it is reasonable that the Channel 3 licensees, in common with other broadcasters, should seek to develop other services to enable them to exploit content which they have acquired.
- 4.13 We do not consider it is appropriate to examine the details of which rights are acquired under the NPL and TA and how broad such rights should be – our *Guidelines* referred to above addressed this issue. However, we do believe that each of the licensees are entitled to know what rights have been acquired by ITV Network on their behalf, including those new media rights which form part of the primary rights package, and how those rights can be exploited. On that basis, therefore, we consider a change to the Statement of Principles may be appropriate to ensure that ITV Network, which acts as an agent on behalf of all licensees in acquiring primary rights, reports to the licensees on those rights which they are entitled to exploit. In our view, this should include both commissioned and acquired programming.
- 4.14 Clarity and transparency over rights held in common ownership for the regional Channel 3 licensees should facilitate exploitation by each of those licensees. We note however that for broadcast television services, licensees have to date been the sole providers of Channel 3 content for their region and have made contributions to the network budget according to the terms as laid out within the Network Supply Contract. The regional nature of the Channel 3 television service has not been reflected by a similar regionalisation of the licensees' internet services, to ensure that catch-up programming on the stv.tv site, for example, is made available only to those in Scotland. It is not clear to us that changes to the NWA requiring regionalisation across media to ensure the fair exploitation of rights are either practicable or appropriate. Nevertheless, we would invite respondents to give their views as to whether the current arrangements in relation to internet services have any implications for the effective operation of a nationwide Channel 3 service.
- 4.15 As indicated above, we would not object to ITV Network securing additional rights on behalf of a single licensee or combination of licensees, providing that:

- negotiations for primary rights are conducted separately from other rights negotiations, as noted in our *Guidelines*;
 - information about secondary rights acquired by ITV Network on behalf of one or more licensees is shared equally among those licensees; and
 - any conditions required by new media rights holders relating to the exploitation of acquired rights are agreed among licensees purchasing those rights.
- 4.16 We do not have a strong view as to the basis on which payment for those additional rights should be apportioned among those licensees who wish to purchase them. We do, however, consider that only those licensees acquiring additional rights should incur the cost of doing so and we would welcome the views of respondents as to the appropriate mechanism for cost allocation.
- 4.17 It is our view that, although ITV Network acts collectively on behalf of the licensees with regards to primary rights, the terms under which Network has acquired additional rights for specific licensees, is a matter for those licensees only. We do not, therefore consider that a wider reporting requirement is necessary.

Q2. Do you agree with us that changes should be made to the NWA so that there is clarity as to what new media rights have been purchased on the licensees' behalf and how they can be used?

Q3. Do you consider that changes to the NWA are necessary to ensure information about secondary rights acquired by ITV Network on behalf of certain licensees is shared among purchasing licensees? What do you consider is the appropriate mechanism for allocating the cost of additional new media rights?

Section 5

Other issues

- 5.1 In this section we outline issues which remain outstanding from earlier reviews and describe our approach for dealing with them. We also comment on points that have been raised by licensees during pre-consultation and look forward to some matters that are likely to need further consideration in the 2009 NWA review.
- 5.2 Ofcom has a duty to conduct NWA reviews on an annual basis, producing recommendations which it is then a matter for the licensees to implement following negotiations among themselves. Although we understand licensees have accepted the principles of the recommendations in previous reviews, it remains the case that, since 2005, the licensees have not submitted a fully agreed and revised set of NWA to Ofcom for approval.
- 5.3 We believe the 2008 review should seek to draw a line under previous reviews. We therefore asked the licensees to provide us with a comprehensive list of outstanding issues and address those which seem to us to remain unresolved below.

Network Governance Arrangements and Future Funding of the ITV1 Network

- 5.4 Each of the licensees makes a contribution to the costs involved in running NWC. These include the costs of operating NWC itself as well as the provision of ancillary services such as off-air marketing. In the 2005 Review, we made clear that the mechanism for sharing NWC costs was for the licensees to agree and suggested that ITV plc and the non-consolidated licensees consider whether to continue to share costs on a QR basis or whether the non-consolidated licensees would pay a fixed sum towards running costs. We understand that the licensees agreed to pursue the latter option.
- 5.5 stv and UTV have argued that, in light of increasing rationalisation within and between ITV plc and ITV Network, the agreement reached by the licensees over costs is no longer suitable and that the contribution which they make to NWC costs should be re-examined. In our view, however, whether or not it is appropriate that the terms of this agreement should now be renegotiated is a matter for the licensees.
- 5.6 Nevertheless, this review is being conducted against the background of digital switchover and a significant debate on the future of public service broadcasting, to which both Ofcom and the Government have made detailed contributions in recent weeks. This debate has highlighted the importance to the licensees of the financial arrangements enshrined in the NWA. We anticipate the need to consider issues around the future funding of ITV Network as part of the next NWA review.

ITV.com Reporting

- 5.7 stv and UTV each raised objections to the fact that ITV plc had, in early 2007, ceased to provide the non-consolidated licensees with information about revenues obtained from the itv.com website. ITV plc has told us that it entirely funded the costs of developing the itv.com website and considers it to be a wholly owned ITV plc asset. On that basis, therefore, it does not consider that it is obliged to report itv.com details to the non-consolidated licensees.

- 5.8 In our view, the ownership of itv.com as opposed to the new media rights discussed in section four is a legal issue which sits outside the scope of the NWA. We do consider that the issues of clarity and transparency discussed above are likely to address some of the concerns expressed by stv and UTV, but in this context it does not seem appropriate to us to offer a view on reporting.

Clean Feed

- 5.9 The Carlton-Granada merger undertakings contain a requirement that the non-consolidated licensees receive a “Clean Broadcast Feed” of the Channel 3 network broadcast.¹⁹ The non-consolidated licensees have raised a concern that ITV plc is not supplying a clean feed as required. We understand that the licensees are continuing discussions on this matter. In the first instance, however, compliance by ITV plc with the merger undertakings is a matter for the OFT rather than Ofcom. We do not therefore propose to comment on this issue during the review.

Composition of the NWA

- 5.10 Licensees have made differing suggestions to us about the composition of the NWA. The non-consolidated licensees have suggested that it may be appropriate to seek to include the ITV Network Memorandum and Articles of Association within the NWA. In contrast, ITV plc has suggested that it may be appropriate to remove the Code of Practice, NPL and TA from the group of regulated documents.
- 5.11 In earlier reviews, we have made clear that we would be willing to look at the composition of the NWA once the terms of trade agreements and Code of Practice have been updated and approved by Ofcom. It remains our view that it would be premature for us to reach any final conclusion about the scope of the NWA before all of the relevant documents have been finalised. We consider that in the 2009 review we may need to examine the composition of the NWA.

Contributions to Financing of the Network Programme Budget

- 5.12 UTV raised an issue about the level of its contribution to cash flow for the network programme budget. Our understanding is that UTV and ITV plc are continuing negotiations on this point and we anticipate that a conclusion may be reached before the end of the current review process.

Premium Rate Services

- 5.13 In the 2007 Review, we noted that significant concerns had been raised about the use of premium rate telephony services (‘PRS’) by television broadcasters. An inquiry commissioned by us and led by Richard Ayre (a member of the Ofcom Content Board) was charged with making recommendations on actions needed to restore confidence and trust in the use of PRS in television programming.²⁰ Following a consultation, the Ayre inquiry’s recommendations led to changes to their broadcast licences,²¹ including the imposition of third-party verification requirements.

¹⁹ A “Clean broadcast feed” is defined in the Undertakings as “the provision of a broadcast transmission feed of the Channel 3 Network schedule of all programmes including end credits, but free from all end credit promotions and end credit announcements, commercials, other promotions, interstitial material and continuity announcements not relevant to the regions served.”

²⁰ See <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport>

²¹ See <http://www.ofcom.org.uk/consult/condocs/participationtv/statement/ptvstatement.pdf>

- 5.14 Although we anticipated using the 2008 Review to assess the success or otherwise of the licensees' work in this area, we have instead used this review to consider broader structural aspects of the Channel 3 compliance framework. Ofcom will make a more general assessment of the ways in which all UK licensed broadcasters have implemented the verification requirements.

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 30 April 2009**. Ofcom considers that, although the issues covered are of interest to a limited number of stakeholders only, because they are likely to be of major importance to those stakeholders, a 10 week consultation period is appropriate.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at http://www.ofcom.org.uk/consult/condocs/itv_network2008/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 coversheet (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 anthony.szynkaruk@ofcom.org.uk attaching your response in Microsoft Word format, together with a response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Anthony Szynkaruk
5th Floor
Content & Standards Group
Ofcom
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7981 3806
- 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 Annex 4. It would also help if you can explain why you hold your views.

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 Anthony Szynkaruk on 020 7783 4341.

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 (when respondents confirm on their response coversheet that this is acceptable).

- A1.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex so that non-confidential parts may be published along with the respondent's identity.
- A1.10 Ofcom reserves its power to disclose any information it receives where this is required to facilitate the carrying out of its statutory functions.
- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use in order to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/account/disclaimer/>

Next steps

- A1.12 Following the end of the consultation period, Ofcom intends to publish a statement as soon as practicable.
- A1.13 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

- A1.14 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.15 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.
- A1.16 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, we will publish all consultation responses in full on our website, 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.
- 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 by allowing you to state very clearly what you don't want to be published. We will keep your completed coversheets confidential.
- 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 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 coversheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation**BASIC DETAILS**

Consultation title: Review of ITV Networking Arrangements 2008

To (Ofcom contact): Anthony Szykaruk

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

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 4

Consultation questions

Q1. Which option (or variation of an option) for the ITV1 compliance framework in the future do you prefer, and why? Please include within your response details of any regulatory and/or statutory changes that may be necessary. In particular, please explain:

- a) whether and how your preferred option or options are compatible with our duties under Schedule 11 of the Act;*
- b) whether, in your view, there is scope for the Channel 3 licensees to secure appropriate indemnity insurance, either in the market or by modifying the compliance fee to enable the compliance licensee to self-insure.*
- c) whether a review of the tariff structure for compliance is necessary and, if so, how you believe such a review should be conducted.*

Q2. Do you agree with us that changes should be made to the NWA so that there is clarity as to what new media rights have been purchased on the licensees' behalf and how they can be used?

Q3. Do you consider that changes to the NWA are necessary to ensure information about secondary rights acquired by ITV Network on behalf of certain licensees is shared among purchasing licensees? What do you consider is the appropriate mechanism for allocating the cost of additional new media rights?

Annex 5

The statutory framework for reviewing the NWA

Introduction

- A5.1 The framework for this review is set out in Schedule 11 of the Act. Ofcom must not approve revised ITV Networking Arrangements (or propose modifications to the existing arrangements), unless it is satisfied that the revised arrangements (or proposed modifications) satisfy the competition test set out in paragraphs 6(3) and 6(4) respectively of Schedule 11 of the Act.
- A5.2 The Act sets out the three statutory tests - described below - that Ofcom must take into account, alongside its wider statutory duties, when carrying out this review. Ofcom reviews the ITV Networking Arrangements in this document from the perspective of these statutory tests and duties. In addition Ofcom must also be mindful of its wider statutory duties and public policy objectives. As a general rule, Ofcom must not propose, impose or approve arrangements or modifications to the arrangements unless it considers that such arrangements or modifications are satisfactory.
- A5.3 The statutory competition test is focused on restrictions of competition arising from the arrangements themselves, as opposed to restrictions of competition arising from the unilateral behaviour of one of the parties to the arrangements. When this test was conceived, the Channel 3 licensees were not so unevenly matched. ITV plc now owns 11 of the 15 licences, affording it a position of strength within the ITV network that creates different competition issues, which we believe are not covered by the statutory competition test, but which are nevertheless relevant to the arrangements between ITV licensees.

The “Competition Test”

- A5.4 The statutory Competition Test set out in paragraph 6 of Schedule 11 of the Act is in two parts:
- 5.4.1 Arrangements satisfy the first Competition Test if they do not have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. If the arrangements satisfy this test, there is no need to consider the second test; and
- 5.4.2 Arrangements satisfy the second Competition Test if (a) they do have such an object or effect; but (b) they would satisfy the criteria set out in section 9 of the Competition Act 1998.
- A5.5 Before making a decision about whether a competition test is satisfied or not, Ofcom must consult the Office of Fair Trading. In determining whether arrangements or modified arrangements would satisfy either of the tests, Ofcom must ensure the principles it applies and the decisions it reaches are consistent with the EC Treaty and any relevant decisions of the European Court. In addition, it must have regard to any relevant decisions or statements of the European Commission.

- A5.6 The NWA are excluded from the application of the Chapter I Prohibition under Schedule 2 to the Competition Act 1998 to the extent that they fulfil the relevant competition tests set out in Schedule 11 of the Act. However, the licensees are still prevented from engaging in any practice which is prejudicial to fair and effective competition (towards external parties and to each other) by conditions in their licences. The licensees also remain subject to the Chapter II prohibition in the Competition Act 1998.

The “Effectiveness Test”

- A5.7 Ofcom must not approve, impose or propose arrangements and/or modifications unless Ofcom considers those arrangements / modifications to be satisfactory for the purpose of enabling regional Channel 3 services (taken as a whole) to be a nationwide system of services which is able to compete effectively with other television programme services provided in the United Kingdom.

The “Regional Programming Test”

- A5.8 Ofcom must not approve, impose or propose arrangements and/or modifications unless Ofcom considers those arrangements/ modifications to be satisfactory, including the likely effect of the arrangements/ modifications on the ability of Channel 3 licensees to maintain the quality and range of regional programmes and other programmes which contribute to the regional character of the services.
- A5.9 It should be noted that the second and third statutory tests relate to public policy rather than specifically to competition law.
- A5.10 In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act states that Ofcom must not approve, impose or propose arrangements and/or modifications if such arrangements/modifications would be likely to be prejudicial to the ability of the Channel 3 licensees, or any of them, to comply with:
- 5.10.1 their public service remits;
 - 5.10.2 their regional production obligations²²;
 - 5.10.3 their regional programming obligations; or
 - 5.10.4 conditions imposed on them following a change of control.

Ofcom’s other duties and objectives

- A5.11 Section 3 of the Act sets out Ofcom’s general duties and the matters that Ofcom must take into account in performing its duties. These matters include:
- 5.11.1 our principal duty to further the interests of citizens in relation to communications matters and consumers in relevant markets, where appropriate by promoting competition;
 - 5.11.2 our obligation to secure the application, in the case of all television and radio services, of standards that provide adequate protection to members of

²² In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act requires Ofcom to take into account the impact of the arrangements or modifications to the arrangements on the ability of the Channel 3 licensees to comply with certain of their licence obligations

- the public from the inclusion of offensive and harmful material in such services;
 - 5.11.3 the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
 - 5.11.4 the desirability of promoting competition in relevant markets;
 - 5.11.5 the desirability of promoting and facilitating the development and use of effective forms of self-regulation; and
 - 5.11.6 the desirability of encouraging investment and innovation in relevant markets.
- A5.12 Ofcom also has a general regulatory principle that it will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.
- A5.13 Ofcom also believes that the following public policy objectives (as articulated in the 2005 Review) are appropriate guiding principles to follow when reviewing the NWA:
- 5.13.1 the documents that together comprise the NWA should continue to reflect accurately the actual operational arrangements;
 - 5.13.2 organisational arrangements should be robust to changes in corporate ownership;
 - 5.13.3 the non-consolidated licensees should be able to continue to meet their specific licence obligations efficiently and effectively;
 - 5.13.4 the principles which underlie the relevant cost sharing arrangements should be transparent and clearly understood by all parties to the NWA; and
 - 5.13.5 there should be an appropriate degree of non-discrimination between parties to the NWA and (where appropriate) any relevant third parties.