

Conditional access charges – consent in relation to notification requirements

Statement

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Section 1

Summary

- 1.1 On 21 September 2006, Ofcom published a proposal¹ to give a consent to Sky to notify any changes to its charges or charging methodology for the provision of conditional access (“CA”) services 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 the condition. Ofcom provided interested parties with one month to respond to the proposal.
- 1.2 Ofcom received three responses to the consultation. Having carefully considered these responses, Ofcom is satisfied that granting consent to Sky’s request to publish new CA charges (or charging methodology) within 1 working day of these changes taking effect is justifiable, non-discriminatory, proportionate and transparent. This consent is only granted for notifications made on or before the 2 January 2007 and after this date 90 days notice will be required as set out in the CA conditions.

¹ The proposed consent can be found at:

<http://www.ofcom.org.uk/consult/condocs/accesscharges/summary/>

Section 2

Explanatory Statement

Background

- 2.1 In July 2003, the Director General of Telecommunications, 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.
- 2.2 On 21 September 2006, Ofcom published its revised guidelines³ on how it would normally interpret, amongst other things, the CA conditions (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.
- 2.3 Therefore, 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.
- 2.4 Under the CA conditions, Ofcom may give a consent in writing to affect the operation of the notification obligation⁴. However, in accordance with section 49(2) of the Communications Act 2003, 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.
- 2.5 On 21 September 2006, Ofcom published a proposal⁵ to give a consent to Sky to notify any changes to its charges or charging methodology for the provision of conditional access (“CA”) services 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 the condition. Ofcom provided interested parties with one month to respond to the proposal.

Responses to the consultation

- 2.6 Ofcom received responses from ITV, Five and the BBC in response to the proposal.
- 2.7 Whilst they supported the proposal, ITV and Five requested clarification that the consent to reduce the notification period would only apply to the publication of

² 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

³ The Guidelines can be found at:

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

⁴ CA Condition 6.1

⁵ The proposed consent can be found at:

<http://www.ofcom.org.uk/consult/condocs/accesscharges/summary/>

revised charges or charging methodology for CA services in January 2007, and not to subsequent revisions (for which the standard 90 day notice period would apply).

- 2.8 Ofcom has provided this clarification in the consent (see Annex 1) by modifying the wording of the consent to state that OFCOM consents that: “up to and including the 2 January 2007, SSSL can publish any such notice at least 1 working day before the date on which any proposal to amend any charge or the method of determining the same is to become effective”.
- 2.9 The BBC did not agree with Ofcom’s proposal to grant consent to Sky to reduce the notification period and considered that such a proposal was not proportionate to what it was intended to achieve. The BBC did not consider that reducing the notification would ensure stability in the market. The BBC recommended that the notification period remain unchanged to allow CA customers a suitable period to reflect on the changes to their charges and their likely response to the implementation of the Guidelines.
- 2.10 Ofcom considers that in order to provide increased certainty to the market it is important for Sky to issue its new charges for providing CA services or charging methodology as soon as possible after the new Guidelines take effect. Ofcom has no evidence to suggest that reducing the notification period would reduce the stability of the market. Additionally, Ofcom notes that the period between the publication of the revised Guidelines (21 September 2006) and the Guidelines coming into effect (1 January 2007) provides existing CA customers with over 90 days to consider the impact of the revised Guidelines and how they might affect their existing CA charges. For these reasons, Ofcom does not consider that granting the consent would be disproportionate.
- 2.11 The BBC also questioned whether Ofcom should notify the European Commission of the new Guidelines (as opposed to this Consent) under section 50(4) of the Communication Act 2003 (“the Act”).
- 2.12 For clarity, Ofcom notes that it is only required to notify the European Commission under section 50(4) of the Act if it considers that any notification made under section 49(4) of the Act would affect trade between member states. Publication of the revised Guidelines did not require such a notification and therefore Ofcom is not required to notify the European Commission.

Conclusions

- 2.13 Having considered the responses to the consultation, Ofcom is satisfied that granting consent to Sky’s request to publish new CA charges (or charging methodology) within 1 working day of these changes taking effect is objectively justifiable, non-discriminatory, proportionate and transparent. The reasons for this are that:
- i) The consent is objective and proportionate as it allows Sky to introduce its revised CA charges from 1 January 2007, where industry will have had over a year’s notice of potential changes to their CA charges, and over 90 days between the publication of Ofcom’s Guidelines and the date of the change. Also, it allows Sky the period of time between the publication of the Guidelines and 1 January 2007 in which to publish new charges or charging methodology.
 - ii) The 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 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 or charging methodology could change, and guidance as to how they might change.

iii) The consent is transparent in that it is clear from the face of it what is required.

- 2.14 Ofcom confirms that it is granting this consent only to enable Sky to introduce revised CA charges (or charging methodology) as soon as possible after the revised Guidelines come into effect on 1 January 2007, if not before. Ofcom clarifies that Sky will still have to provide 90 days notice of any subsequent changes after the 2 January 2007 to its CA charges or charging methodology; in accordance with CA condition 6.2 (c) (subject to any future consent).
- 2.15 Ofcom has therefore decided to grant consent to Sky's request to notify changes to the charges for CA services within a minimum of 1 working day before the changes are due to take effect, but notes that this consent is only granted for notifications made on or before the 2 January 2007 (being the first working day after 1 January 2007) and after this date 90 days notice will be required as set out in the CA conditions.
- 2.16 The consent is set out at Annex 1.

Annex 1

Consent

Consent under section 49 of the Act and 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 2003 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 21 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 section 49 of the Act and conditional access Condition 6.1 of the Notification, OFCOM gives the following Consent:

1. For the purposes of complying with its obligation under conditional access Condition 6.2(c) of the Notification, OFCOM consents that up to and including the 2 January 2007, SSSL can publish any such notice at least 1 working day before the date on which any proposal to amend any charge or the method of 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

23 November 2006