

Conditional access charges – request for consent in relation to notification requirements

Consultation

Publication date: 21 September 2006

Closing Date for Responses: 23 October 2006

Contents

Section		Page
1	Summary	1
2	Explanatory statement	2
Annex		Page
1	Responding to this consultation	6
2	Ofcom's consultation principles	8
3	Consultation response cover sheet	9
4	Notification of proposals under section 49 of the Communications Act 2003	11

Section 1

Summary

- 1.1 Ofcom is proposing to give a consent to Sky to notify any changes to its charges or charging methodology for the provision of conditional access (“CA”) services in accordance with Ofcom’s revised TPS guidelines¹ by publishing a notification no later than the last working day before the date on which the revised charges or methodology are to become effective, rather than the 90 days’ that is required by CA Condition 6.2(c).
- 1.2 In July 2003, the Director General of Telecommunications (the ‘Director’), the predecessor telecommunications regulator, imposed certain regulatory conditions on the digital TV platform operator Sky Subscriber Services Limited (“Sky”), that require it to provide CA services on regulated terms². One of the regulatory conditions, CA condition 6.2(c), requires Sky to publish a notification of any changes to its terms and conditions on which it is proposing to provide CA services 90 days before the date on which any proposal is to become effective.
- 1.3 On 20 September 2006, Ofcom published its revised TPS guidelines (the ‘Guidelines’). The Guidelines apply from 1 January 2007. Amongst other things, the Guidelines set out how Ofcom would normally interpret the requirement on Sky to ensure that its terms, conditions and charges for providing CA services are fair, reasonable and non-discriminatory. It is likely that Sky will either revise its CA charges or its charging methodology in line with the new Guidelines. Given these likely revisions, Sky has requested that Ofcom consent to it providing one day’s notice before making such changes, in order that revised charges can take effect from 1 January 2007.
- 1.4 Ofcom may under the CA conditions give a consent in writing to affect the operation of this charge notification obligation (CA Condition 6.1). However, in accordance with section 49(2) of the Communications Act 2003 (“the Act”), before giving such a consent, Ofcom must be satisfied that to do so would be: objectively justifiable, non-discriminatory, proportionate and transparent. In addition, amongst other things, Ofcom must publish a notification setting out its proposals to give a consent and must provide an opportunity for interested parties to comment on the matter.
- 1.5 For the reasons set out in Section 2 of this document, Ofcom proposes to grant Sky the consent specified in paragraph 1.1. In reaching this initial view, Ofcom has considered and acted in accordance with its duties under sections 3 and 4 of the Act.

¹ *Provision of Technical Platform Services*, 21 September 2006, can be found at <http://www.ofcom.org.uk/consult/condocs/tpsguidelines/statement/>

² Details of the regulatory conditions imposed by Oftel can be found at: http://www.ofcom.org.uk/telecoms/ioi/g_a_regime/sce/arc

Section 2

Explanatory statement

The conditional access conditions

- 2.1 On 24 July 2003, the Director General of Telecommunications (the “Director”), the predecessor telecommunications regulator, imposed certain regulatory conditions on the digital TV platform operator Sky Subscriber Services Limited (“Sky”), that require it to provide conditional access (“CA”) services on regulated terms³.
- 2.2 The relevant CA condition 6 was imposed under section 45(5) of the Communications Act (“the Act”) and is an access-related condition and in particular a conditional access condition in accordance with sections 73(5) and 75(2) of the Act. CA condition 6 requires Sky to provide notice:

“90 days before the date on which any proposal to amend any charge, term or conditions or the method of determining the same is to become effective”.

The revised TPS guidelines

- 2.3 On 20 September 2006, Ofcom published its revised TPS guidelines (the ‘Guidelines’). The Guidelines apply from 1 January 2007. Amongst other things, the Guidelines set out how Ofcom would normally interpret the requirement on Sky to ensure that its terms, conditions and charges for providing CA services are fair, reasonable and non-discriminatory. It is likely that Sky will either revise its CA charges or its charging methodology in line with the new Guidelines. Given these likely revisions, Sky has requested that Ofcom consent to it providing one day’s notice before making such changes.
- 2.4 Ofcom considers that the 90 day notification period for changes to charges or the charging methodology is not appropriate in this instance. The reasons for this are that the review of the Guidelines has been ongoing for over a year and broadcasters have in effect had notice from the date the TPS statement and Guidelines were published of possible changes to Sky’s charges or charging methodology for the provision of CA services. Therefore, Ofcom proposes to give its consent that Sky can notify its amended CA charges or charging methodology no later than one working day before such changes become effective, in order that revised charges can take effect from 1 January 2007.

Statutory requirements to be met before giving a consent

- 2.5 Section 49 of the Act applies where Ofcom proposes to give a consent to affect the operation of a condition made under section 45 of the Act (including access-related conditions). In order to give such a notice, Ofcom must first satisfy itself that the criteria set out in section 49(2) are satisfied, namely the giving of a consent:
- i) must be objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;

³ Details of the regulatory conditions imposed by Oftel can be found at:
http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/condac0703.pdf

- ii) must not discriminate unduly against particular persons or against a particular description of persons;
 - iii) must be proportionate to what it is intended to achieve; and
 - iv) must be, in relation to what it is intended to achieve, transparent.
- 2.6 As set out in the July 2003 statement that imposed the CA regulatory conditions on Sky, Ofcom's main reason for imposing the notification requirements in CA condition 6 was that an appropriate notice period for changes to charges, terms and conditions would help ensure stability in the market and ensure that incentives to invest were not undermined and opportunities for market entry less likely⁴.
- 2.7 Ofcom is satisfied that, given the review of the Guidelines has been ongoing for over a year and broadcasters have in effect had notice from the date the TPS statement and Guidelines have been published of possible changes to their CA charges, that allowing Sky to introduce revised CA charges on 1 January 2007 to bring them into line with Ofcom's revised guidelines remains consistent with the intention of CA condition 6 and Ofcom's duties under sections 3 and 4 of the Act.

Section 3 and 4 – general duties & the six Community requirements

- 2.8 Section 3 of the Act sets out the duties of Ofcom in carrying out its functions, such as securing a wide range of television and radio services and maintaining sufficient plurality.
- 2.9 Section 4 of the Act requires that Ofcom acts in accordance with the six Community requirements concerning: the promotion of competition; the development of the European internal market; the promotion of the interests of all EU citizens; non-discrimination; promoting efficiency and sustainable competition and the maximum benefit for consumers; and facilitating service interoperability and securing freedom of choice for consumers.
- 2.10 Ofcom considers that in giving this proposed Consent, these duties are met, in that the Consent has as its ultimate aim securing a wide range of services, which are of high quality and appeal, and maintaining sufficient plurality. The Consent achieves this by allowing Sky to introduce revised TPS charges or a charging methodology in line with the Guidelines as soon as possible after the Guidelines take effect.

Section 49(2) – general tests

- 2.11 Ofcom considers that the criteria set out in section 49(2) of the Act are satisfied in that:
- The proposed Consent is objective and proportionate as it allows Sky to introduce revised CA charges from 1 January 2007, where industry will have had over a year's notice of changes to their CA charges, but still allows Sky the period of time between the publication of the Guidelines and the 1 January 2007 in which to publish the required notification.

⁴ Paragraph 3.18 at http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/condac0703.pdf

- The proposed consent does not discriminate unduly against Sky as it is the only regulated provider of CA services and as such the obligation to publish a notification of any amendments to its terms and conditions only affects Sky. Also, the proposed consent does not discriminate unduly as against broadcasters as they have had notice from the publication of the TPS statement and Guidelines that Sky's charges could change.
- The proposed consent is transparent in that it is clear from the face of it what is required.

- 2.12 Ofcom therefore proposes that it is appropriate to consent to Sky introducing any changes to its CA charges, in order to bring them into line with the Guidelines, with a minimum of one working day's notice before charges become effective. This proposal means that any revised CA charges or charging methodology could take effect from 1 January 2007.

Question 1: *Do you consider that Ofcom should consent to Sky introducing changes to CA charges or its charging methodology, in order to bring them into line with Ofcom's TPS guidelines, with one working day's notice?*

Notification of Ofcom's proposal to give consent

- 2.13 Before a consent can be given under section 49 of the Act, Ofcom is required by section 49(4) to publish a notification:

- i) stating that there is a proposal to give, modify or withdraw it;
- ii) identifying the person whose proposal it is;
- iii) setting out the direction, approval or consent to which the proposal relates;
- iv) setting out the effect of the direction, approval or consent or of its proposed modification or withdrawal;
- v) giving reasons for the making of the proposal; and
- vi) specifying the period within which representations may be made about the proposal to the person whose proposal it is.

- 2.14 Section 49(5) of the Act requires that the period for making representations must be one month after the day of the publication of the notification unless there are exceptional circumstances, in which case a shorter notification period may be used so long as it is reasonable in the circumstances.

- 2.15 Section 50(4) of the Act requires that Ofcom send to the Commission a copy of every notification published under section 49(4) with respect to a proposal which:

“... ”

- (a) relates to the giving of a direction, approval or consent for the purposes of –
 - (i) an access-related condition falling within section 73(2) or (4), or

(ii) an SMP services condition,

or to the modification or withdrawal of such a direction, approval or consent; and

(b) is a proposal which, in Ofcom's opinion, would affect trade between Member States".

- 2.16 Ofcom does not consider that this Notification is one that is required to be sent to the Commission under section 50(4) of the Act as, although it relates to the giving of a consent for the purposes of an access-related condition, Ofcom does not consider that the proposal itself would affect trade between Member States.
- 2.17 The proposed consent relates to reducing the requirement to provide 90 days' notice of changes to CA charges or the charging methodology, as a result of Ofcom's Guidelines, to one working day's notice. Sky reducing or increasing its charges on 1 January 2007, rather than at a later date, will not have an effect on trade between Member States as the charge changes would otherwise come into force at the end of the 90 days' advance notice period required by CA condition 6.
- 2.18 In light of the foregoing considerations, Ofcom considers it appropriate and proportionate to specify the period within which representations may be made to Ofcom about its proposal to give the said consent to Sky as one month. In other words, representations on Ofcom's proposed consent set out in Annex 4 should be made by the deadline and in the manner specified in Annex 1 of this document. As regards the effect of the proposed consent and Ofcom's reasons for making this proposal, these are set out above.

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 23 October 2006**.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at <http://www.ofcom.org.uk/consult/condocs/accesscharges/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 (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 richard.moore@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Richard Moore
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- 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 question asked in this document. 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 Richard Moore on 020 7981 3537.

Confidentiality

- A1.8 Ofcom thinks it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt. If you think your response should be kept confidential, can you please specify what part or whether all of your response should be kept confidential and specify why. Please also place such parts in a separate annex.

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

Next steps

- A1.11 Following the end of the consultation period, Ofcom intends to publish a statement in November 2006.
- A1.12 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

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

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

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

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

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

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

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

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

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, 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:

To (Ofcom contact):

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing

☐

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

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 5

Notification of proposals under section 49 of the Communications Act 2003

NOTIFICATION UNDER SECTION 49 OF THE COMMUNICATIONS ACT 2003

Proposal to give a consent to Sky Subscriber Services Limited ('SSSL') under access-related conditional access condition 6.1, imposed on SSSL as a result of a notification made by the Director General of Telecommunications of the 24 July 2003 that SSSL provides a Conditional Access System in relation to a Protected Programme Service

1. OFCOM hereby make, in accordance with section 49 of the Act, a proposal for a Consent to be given to SSSL under Condition 6 which was set out in the Schedule to the notification published by the Director General of Telecommunications (the 'Director') on 24 July 2006 pursuant to sections 48(1) and 73(5) of the Act.
2. The proposed Consent is set out in the Annex to this Notification.
3. The effect of the proposed Consent, and the reasons for making the proposal, are set out in the accompanying Explanatory Statement hereto.
4. In making the proposal set out in this Notification, OFCOM have considered and acted in accordance with their general duties set out in section 3 of the Act and the six Community requirements set out in section 4 of the Act.
5. Representations may be made to OFCOM about the proposal set out in this Notification and the accompanying Explanatory Statement by 5pm on 23 October 2006.
6. In this Notification—
 - (a) **"Act"** means the Communications Act 2003;
 - (b) **"SSSL"** means Sky Subscriber Services Limited, whose registered company number is 02340150, and any Sky Subscriber Services Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989; and
 - (c) **"OFCOM"** means the Office of Communications.
7. Except as otherwise defined in this Notification, words or expressions used shall have the meaning ascribed to them in the Act.

Steve Unger
Director of Competition Technology

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

21 September 2006

Annex

[Proposed] Consent under conditional access Condition 6.1 imposed on SSSL as a result of a notification made by the Director General of Telecommunications of the 24 July 2003 that SSSL provides a Conditional Access System in relation to a Protected Programme Service.

WHEREAS:

- (A) The Director General of Telecommunications (the 'Director') on 24 July 2006 pursuant to sections 48(1) and 73(5) of the Act issued a notification that SSSL provides a Conditional Access System in relation to a Protected Programme Service and set certain access-related conditions on SSSL, including Condition 6;
- (B) this Consent concerns matters to which Condition 6.1 relates;
- (C) on 5 September 2006, SSSL requested consents under Condition 6.1, where it is revising its charges or the methodology to be adopted for determining its charges in accordance with Ofcom's Guidelines, to publish its notification no later than the last working day before the date on which any proposal to amend charges or the method for determining the same is to become effective;
- (D) for the reasons set out in the explanatory statement accompanying this Consent, OFCOM are satisfied that, in accordance with Section 49(2) of the Act, this Consent is:
 - (a) objectively justifiable in relation to the networks, services, facilities, apparatus or directories to which it relates;
 - (b) not such as to discriminate unduly against particular persons or against a particular description of persons;
 - (c) proportionate to what it is intended to achieve; and
 - (d) in relation to what it is intended to achieve, transparent.
- (E) for the reasons set out in the Explanatory Statement accompanying this Consent, OFCOM are satisfied that they have acted in accordance with the relevant duties set out in sections 3 and 4 of the Act;
- (F) on 20 September 2006, OFCOM published a notification of the proposed Consent in accordance with section 49 of the Act;
- (G) OFCOM have considered every representation about the proposed Consent duly made to them; and

NOW, therefore, pursuant to conditional access Condition 6.1 of the Notification, OFCOM gives the following Consent:

1. For the purposes of complying with its obligations under conditional access Condition 6.2(c) of the Notification, OFCOM consents that SSSL, where it is revising its charges or the methodology to be adopted for determining its

charges in accordance with Ofcom's Guidelines, can publish any notification no later than the last working day before the date on which any proposal to amend charges or the method for determining the same is to become effective.

2. For the purposes of interpreting this Consent, the following definitions shall apply:
 - (a) **"Act"** means the Communications Act 2003
 - (b) **"SSSL"** means Sky Subscriber Services Limited, whose registered company number is 02340150, and any Sky Subscriber Services Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;
 - (c) **"OFCOM"** means the Office of Communications; and
 - (d) **"the Guidelines"** means the guidelines published by OFCOM on 21 September 2006;
 - (e) **"the Notification"** means the Notification referred to in recital (A) of this Consent above.
3. Except insofar as the context otherwise requires, words or expressions used in the Consent (including the recitals) shall have the meaning ascribed to them in paragraph 2 above and otherwise any word or expression shall have the same meaning as it has in the Notification and otherwise any word or expression shall have the same meaning as it has in the Act.
4. For the purpose of interpreting this Consent:
 - (a) headings and titles shall be disregarded; and
 - (b) the Interpretation Act 1978 shall apply as if this Consent were an Act of Parliament.
5. This Consent shall take effect on the day it is published.

Steve Unger
Director of Competition Technology

A person duly authorised in accordance with paragraph 18 of the Schedule to the Office of Communications Act 2002

[Date]