



## **SWITCHOVER-RELATED CHANGES TO DTT LICENCES: RESPONSE TO OFCOM CONSULTATION**

Flextech Television provides entertainment channels to the UK multi-channel television market. Flextech owns seven entertainment channels – LIVINGtv, LIVINGtv2, Bravo, Challenge, Player, Trouble and Ftn (plus their time-shifted variants).

Flextech also has a 50% interest in UKTV, a joint venture with BBC Worldwide, which consists of ten channels: UKTV Gold, UKTV G2, UKTV Drama, UKTV Style, UKTV Style Gardens, UKTV Food, UKTV History, UKTV Documentary, UKTV People and UKTV Bright Ideas. Together Flextech and UKTV are the largest supplier of basic channels to the UK pay-TV market. Flextech Television also owns the media sales house **ids**, and the content distributor Minotaur International.

Flextech is part of the content division of ntl:Telewest, which offers a wide range of communications and entertainment services to more than five million residential customers. ntl's networks can service more than twelve million homes – 50% of UK households – and 85% of UK businesses.

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## INTRODUCTION

We welcome the opportunity to comment on Ofcom's draft licence amendments.

The Digital Switchover process is off to a flying start. Ofcom reported in June 2006 that 72.5% of UK homes had adopted digital television – an impressive level of penetration given the relatively short life of digital in the UK.

We accept that the challenge to complete the process is a significant one. The same Ofcom progress report detailed that only 40% television sets are capable of receiving digital signals, which highlights the scale of the task necessary to complete the job. Ofcom is therefore proposing to amend the current DTT licences to smooth the path. While we are supportive of this aim, we are deeply concerned that the scope of the amendments is so broad as to present considerable risks to our business.

Flextech agrees that achieving switchover within the Government's timetable will require close cooperation between all parties involved in the process, and effective communication with our audiences. We therefore have no objection in principle to amendments that clarify our responsibilities as a DTT licensee. However, the amendments that Ofcom is proposing create apparently limitless obligations, and provide no certainty about the likely costs of those obligations.

As Ofcom points out in the consultation document, it is vital for Ofcom to demonstrate that these proposals are "necessary, appropriate and proportionate". We question whether any of these tests are met.

In its impact assessment, Ofcom states that:

*"The DSO process would not necessarily be derailed without the inclusion of these conditions in relation to the provision of information, cooperation and communications but it could make efforts by Ofcom to ensure that the industry works together in an effective and efficient way materially more difficult."*

This goes to the heart of our concern. We do not accept that the mere possibility of Ofcom's job being made "more difficult" is sufficient to justify including such sweeping obligations in our licences.

The rest of this submission outlines in detail why we believe that neither set of revisions meets Ofcom's proportionality test, and why we believe that they present substantial commercial risks to us.

## **"COOPERATION AND COORDINATION WITH OTHER PARTIES"**

***Q7. Are the proposed new provisions relating to cooperation and coordination with other parties concerning DSO, and contained in the annexes to the DTT service licences, necessary, appropriate and proportionate?***

Co-operation on a project as complex as digital switchover is – of course – to be welcomed and encouraged. Indeed, achieving switchover is in our commercial interests, and we would not therefore act in a way that would hinder its completion. We therefore question the necessity of the revision regarding co-operation. Ofcom's proposed licence would require us to use:

*"all reasonable endeavours to cooperate in all respects ... with other Ofcom licensees (in particular the holder of the television multiplex service licence which carries the Licensed Service/s)".*

This particular requirement is unnecessary. Failure to “cooperate” with our multiplex operator would most likely give rise to a breach of our contract. The agreements in place between licensees and the multiplex operators should be sufficient to ensure the co-operation Ofcom seeks.

We also believe that this proposed revision is neither appropriate, nor proportionate. We do not regard co-operation with other Ofcom licensees (whoever they may be, and whatever their request) to be an appropriate licence condition. “Other Ofcom licensees” is an extremely broad category of companies, many of whom are in direct competition with Flextech on any number of issues. Since the proposed wording includes no requirement for these requests to be reasonable or justifiable, we could be in breach of licence for refusing to comply with any request put to us that our competitors choose to label as a “switchover related” issue, however spurious.

We are also concerned about the requirement to comply with all requests from Digital UK. This is not to doubt the motives of Digital UK nor question the way it has conducted itself thus far. Our point is that while Ofcom is required to act within its statutory framework and in line with its regulatory duties – always subject to clear and understood processes for scrutiny and accountability – Digital UK is not. It is a quasi-public company owned by the multiplex operators and the public service broadcasters. Although it has been afforded a central role in implementing switchover, it has a curious constitutional status.

As a responsible broadcaster, we seek to avoid breaches to our licence conditions wherever possible. We are very uneasy about revisions to a licence that could give rise to a breach in an almost infinite number of situations. We believe that a change to the proposed wording should give greater clarity to the nature of co-operation that would be expected – and that licensees must have the ability to judge the reasonableness (or otherwise) of what is being requested.

We note that the Regulatory Impact Assessment makes no attempt to quantify the possible costs of complying with an almost limitless set of requests from a very wide range of possible sources. This cannot – therefore – be regarded as a proportionate response to what Ofcom itself points out is not a critical factor in the success of switchover.

Since the risk that Ofcom has identified above relates to its own ability to manage its responsibilities effectively, we would also prefer the revision to be limited only to co-operation and compliance with requests from Ofcom or the Government. Any issues concerning other licensees or Digital UK should be directed via Ofcom or through the Government departments tasked with driving the switchover process.

## **COMMUNICATIONS WITH VIEWERS**

***Q8. Are the proposed new revisions relating to an obligation to inform viewers/listeners about rescanning contained in the annexes of the DTT service licences necessary, appropriate and proportionate?***

We are unclear exactly what Ofcom intends by this change, so it is therefore difficult to assess its impact.

As a major broadcaster operating on all digital platforms, we have considerable experience in communicating information such as EPG moves to our audiences. It is clearly in our commercial interest to inform our viewers of how to continue receiving our DTT channels after switchover, so Ofcom can therefore be assured

that any changes in frequencies – or requirements to rescan boxes – will be adequately communicated to our audience. We do not therefore believe that it is necessary to revise our licence to achieve this objective.

However, Ofcom's proposed wording suggests that this obligation extends well beyond messages about our own channels, which questions both the appropriateness and proportionality of the change.

We strongly believe that we should be under no obligation to broadcast broader switchover-related messages to our audiences in our valuable cross-promotional and commercial airtime. It is a certainty that the BBC's new licence fee settlement will contain a generous amount of funding earmarked for supporting switchover, including promotional messages to the BBC's massive radio, television and online audience. Digital UK will also be mounting a formidable programme of on-air communications about switchover on all major channels.

As Ofcom will be aware, we have expressed a series of ongoing concerns about how the switchover process continues to favour the interests of the public service broadcasters over all other stakeholders. We receive no public subsidy or gifted spectrum on DTT. We believe that the lion's share of any obligation to communicate with viewers should rest with those that do.

Notwithstanding our concern about the fairness of this requirement in general, the detailed wording also gives rise to objections.

As with the revision about co-operation, the draft creates almost limitless obligations that – again – have not been captured in Ofcom's impact assessment. Who will determine the "adequacy" of communication? To what level of detail would we be expected to explain the rescanning process for each individual brand and model of set-top box? How often would these communications be required? Will we be expected to produce them ourselves and at our own expense? Without providing clear limits on what is reasonably required of us, it is impossible to determine the likely costs (and therefore their proportionality).

## **CONCLUSION**

We cannot accept these proposed licence revisions as necessary, appropriate or proportionate.

Some – but not all – of our concerns can be addressed by introducing much tighter wording about the extent of our obligations under these amendments. This should then be subjected to a more rigorous assessment of possible costs.

We would welcome the opportunity to discuss these issues in more detail with Ofcom.