

# Provision of Technical Platform Services

A consultation on proposed guidance as to how Ofcom may interpret the meaning of “fair, reasonable and non-discriminatory” and other regulatory conditions when assessing charges and terms offered by regulated providers of Technical Platform Services

Consultation

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## Section 1

# Summary

## Introduction

- 1.1 This consultation invites stakeholders to comment on Ofcom's proposal to issue new guidelines on how Ofcom intends to interpret the existing regulatory conditions that apply to those operators of digital TV platforms that are required to provide access to Conditional Access, Access Control and Electronic Program Guide technical services on regulated terms. Ofcom has adopted the term "Technical Platform Services" ("TPS") to jointly describe these technical services and refer to such regulated providers as a "TPS Provider".
- 1.2 The regulatory conditions ("the Conditions") which Ofcom is required to interpret were put in place by Oftel in July 2003. The Conditions currently only apply to the digital TV platform operator SSSL ("Sky").
- 1.3 Certain regulatory conditions imposed on the TPS Provider require it to provide access to TPS on fair, reasonable and non discriminatory ("FRND") terms. Other conditions relate to, for example, the publication of charges and separation of accounts.
- 1.4 To date, Ofcom has based its interpretation of the regulatory conditions imposed on the TPS Provider using guidelines published by the Oftel in 2002. Currently the two 'guidance' documents that primarily relate to the regulation of access to Conditional Access, EPG and Access Control services, collectively defined as the "Current Guidelines", are:
  - "The pricing of conditional access services and related issues – a statement by the Director General of Telecommunications" (8 May 2002)
  - "Terms of supply of conditional access, Oftel guidelines" (22 October 2002)
- 1.5 This consultation invites stakeholders to comment on Ofcom's proposal to replace the Current Guidelines with a new set of guidelines that apply to TPS – the "Proposed Guidelines".
- 1.6 In this document Ofcom sets out various options for interpreting the Conditions and, based on an evaluation against its statutory duties, identifies its preferred options. It is these preferred options that form the Proposed Guidelines.
- 1.7 Feedback on these proposals is welcomed. Please send your responses to [Richard.Moore@ofcom.org.uk](mailto:Richard.Moore@ofcom.org.uk) by 5pm on 1st February 2006 (Deadline extended on 18 January 2005). Further details on how to engage with this consultation are set out in Annex 1.

## Summary of proposed guidelines

- 1.8 The remainder of this summary sets out the key points of the Proposed Guidelines:
- 1.9 In the Current Guidelines no guidance is given to the TPS Provider on how common costs should be recovered from different groups of customers. Ofcom considers that, for reasons detailed within this document, it is now appropriate to provide guidance in this area. Specifically, Ofcom presents several options for determining the level of

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common costs that could be recovered from providers of Free-to-View Television channels. This is a complex area and Ofcom welcomes any additional feedback or suggestions that stakeholders have on these proposals.

- 1.10 Ofcom proposes a set of charging methodologies for the provision of different TPS which it considers would lead to terms which are FRND. Ofcom considers that the proposed methodology would provide increased transparency and predictability of charges compared to those achieved through commercial negotiation between the TPS Provider and the TPS Customer whilst maintaining a cost allocation method between TPS Customers which broadly tracks the benefits they receive.
- 1.11 Having evaluated various different options (which are detailed in this document), the charging methods that Ofcom proposes will best meet the FRND conditions are :
  - a fixed “per EPG listing” charge for Basic EPG Listings plus a variable charge related to the viewing share (above a threshold of viewing share) achieved by the channel;
  - a fixed “per channel” charge for Free-to-View channels which are encrypted to prevent them from being viewed from outside the UK (“Geographic Mask”);
  - a fixed “per region” charge for regionalised channels e.g. the BBC has 18 regional variants of BBC1 (“Regionalisation”); and
  - a simple “pence per pound of subscription or PPV revenue” for commercial and residential Pay-TV services.
- 1.12 Ofcom recognises the evolving nature of interactive services that utilise the Access Control services on the Sky DSat platform. Ofcom does not therefore consider it appropriate to be prescriptive on what charging methods should be used by the TPS Provider. However, it is proposed that the general criteria of transparency, predictability and practicability are adopted by the TPS Provider when determining charging methods for Access Control services.
- 1.13 Ofcom does propose to change the way it assesses whether financial returns made by the TPS Provider are reasonable. To date the TPS Provider has used a Discounted Cash Flow Models to assess the level of return on its investment. Having considered the increased maturity of the digital TV industry, Ofcom proposes that a financial accounting based approach may now be more appropriate.
- 1.14 Ofcom does not propose to change the way it assesses whether common costs attributed to a TPS Provider from a parent organisation are reasonable. This is applicable in the case of Sky where some common costs, such as marketing and customer services, are recovered partly from its TPS business and partly from its broadcasting and distribution businesses.
- 1.15 Ofcom does not propose to modify the requirements placed on the TPS Provider to publish accounting information or its charges or charging methodology. However, the requirement to publish charges and charging methodologies is re-iterated. Ofcom considers that publication of charges and charging methodologies is important to minimise the regulatory burden which may result from a lack of transparency of charges and to maximise the plurality and range of services available to the consumer by reducing the business risk faced by TPS Customers that results from a lack of predictability of charges.

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- 1.16 Ofcom is not setting charges within the Proposed Guidelines. However, Ofcom welcomes feedback from the TPS Provider during the consultation as to how it may interpret the Proposed Guidelines and the charges that it may consider appropriate.

## Section 2

# Introduction

- 2.1 This section explains the benefits of guidelines and why Ofcom considers it is appropriate to review its current approach to the interpretation of the Conditions.

### Purpose of this Consultation

- 2.2 In July 2003 Oftel imposed certain regulatory conditions (“The Conditions”) on the digital TV platform operator SSSL (“Sky”) requiring it to offer third parties access to certain technical services on regulated terms. Ofcom is now responsible for interpreting the meaning of these Conditions in the event of a complaint being brought to it.
- 2.3 The technical services to which access must be provided are Conditional Access, Electronic Programme Guide and Access Control. Ofcom has adopted the term “Technical Platform Services” (“TPS”) to jointly describe these technical services and a regulated provider as a “TPS Provider”.
- 2.4 Certain regulatory conditions imposed on the TPS Provider require it to provide access to TPS on fair, reasonable and non discriminatory (“FRND”) terms. Other conditions relate to, for example, the publication of charges and separation of accounts.
- 2.5 To date, Ofcom has based its interpretation of the regulatory conditions imposed on the TPS Provider using guidelines published by the Oftel in 2002. Currently the two ‘guidance’ documents that primarily relate to the regulation of access to Conditional Access, EPG and Access Control services, collectively defined as the “Current Guidelines”, are:
- “The pricing of conditional access services and related issues” (8 May 2002) [<http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/cast0502.htm>]; and
  - “Terms of supply of conditional access: Oftel guidelines” (22 October 2002). [<http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/caqu1002.htm>]
- 2.6 Ofcom, for the reasons set out in this document, considers that it is now appropriate that it reviews the Current Guidelines. This consultation invites stakeholders to comment on Ofcom’s proposal to replace the Current Guidelines with a new set of guidelines that apply to TPS – the “Proposed Guidelines”.
- 2.7 It is important to note that Ofcom’s “Code of practice on electronic programme guides” (July 2004) [<http://www.ofcom.org.uk/tv/ifi/codes/EPGcode/241557>] does not form part of this consultation. However, when Ofcom does review that Code, it expects to propose principles analogous to those set out in this document for the interpretation of the requirements placed upon EPG providers by the Code to act in a fair, reasonable and non-discriminatory way where appropriate.

## The role of guidelines

- 2.8 One of Ofcom's regulatory principles is that it will regulate in a transparent manner<sup>1</sup>. Guidelines are an important means to achieving this principle and to increasing understanding of Ofcom's statutory duties and approach to regulation.
- 2.9 Guidelines provide stakeholders increased certainty as to how Ofcom may interpret the Conditions.
- Guidelines encourage compliance by explaining the Conditions imposed, thereby ensuring that a TPS Provider understands its obligations and enables potential customers to identify potential non-compliance with those Conditions.
  - Guidelines can reduce the number of complaints that are taken to Ofcom by giving a TPS Provider and TPS Customers increased clarity on how Ofcom might be minded to decide if a complaint were to be brought. A reduction in the number of complaints can reduce the costs of regulation for all parties.
  - Guidelines can reduce uncertainty and therefore reduce business risk and the cost of capital, resulting in an opportunity to pass cost savings onto consumers.

## Application

- 2.10 The Current and Proposed Guidelines only apply to a regulated provider of Technical Platform Services.
- 2.11 SSSL (Sky) is currently the only supplier required to provide access to Conditional Access<sup>2</sup> ('CA'), Access Control<sup>3</sup> ('AC') and Electronic Programme Guide<sup>4</sup> ('EPG') services in the UK. (For a definition of these terms, see Annex A.)
- 2.12 As Sky is currently the only regulated supplier of access to CA, AC and EPG services in the UK many of the specific examples discussed in this consultation relate to the Sky digital satellite ('DSat') platform. However, the principles would apply equally to any other designated TPS Provider.

## Summary of the relevant regulatory conditions

- 2.13 Details of the Conditions which the Current Guidelines interpret are provided in Annex A.
- 2.14 The conditions that are of particular importance to TPS Customers and TPS Providers and that are the primary focus of the Current and Proposed Guidelines are summarised as follows:

<sup>1</sup> The Communications Act 2003, Section 3 (3).

<sup>2</sup> As set out in the Directors "Explanatory statement and formal notification pursuant to Section 48(1) of the Communication Act 2003" (24 July 2003):

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/condac0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/condac0703.pdf)

<sup>3</sup> As set out in the "Continuing Licence Conditions after 25 July" Sept 2003 Section 3.121

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/cont0903.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/cont0903.pdf)

<sup>4</sup> As set out in the "Continuation notice to a class of persons defined as the licensee for the purposes of the provision of electronic program guide services under paragraph 9 of schedule 18 to the Communications Act 2003"

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/epg\\_class.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/epg_class.pdf)



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- The obligation on TPS Providers to provide access to CA, AC and EPG services on fair and reasonable terms.
- The obligation on TPS Providers not to unduly discriminate against particular TPS Customers when providing that access. This condition is particularly important where a TPS Provider is vertically integrated with a commercial broadcasting business. In this case, for example, the broadcasting business should not be able, amongst other things, to use information that is not available to other third party broadcasters in order to secure preferential terms.
- The obligation on TPS Providers to publish charges, or the method that is to be adopted for determining charges.

## Scope of the Proposed Guidelines

- 2.15 It is intended that the Current Guidelines be withdrawn in their entirety and replaced by the Proposed Guidelines when finalised. Once published, the principles set out in these “New Guidelines” will give guidance to the Broadcasting Industry as to how Ofcom intends to interpret the meaning of what are fair and reasonable, and non-discriminatory, terms and conditions offered by a TPS Provider for providing access to TPS. These principles, including the requirement for transparency, predictability and practicability as discussed in Section 4, are intended to apply whether what is fair and reasonable and what is non-discriminatory are being considered together or separately.
- 2.16 Ofcom has powers<sup>5</sup> to resolve any dispute or investigate any complaint brought to it in relation to the Conditions that would allow it, among other things, to determine what an appropriate TPS access charge should be. Whilst Ofcom would normally expect to follow the guidelines in place at the time a complaint is brought, Ofcom acknowledges that terms that the TPS Provider offered under previous guidelines may no longer be consistent with the New Guidelines. Adjustments in TPS terms and charges (either increases or reductions) may be required for some TPS Customers to achieve consistency with the New Guidelines. Ofcom recognises that the introduction of New Guidelines may create some transitional issues that will require careful management by the TPS Provider and TPS Customers. Ofcom welcomes the views of all stakeholders on how such a transition could be best managed.

*Question 2.1 – How do you think the transition from Current Guidelines to the New Guidelines could be best managed?*

## Status of the New Guidelines

- 2.17 Once issued, Ofcom intends to take the New Guidelines into account in applying the Conditions in force and would normally expect to follow the New Guidelines and to give reasons where Ofcom departs from them. However, they do not form part of the Conditions and so do not affect the scope of those Conditions. Ofcom cannot legally fetter its discretion in advance and therefore retains the ability to depart from the New Guidelines where the circumstances warrant it. The New Guidelines and any subsequent guidelines will therefore not be binding on Ofcom.

## Impact assessment

- 2.18 In developing the Proposed Guidelines presented in this consultation document Ofcom has been minded to consider the recommended approach to conducting

<sup>5</sup> Under Part 2 Chapter 3 of the Communications Act 2003

impact assessments set out in Ofcom's consultation document "Better Policy Making – Ofcom's Approach to Impact Assessments" (21 July 2005).

- 2.19 It is noted that the approach adopted by Ofcom in developing the Proposed Guidelines, which is reflected in the overall structure of this consultation document, represents the consideration Ofcom has given to the impact of the various options for different stakeholder groups. It is Ofcom's view that, in this case, integrating the impact assessment into the main sections of this consultation is preferable to replicating much of the text in a separate annex due to the clarity that this approach provides.
- 2.20 In developing the Proposed Guidelines Ofcom has developed a financial model which allows a sensitivity analysis of many of the options that are considered in this document and the implications for different stakeholder groups. However, due to the sensitivity and commercially confidential nature of much of the underlying data in this model (which has been provided by Sky) Ofcom does not consider it appropriate to provide exact figures in this impact assessment relating to particular stakeholder groups or individual TPS Customers.

### Options considered by Ofcom

- 2.21 As part of Ofcom's impact assessment Ofcom has considered 3 options in reviewing the Current Guidelines:
- Option one - No change; leave the Current Guidelines as they are.
  - Option two - Issue amended guidelines.
  - Option three - Retract the Current Guidelines.
- 2.22 Ofcom is not proposing Option one on the basis that, while some of the elements of the Current Guidelines are still appropriate, other elements no longer reflect the current situation in the marketplace or Ofcom's new statutory duties as set out in the Communications Act 2003 (the "Act").
- 2.23 Ofcom is not proposing Option three, as an absence of guidelines would increase the uncertainty around future pricing of TPS, and potentially increase the business risks for TPS Customers. The absence of guidelines would also be likely to lead to an increased number of complaints to the regulator, thereby increasing the cost of regulation for all stakeholders (see paragraphs 2.8 and 2.9).
- 2.24 It is Ofcom's view that there are benefits from issuing amended guidelines (Option two) as set out below.

### Rationale for Ofcom issuing amended guidelines

- 2.25 There are four key reasons that have prompted Ofcom to review its approach to interpreting the Conditions and its proposal to consult on updating the Current Guidelines.
- 2.26 First, since its creation in 2003 Ofcom has been methodically reviewing the regulatory responsibilities it has inherited from the legacy regulators. This is appropriate because the regulatory regime under which the Current Guidelines were set in place, namely the Telecommunications Act 1984<sup>6</sup>, has been replaced by the EC Communications Directives and the Communications Act 2003, and Ofcom has

<sup>6</sup> See "The pricing of conditional access services and related issues" (8 May 2002) paragraph 1.2

different duties to consider under these new legal instruments when exercising its functions. (For an explanation of Ofcom's new duties, please refer to Section 4).

- 2.27 Secondly, in pre-consultation meetings a number of stakeholders have suggested to Ofcom that the Current Guidelines do not provide sufficient clarity for them to determine whether the TPS terms and conditions they are offered would be considered FRND by Ofcom in the event of a complaint. Ofcom is concerned that a lack of clarity in the Current Guidelines introduces uncertainty in the business plans of existing and prospective TPS Customers which may in turn dis-incentivise investment and/or market entry. This may adversely impact on Ofcom's duty to promote **plurality** and **range** of television and radio services and service providers.
- 2.28 Thirdly, the lack of clarity in the Current Guidelines may result in an increased number of complaints being brought to the regulator and hence unnecessarily increasing the cost of regulation for all parties.
- 2.29 Finally, since the publication of the Current Guidelines Ofcom considers that the digital TV industry has developed and is now more mature than when the platform was launched. In particular, the level of demand for certain TPS services has become more predictable, the definition of TPS services required by broadcasters has been refined and broadcasters have more experience of running businesses based on TPS. Ofcom regards it appropriate that these developments should be reflected in new guidelines.

*Question 2.2 – Do you agree that it is appropriate and beneficial that Ofcom issues revised guidelines at this time?*

*Question 2.3 – Do you agree that it is better to issue revised guidelines rather than to retract the Current Guidelines and not replace them?*

## Structure of this document

- 2.30 The remainder of this consultation document is laid out as follows:
- Section 3 provides non-technical descriptions of the TPS that are currently offered on the Sky DSat platform to which the Conditions apply. This section is intended to provide a common language on which subsequent discussion can be based.
  - Section 4 outlines the statutory duties and responsibilities Ofcom has been minded to consider when assessing options for FRND charges and related terms. These duties underpin the criteria that have been used to assess the various options considered for FRND charging methodologies.
  - Section 5 describes the cost recovery principles that Ofcom has considered when assessing options for FRND charges. The relative merits of different accounting methods for measuring returns are also considered.
  - Section 6 presents the options Ofcom has considered for FRND recovery of costs associated with acquiring new customers on the Sky DSat platform and proposes its preferred approach.
  - Section 7 presents the options Ofcom has considered for FRND recovery of the costs incurred in operating the individual TPS and presents its preferred approach.
  - Section 8 presents Ofcom's thinking on how FRND applies to non-pricing terms associated with the provision of TPS.

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- Section 9 considers how the conditions relating to accounting separation and the publication of charges imposed on TPS Providers could be relied on to help ensure TPS terms are FRND.
- Annex 1 provides details on how to respond to this consultation
- Annex 2 provides details of Ofcom's consultation principles
- Annex 3 contains a cover sheet for responses to this consultation
- Annex 4 summarises the consultation questions
- Annex 5 provides details of the legal framework relating to access to TPS
- Annex 6 provides a glossary of terms

## Section 3

# Technical Platform Services

- 3.1 The purpose of this section is to describe the various technical services that are currently covered by the Proposed Guidelines.

## Technical Platform Services (TPS)

- 3.2 Broadcasters and operators of interactive TV services who wish to make their content available on a digital platform operated by a third party make use of a number of different technical services relating to encryption, electronic programme guides and use of the platform operator's technology and systems.
- 3.3 A number of these services are subjected to regulation and have specific legal definitions (details in Annex A). In particular, separate regulations are in place for access to Conditional Access ("CA"), Electronic Programme Guides ("EPG") and Access Control ("AC") services - together Technical Platform Services ("TPS").
- 3.4 The following sections describe a number of individual TPS that are currently offered on the Sky DSat platform. Each service falls within the legal definitions of CA, AC or EPG services and must be offered by Sky on regulated terms.

## Conditional Access

- 3.5 A Conditional Access (CA) service enables a broadcaster to restrict access to content that it has made available on a digital platform only to those customers that have been authorised to access it. CA systems typically employ content scrambling and encryption technologies along with an end user authorisation system and decryption technologies operating within the digital receiver (e.g. a digital receiver could be a digital set top box with an active viewing card)
- 3.6 On digital TV platforms, CA services are primarily used to enable subscription and pay per view pay-TV services ("Pay-TV CA" services). Access to specific encrypted channels and content is only provided to those users who have paid (or have committed to pay) for the content.

## Geographic Masking

- 3.7 By implementing technologies and procedures which seek to restrict and/or record the geographic locations in which each of its digital receivers is installed and used, CA service providers are able to restrict access to content to defined geographic territories. On the Sky DSat platform this technique is used to minimise the number of digital receivers that are able to access specific encrypted channels outside of specific geographic territories (e.g. the UK). Ofcom has adopted the term "Geographic Masking" to describe this functionality.

## Electronic Programming Guide services

- 3.8 End users of digital platforms (e.g. digital TV viewers) use Electronic Programme Guides (EPGs) primarily to navigate between channels, access channels by unique channel numbers, and browse through programming schedules and related data.

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- 3.9 On the Sky DSat platform there is only one EPG available to the end user and this is provided by Sky. Sky provides broadcasters a technical service which, amongst other things, assigns an EPG channel number to each of the broadcaster's channels. It also provides a technical interface by which the broadcaster can deliver and amend programme schedules and related data which is subsequently viewed in the EPG by the viewer. Ofcom has adopted the term "Basic EPG Listing" for this type of EPG technical service. If the broadcaster was to choose not to procure a Basic EPG Listing, very few end users of the platform would be aware that the channel was available and they would find it hard to navigate to it. Therefore, access to a Basic EPG Listing service is a necessary requirement to provide a broadcasting service on a particular digital platform.

## Regionalisation

- 3.10 A broadcaster may find it desirable to associate different broadcast channels with the same EPG channel number in different geographic regions e.g. Sky DSat viewers in London see a different version of ITV1 on channel 103 to that seen by viewers in Manchester accessing the same EPG channel number. Different broadcasters may require different regions to be defined, for example the geographic boundaries of the ITV regions do not necessarily correspond with the geographic boundaries of the BBC regions. Ofcom has adopted the term "Regionalisation" to describe the functionality associated with configuring and operating this type of technical service.

## Access Control Services

- 3.11 The definition of Access Control (AC) services covers a broad range of technical services. On digital TV platforms, providers of AC services are required to provide broadcasters:
- Access to certain application programming interfaces (APIs) on its digital receivers.
  - Access to the digital broadcaster's remote computer hardware and software systems using network connections that the digital receiver is able to establish.
- 3.12 Such services allow broadcasters to develop software applications (i.e. interactive TV applications) which can be loaded and executed on the digital receiver. These applications may then establish an on-line connection with the broadcaster's network infrastructure to create a "client server" computing environment.
- 3.13 Other AC services also enable the broadcaster to provide viewers with the ability to identify and access interactive applications. For example, on the Sky DSat platform TV viewers might access interactive applications by "pressing the red button" whilst watching a TV channel or selecting the service from the "Interactive Main Menu".
- 3.14 Because interactive services are bespoke software applications that run on the digital receiver they are able to support a wide range of functionality. For example, some interactive services are designed to enhance broadcast TV by providing the viewer with additional information or allowing them to access different audio or video streams whilst other interactive services are independent of the TV broadcast, such as TV banking, games or e-mail.
- 3.15 As stated in paragraph 2.11, Sky is the only regulated provider of Access Control services in the UK. The Access Control services currently offered by Sky on its DSat platform include:

<b>Application Signing Services</b>	The Sky Set Top Box will only recognise and execute interactive applications that have been digitally “signed” with certificates issued by Sky. The provision of these certificates, use of the “red button” technology, procedures relating to testing of the applications and conditions relating to the visual and functional design of the applications form the basis of the Application Signing service.
<b>Authentication Services</b>	Interactive applications which connect to the broadcaster’s online infrastructure using the STB modem must do so via an “authentication server” provided as part of the Authentication Service. The processing capacity and level of reliability of this server is determined for each Authentication Service customer to match their expected connection volumes and peak connection rate (i.e. connections per second). Consequently the direct cost of providing this service varies between customers.
<b>Customer Data Sets</b>	Sky holds name and address data relating to customers who received subsidised set top boxes. 3rd parties can procure this information to use in conjunction with an interactive TV service. For example, to reduce the burden on a TV viewer, an interactive application operator may pre-populate a customer registration screen within its service with the address data it has procured from Sky.

## New TPS

- 3.16 Given the evolving nature of interactive TV services and the Sky DSat platform Ofcom considers it possible that other technical services may be introduced that fall within the definition of Access Control services. Ofcom considers that the principles laid out in the Proposed Guidelines are sufficient to provide guidance on how a complaint relating to the purchase of such a ‘new’ service may be viewed.



## Section 4

# Ofcom's duties and criteria for assessing options

4.1 This section sets out the statutory duties Ofcom has had regard to in reviewing the Current Guidelines. The criteria Ofcom has used to assess alternative approaches to interpreting fair, reasonable and non-discriminatory as applied to the provision of access to TPS are then presented.

## Ofcom's statutory duties

4.2 Section 3 (1) of the Communications Act 2003 ('the Act') states that Ofcom's principal duty in carrying out its functions is to further the interests of citizens in relation to communications matters; and, to further the interests of consumers in relevant markets, where appropriate by promoting competition.

4.3 Sections 3 (2) of the Act states that, in carrying out its functions, Ofcom is required to secure amongst other things:

- the availability of a wide range of electronic communications services throughout the United Kingdom (s 3 (2) (b)) ;
- A wide range of television and radio services to be available (duty to secure **range**) which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests (s 3 (2) (c)) (duty to secure **high quality** and **appeal**); and,
- The maintenance of a sufficient plurality of providers of different television and radio services (s 3 (2) (d)) (duty to secure **plurality**).

4.4 In performing those duties, Ofcom must also have regard to, amongst other things:

- the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom (s 3 (4) (a) of the Act);
- the desirability of promoting competition in the relevant markets (s 3 (4) (b) of the Act);
- the desirability of encouraging investment and innovation in relevant markets (s 3 (4) (d) of the Act).

4.5 Section 4 of the Act requires Ofcom to act in accordance with the six European Community requirements of Article 8 of the Framework Directive for regulation. In summary these requirements are to:

- promote competition in the provision of electronic communications networks and services, associated facilities and the supply of directories (s 4 (3) of the Act);
- contribute to the development of the European internal market (s 4 (4) of the Act);
- promote the interests of all persons who are citizens of the European Union (s 4 (5) of the Act);
- not favour one form of or means of providing electronic communications networks or services, i.e. to be technologically neutral (s 4 (6) of the Act);



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- to encourage the provision of network access and service interoperability for the purpose of securing (s 4 (7) and (8) of the Act):
  - efficient and sustainable competition; and
  - the maximum benefit for customers of communications providers;
- to encourage compliance with certain standards in order to facilitate service interoperability and secure freedom of choice for the customers of communications providers (s 4 (9) of the Act).

### Criteria for assessing options for interpreting “fair, reasonable and non-discriminatory”

- 4.6 In interpreting the meaning of FRND in relation to the terms under which access to TPS are offered, Ofcom is minded to consider the extent to which its duties to secure **range** and **plurality** of high **quality** television and radio services that **appeal** to a variety of tastes and interests are fulfilled.
- 4.7 Ofcom considers that, in the promotion of **range, plurality, quality** and **appeal**, access to TPS should not be discouraged or unnecessarily hindered. Initial discussions that Ofcom has held with potential and existing TPS Customers have highlighted that **transparency** of pricing methodologies and the **predictability** of charges are important to TPS Customers in assessing whether terms they are offered are FRND and to reduce uncertainty in business planning. Consequently, Ofcom considers that TPS terms which are transparent and predictable will help to achieve the widest **range, plurality, quality** and **appeal** of television and radio services.
- 4.8 In performing its duties Ofcom must have regard to the extent to which its activities are transparent and proportionate (s 3 (3) (a) of the Act) and do not impose burdens on stakeholders that are unnecessary (s 6 (1) (a) of the Act). To this end Ofcom seeks to minimise the burden imposed on stakeholders in conforming to the Proposed Guidelines by ensuring regulatory measures are practicable and simple to implement.
- 4.9 The objectives of transparency, predictability and practicability are the key criteria Ofcom has considered in assessing different options for FRND terms. These are now considered in turn:

### Transparency

- 4.10 Transparent pricing helps TPS Customers to understand how prices are derived and what costs are being recovered. This can provide confidence that prices charged are fair and reasonable.
- 4.11 Transparency better enables customers to compare the basis for charges applied to them to those applying to other customers. This allows them to judge whether the terms they are offered are non-discriminatory.
- 4.12 All customers should enjoy the same level of transparency. Broadcasters who are vertically integrated with a TPS Provider should not be able to use information that is not available to other third party broadcasters in order to secure preferential terms.
- 4.13 The Current Guidelines support a pricing regime that in practice provides the TPS Provider with the flexibility to charge a potentially very wide range of prices for

individual services<sup>7</sup>, but with two overall requirements that: firstly costs are not over recovered, and, secondly that the TPS Provider cannot discriminate between comparable services provided to comparable customers at a comparable time. Individual prices for each service can range from a “floor” of the incremental costs of providing that service and a “ceiling” of the stand-alone cost which the TPS Provider would incur if that service were the only service it offered. Where prices fall between these two points is left to commercial negotiation between the two parties.

- 4.14 Ofcom’s initial view, based on discussions with various TPS Customers, is that deriving TPS charges on a case by case basis through commercial negotiation does not result in sufficient transparency to allow customers to establish whether the terms they are offered are FRND. Consequently, such an approach would result in customers having to raise a complaint with Ofcom to establish whether the terms they were offered were FRND. Ofcom considers transparency as a key enabler for, amongst others things, minimising the costs associated with regulatory intervention and thereby increasing the likelihood of a wider range and plurality of services and service providers. This is supported by the existing regulatory condition requiring publication of charges or charging methodology.

### Predictability

- 4.15 TPS Customers require predictability of pricing to enable short and long term business planning. Lack of predictability may dis-incentivise investment in content rights and/or lead to increased business risk and cost of capital. As a result, the plurality of service providers may be less than it might otherwise be.
- 4.16 Ofcom’s initial view is that predictability is an important consideration in assessing whether charges and terms are to be considered FRND.

### Practicability

- 4.17 In considering any changes to the Current Guidelines, Ofcom has considered the costs that are likely to be incurred by stakeholders in implementing any regulatory requirements as well as the overall benefits of doing so.
- 4.18 Generally, where there are alternative approaches to a particular regulatory issue which provide a similar outcome Ofcom will prefer the most practicable approach, in terms of cost, simplicity and ease of implementation.
- 4.19 Also there may be instances where a potential trade-off between objectives needs to be considered. In particular, one possible approach to an issue may be more theoretically correct than alternatives but raise problems in terms of information requirements (it may be costly to obtain, confidential or subjective in its nature). In such cases the availability of proxy measures may provide an outcome with less precision but which better meets the objectives of simplicity and transparency. Ofcom notes that such trade offs would not have a material effect on the TPS Provider who is able to make reasonable returns on its investment, irrespective of the charging regime applied to individual customers.

*Question 4.1: Do you agree with Ofcom’s view that transparency, predictability and practicability of charging methodologies are key in determining whether pricing and terms for TPS are FRND?*

<sup>7</sup> <http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/cagu1002.htm> section 3.5

*Question 4.2: Do you agree that the transparency and reduced regulatory burden provided by practicability is sufficiently beneficial to justify sacrificing some of the accuracy of creating individual terms for individual customers that may be achieved through commercial negotiation?*

## Section 5

# Principles of cost recovery

- 5.1 This section discusses the role of cost recovery in the setting of FRND charges for TPS. Alternative approaches to cost recovery are discussed and Ofcom's proposed approach is set out in detail.

## The importance of costs in assessing FRND

- 5.2 Any consideration of FRND charging will need to consider the costs to the TPS Provider of providing such a service. A pricing structure that allows the TPS Provider to charge prices that exceed its costs may have adverse effects on content and distribution markets and potentially reduce plurality and range of services and/or providers. Conversely, a pricing regime that does not enable the TPS Provider to recover its costs will serve as a disincentive for both that provider and other providers to invest in developing platforms. This would conflict with Ofcom's duties to encourage innovation and investment in relevant markets (s 3 (4) (d)) and in network access (s 4 (7) and (8) of the Act) and hence potentially adversely affect consumer choice in the platform services market.

## Fair and reasonable cost recovery

- 5.3 Ofcom's proposed view is that a fair and reasonable pricing regime is one in which the costs which a TPS Provider is allowed to recover from customers are restricted to those costs which it reasonably, necessarily and efficiently incurs in the provision of those services (including a return that reflects the cost of capital of the investment).

## Principles of cost recovery

- 5.4 Ofcom (and its predecessors) have established 6 principles of cost recovery:
- cost causation - costs should be recovered from those parties whose actions cause the costs to be incurred at the margin;
  - cost minimisation - the mechanism for cost recovery should ensure that there are strong incentives to minimise costs;
  - distribution of benefits - costs should reflect benefits received;
  - effect on competition - the mechanism for cost recovery should not undermine or weaken the pressures for effective competition;
  - reciprocity - where services are provided reciprocally, charges should also be reciprocal; and
  - practicability - the mechanism for cost recovery needs to be practicable and relatively easy to implement.
- 5.5 The most appropriate basis for allocating costs for a particular product needs to be considered on a case by case basis. In practice, different approaches to cost recovery will imply different levels of emphasis on the principles set out above. Relevant factors to be considered in deciding the most appropriate approach include market structure and maturity, business cost structures, materiality, and overall objectives of allocation (in this case a pricing structure that is "fair, reasonable and non-discriminatory"). In all but the most simple of costing allocation exercises, it is

possible that different costs may be best allocated using different methodologies depending on the nature of each cost type.

Incremental Costs

5.6 Where specific costs can clearly be identified as being caused solely by a particular new service or additional customer, the principle of cost causation is generally recognised as appropriate as it promotes an economically efficient allocation of resources by ensuring that each user of a service pays for the additional costs incurred in providing that service. Using this principle, incremental costs<sup>8</sup> incurred by the supplier in providing a new service or a service to a new customer would be expected to be wholly recovered from that particular service or customer.

Common Costs

5.7 In many businesses, including that of a TPS Provider, a number of different services are sold and will involve inputs, activities or assets common to more than one service – so called “common costs”. In determining the cost of each service in such a manner that total product costs equals total business costs it is necessary to allocate common costs across the different services.

5.8 For a vertically integrated TPS Provider, the allocation of common costs involves 3 levels of cost allocation – costs common to the TPS business and other businesses of the TPS Provider, costs common to different TPS services and costs common to different TPS customers for a particular service. This is illustrated in Figure 1 below.

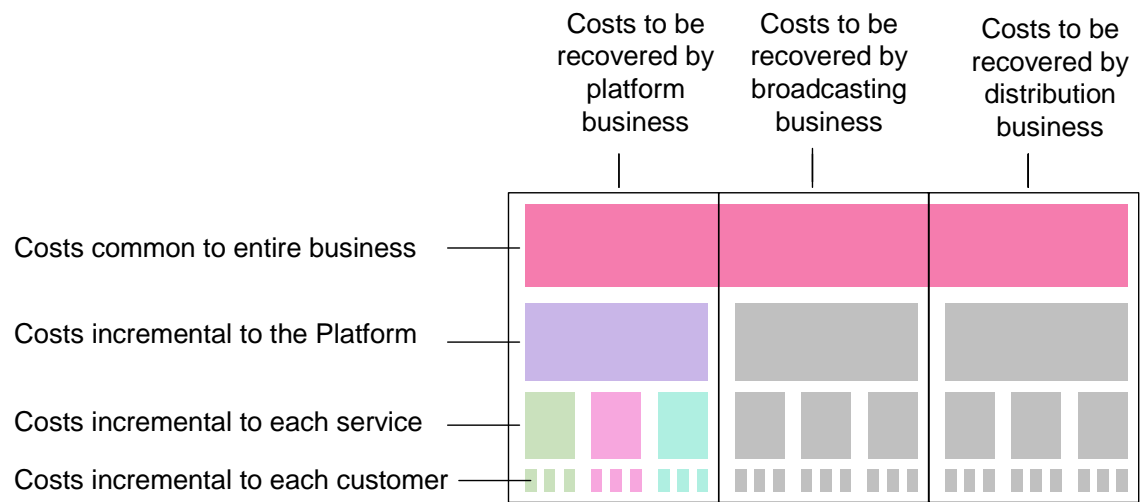


Figure 1 Common cost recovery for a vertically integrated TPS Providers

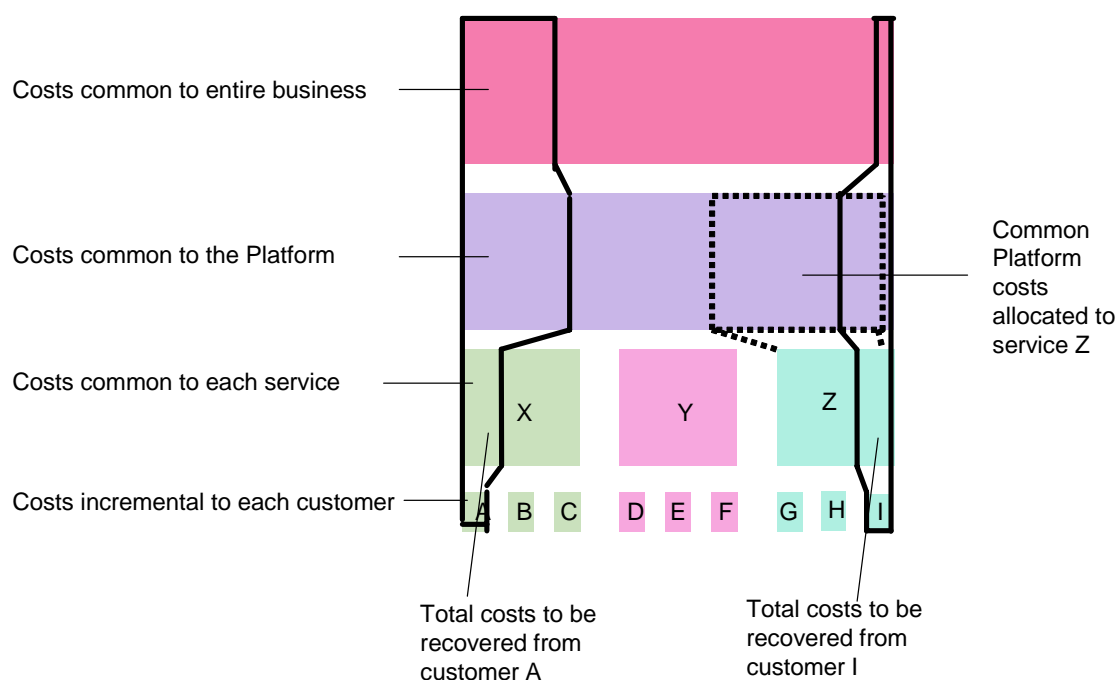
5.9 Illustrative examples of different types of costs are shown in the table below but it should be noted that the nature and structure of the costs are likely to vary between different TPS Providers.

<sup>8</sup> i.e. the costs would not have been incurred if the service was not provided or the customer had not taken the service

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Type of Cost	Examples
Incremental to the TPS customer	Legal costs of drawing up contract, equipment costs specific to the new customer
Common to the TPS service	Development costs, shared server infrastructure, operational costs
Common to the TPS business	Development costs, set top box costs, smart card costs
Common to other businesses of the TPS Provider	Marketing costs, corporate overheads

5.10 As stated in paragraph 5.3, a fair and reasonable pricing structure is one which allows the TPS Provider to recover its costs. This means that the sum of individual prices charged to each customer across the platform should equal all costs incurred by the TPS Provider. This is illustrated in Figure 2 below



**Figure 2**

5.11 Figure 2 shows the total amount of costs which are recovered from Customer A, comprising of the incremental cost of providing a particular service to that customer and the common costs of the service, the platform and the parent business which are allocated to that customer.

## Approaches to common cost allocation

- 5.12 Various cost attribution methodologies can be used to allocate common costs across different services or customers including allocations based on relative direct incremental costs, relative benefits to the user, or other specific cost-drivers of incremental costs such as physical volumes (eg number of customers).
- 5.13 The Current Guidelines do not prescribe a methodology for the allocation of common costs across different services, but rather leave the setting of charges to negotiation between the parties provided that on an overall basis there is no over recovery of costs. Such a flexible approach has benefits during the early stages of a market where business models are not well established and there is a relatively high degree of uncertainty regarding possible benefits from the service to individual broadcasters. In these circumstances, flexibility and a wide range of prices may be efficient and encourage a higher take-up of services than might be the case if a more rigid pricing regime was adopted.
- 5.14 However, such an approach also has two major disadvantages – a lack of predictability and transparency. Potential customers of TPS will not necessarily know in advance of entering negotiations what the level of charges will be. This makes the task of business planning and potentially of fund raising more difficult and may pose a barrier to the purchase of TPS and also distort the decision facing broadcasters as to whether to broadcast “direct” using TPS or rather to sell content to an existing TPS Customer which then either bundles the content into one of its own subscription packages or retails the content direct to consumers on an *a la carte* basis. A key purpose of this consultation document is therefore to assess whether or not an alternative approach to common cost allocation could better meet these important objectives.
- 5.15 The economic principle which is often turned to when determining how to recover common costs from a number of services and/or customers is the Ramsey principle. Under this approach, common costs would be recovered through mark ups applied to direct costs of services in a way that reflects the inverse elasticity of demand of the customers purchasing the service. However, in relation to TPS, prospective customers have to make a participation decision, and the Ramsey rule is not appropriate in such circumstances. The decision facing the customer is whether to purchase a TPS or not, rather than being about the “quantity” of a particular service which they would wish to consume. In these circumstances, the Ramsey principle is likely to be of little help in determining the way that common costs should be recovered from the various users of the platform.
- 5.16 Cost recovery based on **distribution of benefits** typically requires that the relative benefit received by those parties who share a common cost can be assessed.
- 5.17 In situations where there are no credible alternatives to the service, or alternative suppliers, the usual measure of benefit is the profit made by a customer as a result of using the service. This is also referred to the “Willingness to Pay” or the reservation price (i.e. the maximum price at which the customer would still be willing to purchase the service).
- 5.18 The reservation price is normally very difficult to estimate with accuracy and estimates are normally controversial. This is because the reservation price is not usually observed unless where a customer is priced out of the market. Further, estimations of the reservation price requires the availability of information which a

TPS Customer and potential competitor to a TPS Provider's broadcasting business may not wish to pass on to the TPS Provider.

- 5.19 To overcome these difficulties, Ofcom has considered various proxies which broadly track the relative benefits of TPS received by different groups of TPS Customers. These are discussed in Section 7.

### Recovery of costs over time

- 5.20 Where costs give rise to an economic benefit which extends beyond the period in which the cost is incurred, it is necessary to consider the period over which costs should be recovered and how costs are recovered over time. The major costs of a platform business – systems development, fixed assets and set-top boxes will generate an economic benefit beyond the period in which they are incurred. A pricing regime that sought to recover all costs in the period in which they were incurred would not necessarily be efficient or fair and reasonable. For example the recovery of fixed asset costs in the period that the equipment was installed would mean that new platform users in subsequent periods would benefit from those assets but make no contribution to their cost recovery.
- 5.21 It is therefore necessary to assess recovery of costs over a period of time. Various periods of time can be considered relevant, such as:
- Life of assets (e.g. such as set top boxes); and
  - Customer lifetime (i.e. the duration which a customer continues to subscribe to a Pay-TV service).
- 5.22 In Ofcom's view the major investments of Sky's digital platform business are in customer acquisition (see Section 6). The average customer life is in the region of 8 years<sup>9</sup>. In Ofcom's view a fair and reasonable pricing structure would be one which matches the costs of subscriber acquisition to the revenues they generate. This requires an allocation of subscriber acquisition costs over the lifetime of the subscribers.
- 5.23 In assessing cost recovery or profitability over time two approaches can be considered – a financial accounts based approach and a discounted cashflow ("DCF") approach.
- 5.24 A financial accounts based approach uses a business's historical financial accounts for a period to assess whether the prices in that particular period exceeded the costs allocated to a particular service. In this case subscriber acquisition costs would be spread over their useful economic lifetime through a depreciation charge. If in any one year revenues exceeded costs (which included an appropriate return on capital employed or normal profit) then this would indicate excessive pricing, particularly if this occurred in a significant and persistent manner.
- 5.25 A DCF analysis on the other hand considers the cashflows of the business over a number of accounting periods (say 10 years). Cash flows (which can be historic and/or future) are discounted, to arrive at a single measure of profit, the internal rate of return ("IRR"). The IRR represents the discount rate at which the cashflows of the business give a total discounted cashflow for the business, or Net Present Value ("NPV"), of zero.

<sup>9</sup> Based on an estimated churn rate of 10% (eg Deutsche Bank Brokers report *British Sky Broadcasting*, 5 July 2004, page 32: churn for existing customer base 9.6% (p38), forecast rate 10%)



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- 5.26 In this case subscriber acquisition costs are simply recorded in the period they are incurred. All costs and revenues are then discounted back to a base year. If the discount rate necessary to generate an NPV of zero is significantly greater than the firms weighted average cost of capital (which includes the “normal profit” which could be expected in a competitive market) then this would suggest excessive prices are being charged on an overall basis over the period being assessed.
- 5.27 The major drawback of the DCF approach is that it relies on a forward-looking analysis in which numerous assumptions are made, whose validity needs to be considered in order to assess whether a charge is fair or reasonable.
- 5.28 A financial accounts based approach (which includes an adjustment for the depreciation of subscriber acquisition costs) does not require forward looking forecasts of the business, although some view of the future revenue generating ability of assets is required in order to adjust for any accounting distortions.
- 5.29 As the business becomes more established, the relative disadvantages of a DCF approach increase and the benefits of a financial accounts based approach increase. In particular the use of forecasts where there is sufficient historical financial data to assess recovery of historic costs introduces an unnecessary element of uncertainty that is not present in a financial accounts based approach. Also assessing whether prices are fair and reasonable requires a view to be taken on whether the TPS providers own forecasts are reasonable.
- 5.30 A further disadvantage of the DCF approach is that it does not provide a view on the reasonableness of costs in a discrete period – it only assesses cost recovery over the entire period of the DCF calculation. The approach averages out any under or over recovery that may occur during the period assessed. Potentially this can lead to discrimination between users who join the platform at different times.
- 5.31 Also, where the basis of cost allocation changes during the period of the DCF calculation, it becomes necessary to either change the cost allocation methodology modelled or adjust historic revenues to reflect the new cost allocation methodology in the historic period. Both solutions are difficult to implement in practice, but do not arise in the financial accounts based approach.
- 5.32 Taking into account the current level of maturity of Sky’s platform, the availability of historic financial accounts and the disadvantages of a pricing regime that is based on a subjective forward looking business plan, it is Ofcom's proposed view that an adjusted financial accounts based approach to the assessment of cost recovery is preferable to a DCF approach in the case of the Sky DSat platform.

*Question 5.1: Do you agree with Ofcom’s proposed view that a financial accounts based approach to the assessment of cost recovery on the Sky DSat platform is the most appropriate?*

## Section 6

# The allocation and recovery of customer acquisition costs

- 6.1 This section presents the criteria Ofcom proposes to apply in assessing whether the allocation and recovery of customer acquisition costs incurred by a TPS Provider are FRND. The section describes the different types of costs to be recovered, considers alternative approaches to their allocation and then sets out Ofcom's proposed approach.

### Common costs allocated to the TPS Provider

- 6.2 A number of different costs can be incurred in establishing a broadcasting platform depending on the technology used, broadcasting medium and overall business model. Where, as in the case of Sky, the platform is an integral part of a vertically integrated Pay-TV business, a key question in assessing fair and reasonable charges for third party users of the platform is which of the total costs of the vertically integrated business are relevant to the platform business and can therefore be reasonably recovered from users of the platform.
- 6.3 As set out in Section 5, it is Ofcom's proposed view that a FRND pricing regime should only allow a TPS Provider to recover those costs which are reasonably and necessarily incurred in the provision of those services.
- 6.4 The costs of certain activities (such as encryption software and technology) can clearly be solely attributed to the platform business using the principle of cost causality, as described in Section 5. The most appropriate methodology for the allocation of other costs to the platform business rather than the broadcasting or distribution business of a vertically integrated TPS Provider is less clear. In particular, the recovery of costs incurred by a TPS Provider in attracting customers onto the platform from third party users of the platform raises a number of issues which are discussed in detail in this section. The allocation of other costs directly related to the provision of individual TPS are discussed in section 7.
- 6.5 This discussion is largely based on the Sky DSat platform. Any other regulated TPS Provider may not replicate Sky's particular business model and approach to customer equipment subsidies and as a result it may be appropriate to adopt a different cost allocation methodology that better reflects the principles of cost allocation (set out in Section 5) appropriate to that TPS Provider.

### Customer acquisition costs

- 6.6 The type and amount of customer acquisition costs that a TPS Provider incurs will depend on the revenues it expects to be able to generate from the provision of the TPS. Where, as is currently the case for Sky, the level of TPS revenues are overwhelmingly determined by the number of retail customers of its own distribution business, the question of which costs can reasonably be recovered from third party customers of the platform rather than only from TPS Providers vertically integrated distribution business raises a number of issues.

## Customer equipment costs

- 6.7 In order to persuade potential customers to subscribe to its Pay-TV packages, Sky has historically offered a range of discounted or free set top boxes (and viewing cards), dishes and installation packages. Currently Sky offers free basic boxes to anyone<sup>10</sup>, free installation to customers who take out a subscription to any Sky Pay-TV package and various subsidies for Sky + set top boxes<sup>11</sup>. Set top box subsidies are by far the largest component of Sky's customer acquisition costs.
- 6.8 The Current Guidelines provide for the cost of these equipment "subsidies" to be charged to the platform business and part recovered from third party TPS Customers on the basis that they typically benefit from such a subsidy (in terms of increased viewer base). However, the Current Guidelines make a distinction between costs incurred in respect of a customer who is required to take out a subscription to a Sky package and those which are not:

"However, in certain cases, recovery of subsidy via conditional access or access control charges may have anti-competitive effects. In such cases, recovery would not be permitted. Each case would be examined on its merits. However, one example where Ofcom would have serious concerns is where the granting of subsidy was tied to a requirement to subscribe to a retail service of a vertically integrated supplier."<sup>12</sup>

- 6.9 This concern arises from the unequal benefit that could arise if a vertically integrated TPS Provider were, for example, certain that it could recover its share of any customer acquisition costs from the additional margins generated from those new customers during the initial subscription period. In contrast, a third party user of the platform would have to make a contribution to customer acquisition costs whether or not this outlay for a subsidy appears justified from the perspective of their respective business.
- 6.10 In considering how the Current Guidelines have been applied in practice on the Sky DSat platform, Ofcom is aware of a number of anomalies in the current treatment of costs in this area:
- In practice, whilst there may not be a contractual requirement to take out a subscription in order to qualify for a subsidised set-top box, very few customers have acquired a "free" box and then use it to watch non-Sky Pay-TV or free-to-air content only.
  - Currently the costs of satellite dishes which are provided free to customers taking out subscriptions (for a minimum of 12 months) to Sky packages are charged to Sky's platform business (i.e. the TPS Provider) and recovered from all TPS Customers.
  - Currently installation costs which are paid for by Sky's distribution business subject to the customer taking out a subscription to a Sky package are not charged to the platform business
  - The treatment of Sky's Sky+ set top boxes is not straightforward. Sky currently allocate to the platform business all costs and revenues associated with the provision of its Sky + set top boxes, which are only available to customers taking

<sup>10</sup> Subject to them qualifying for and entering into an "Interactive Discount Contract"

<sup>11</sup> Sky+ set top boxes offer additional functionality, notably the ability to record programmes

<sup>12</sup> Paragraph 3.11 of "Terms of supply of conditional access: Ofcom guidelines" (22 October 2002).

out subscriptions (for a minimum of 12 months) to Sky packages. However, retail customers who only take a “basic” Sky package pay a £10 monthly Sky+ subscription which is allocated to Sky’s distribution business which in turn pays a lesser amount to the platform business for each Sky+ subscriber (irrespective of what Sky programming package they take). The overall impact of this depends on assumptions for subscriber life, level of subsidy and type of box purchased but could create a net cashflow benefit to the platform business. In Ofcom’s view any unequal treatment between Sky’s own distribution business (which retains the £10 Sky+ subscription but also pays a Sky+ charge to the platform business) and other third party users of the platform (who have no such charges or revenues) potentially reduce transparency.

- 6.11 In a regulatory context, an economically efficient approach to the allocation of the cost of customer equipment, based on the cost causation principle, would suggest that the cost of set-top boxes should be borne directly by the party making the decisions that cause those costs to be incurred – namely an incremental residential customer of the Sky DSat platform (for example either by paying a one-off upfront charge or by some form of deferred payment mechanism- eg a hire purchase type of arrangement). If this approach were to be applied then each customer would have to bear the cost of the equipment he chooses. However whilst such an approach might theoretically offer an optimal allocation of resources, there are benefits to Sky’s current approach of stimulating take-up by making available subsidised boxes, and also to effectively offering a retail bundle of subscription to pay-TV together with any or all of the set-top box, viewing card, installation and dish.
- 6.12 In Ofcom’s view imposing a requirement on Sky to recover customer equipment costs directly from viewers would be highly interventionist and not necessarily beneficial to consumers. Under the current circumstances, Ofcom considers that such an approach may not be justifiable.
- 6.13 Instead, Ofcom has considered a number of alternative options for the recovery of customer equipment costs from TPS Customers based on (i) an implied allocation resulting from negotiation of prices, (ii) a distribution of benefits approach, (iii) a behavioural approach and (iv) a LRIC proportional mark-up approach, each of which is discussed below.

*Question 6.1 Do you agree that an approach requiring Sky to recover customer equipment costs directly from residential customers is not appropriate or justified at the current time?*

### Options considered for recovery of customer equipment costs

- 6.14 An economically efficient allocation methodology will be one which least distorts the implied allocation of economic resources. The theoretical solution to this problem is Ramsey pricing which, as discussed in paragraph 5.15, has a number of practical difficulties in this context. Ofcom has therefore considered a number of different approaches:
- 6.15 Ofcom has considered the following options for allocating customer equipment costs to individual TPS and individual TPS Customers:

<b>Option 1</b>	Implied allocation based on the outcome of commercial negotiations between the TPS Provider and the TPS Customer to set a price. This is the method currently in use for customers taking Pay-TV, Regionalisation, Geographic Masking or AC services on the Sky DSat platform.
<b>Option 2</b>	A benefits based approach which allocates the cost according to an analysis of the relative benefits to different users of TPS
<b>Option 3</b>	A behavioural approach which considers the underlying rationale of the TPS Provider's decision to incur customer equipment costs
<b>Option 4</b>	A LRIC proportional mark-up approach which distinguishes between a Pay-TV platform and a Free-to-View platform

*Question 6.2 Do you think that Ofcom should consider alternative approaches to the allocation of customer equipment costs?*

### **Option 1: Using negotiated prices to determine an implied cost allocation for customer acquisition costs**

- 6.16 Option 1 represents the approach currently adopted by Sky on the DSat platform. It is Ofcom's proposed view that Option 1 does not best meet Ofcom's new statutory duties in as much as it does not provide a charging structure that is sufficiently transparent or predictable.
- 6.17 Ofcom recognises that a negotiated approach to price determination had distinct advantages in the early days of the DSat platform when there was less certainty of its success, business models for broadcasters were less mature and the value of the TPS services was not as well understood. In these circumstances the flexibility in determining prices as a result of negotiation had merits. However it is Ofcom's view that there is now sufficient maturity in the digital TV industry to enable a more structured pricing methodology to be adopted which can better provide the advantages of transparency and predictability that will promote plurality and range of services and service providers. Additionally, the lack of transparency associated with terms achieved through commercial negotiation may lead to an increased number of complaints being brought to the regulator, and hence increase the cost of regulation for all stakeholders.

### **Option 2: A benefits approach to cost allocation of customer acquisition costs**

- 6.18 A benefits approach to allocating customer acquisition costs between different services would require an allocation based on the relative benefits of using TPS services to different types of customer.

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- 6.19 In considering relative benefits of TPS services between different platform users, a useful distinction can be made between Pay-TV broadcasters, Public Service Broadcasters (PSBs) and other Free-to-View broadcasters.
- 6.20 The benefits of additional viewers on the platform to Pay-TV broadcasters are clear – the broadcaster can earn increased profits from additional subscribers to its services. Quantifying this benefit is discussed in more detail in Section 7.
- 6.21 PSBs currently broadcast on terrestrial analogue, terrestrial digital and cable platforms as well as Sky DSat. Consequently, the value to the PSBs of Sky increasing its number of viewers is likely to be very low on the basis that virtually all households already have terrestrial access to their primary channels. As a result an increasing number of Sky platform viewers does not mean an increasing number of potential PSB viewers, as it does for Pay-TV broadcasters.
- 6.22 A PSB, as part of the pre-consultation process, has stated that it suffers an incremental loss in advertising revenues as Sky's platform grows thus implying a disbenefit to them of continued platform growth or increased levels of customer acquisition cost. However the relevant question to consider is whether this broadcaster is in a better or worse position if they are on the platform rather than off it. In Ofcom's view it is clear that they are better off being on the platform, because:
- of access to Sky's viewers through the EPG listing (rather than the viewer having to switch to another set top box or TV input)
  - with the advent of digital switchover, existing analogue broadcasters will have an obvious desire to be on as many digital platforms as possible in order to maximise the number of viewers who have access to their services when the terrestrial analogue transmitters are shut down
- 6.23 Ofcom's analysis of data provided by Sky demonstrates that historically PSBs have paid prices for TPS services of which a significant proportion represented a contribution to the recovery of customer acquisition and other common costs. There is therefore an argument that such prices may be below their willingness to pay and were therefore below the benefits to them of being on the platform. However, Ofcom also recognises that the PSBs' decision as to whether or not to broadcast on the platform would have taken into account a number of other factors including their special status as PSBs, their interest in promoting digital take-up and their desire to be as easily and flexibly accessible to all viewers on as many platform as possible.
- 6.24 The relevant benefit to Free-to-View channels also available on analogue of being on the Sky DSat platform comprises the incremental viewing achieved through being available on this platform. If they were not on the DSat platform then a number of viewers in Sky homes would still choose to access the channel by reverting to the television set's analogue tuner (or digital tuner on integrated digital TVs). However, a proportion would not choose to do so either because of the inconvenience of having to access channels through a different mechanism, or because they would have less awareness of the programmes being shown (resulting from the absence of information on the Sky EPG). It is difficult to estimate the incremental impact of being on the platform for channels that are also available on analogue. However, Ofcom notes that the availability of these channels on analogue and other digital platforms will tend to reduce the incremental benefit of being on the Sky DSat platform. While there is clearly some benefit to these broadcasters being available on the platform, Ofcom has seen little evidence that this benefit is large compared to that of the Pay-TV broadcasters who depend on the platform to run their businesses. In particular, it is Ofcom's proposed view that the benefit to these broadcasters from

growth of the Sky DSat platform is likely to be particularly low, and this would dictate that only a very small proportion of those costs incurred to induce the growth of the platform should be attributed to these broadcasters.

- 6.25 The methodology used to assess the benefit to other advertising-funded or licence-funded Free-To-View channels of being on the platform will necessarily differ where the channel is not already available on analogue television sets. However, the total viewing share of such channels – i.e. those not part of a Pay-TV package and not available through analogue terrestrial transmissions – is currently very low. It is Ofcom’s proposed view that it would not be appropriate, therefore, for these channels to be faced with anything above a very small contribution to common costs under a benefits approach.
- 6.26 Given the diverse nature of TPS Customers’ business models and differing motivations for being on the Sky DSat platform, using relative benefits to allocate customer acquisition costs with any precision is not a straightforward exercise. Nevertheless, Ofcom’s proposed view is that a benefits approach would clearly suggest that the relative benefits to Free-to-View TPS Customers, who also broadcast on analogue and digital terrestrial TV, of Sky incurring additional customer acquisition costs to grow the DSat platform are very low compared to Pay-TV customers.

### Option 3: A behavioural approach based on Sky’s rationale for incurring costs

- 6.27 Ofcom considers that Sky’s decision to incur significant customer acquisition costs may be solely motivated by the objective of increasing the number of subscribers to its retail Pay-TV distribution business, rather than to grow a “generic” digital TV platform. For example:
- the proportion of revenues received from third party TPS Customers is very small as a proportion of Sky’s total revenues, indicating that providing TPS to third parties is not a major driver of Sky’s business strategy.
  - the number of retail customers who have in the past received subsidised set top boxes and not also taken up a subscription to a Sky retail package is small. Even the recently introduced Sky freesat offer was described by Sky as a “single call instant upgrade path to Sky packages”<sup>13</sup> indicating that this service is primarily offered to acquire new pay-TV customers.
  - Ofcom has reviewed Sky’s marketing strategy and marketing material and found no evidence of any motivation to promote viewing of anything other than Sky packages on the platform.
- 6.28 Ofcom considers there is therefore a clear and direct link between Sky’s platform customer acquisition and retention costs and Sky’s retail Pay-TV customer acquisition and retention costs.
- 6.29 This causal link does not exist for third party users of the platform. For example there is no historic evidence of either significant numbers of viewers choosing to access the platform to view only non-Sky content or of Sky’s customer acquisition strategy taking into account the presence on the platform of any distributors other than Sky.
- 6.30 There is therefore an argument for allocating the customer acquisition costs not to Sky’s platform business, but rather to its distribution business. However, Ofcom recognises that such an approach has a potential fault going forward.

<sup>13</sup> BSkyB 04/05 Interim results presentation.



- 6.31 Requiring Sky's retail distribution business to meet the entire cost of the platform's subscriber acquisition costs (including customer equipment costs) whilst other Pay-TV businesses have access to those customers without having to make any contribution to the costs of bringing those viewers onto the platform could itself be discriminatory. In Ofcom's view therefore a behavioural approach would require that all subscriber acquisition costs be recovered from Pay-TV customers of the platform, and none from other third party users of the platform whose presence on the platform does not influence Sky's decision as to whether or not to incur customer acquisition costs.

### Option 4: A LRIC proportional mark-up approach

- 6.32 Given the problems of quantifying the benefits of customer equipment costs to individual TPS customers, Ofcom has considered an approach which takes into account the differences in costs between set top boxes required for a notional TPS platform solely servicing Free-to-View broadcasters and those incurred by Sky in support of its Pay-TV business.

- 6.33 Sky's total platform cost ( $\text{Cost TPS}_{\text{total}}$ ) can be considered in two ways:

$$\text{Cost TPS}_{\text{total}} = \text{SAC}^{14} \text{ of TPS}_{\text{pay}} + \text{LRIC}^{15} \text{ of TPS}_{\text{free}}$$

or

$$\text{Cost TPS}_{\text{total}} = \text{SAC of TPS}_{\text{free}} + \text{LRIC of TPS}_{\text{pay}}$$

Additionally:

$$\text{Cost TPS}_{\text{total}} = \text{Common Costs} + \text{LRIC of TPS}_{\text{free}} + \text{LRIC of TPS}_{\text{pay}}$$

Where  $\text{TPS}_{\text{pay}}$  is Sky's Pay-TV platform and  $\text{TPS}_{\text{free}}$  the cost of a notional platform developed solely to provide TPS services to free-to-view broadcasters.

- 6.34 In Ofcom's view, the LRIC of  $\text{TPS}_{\text{free}}$  is likely to be very low. It will include the costs of direct administration of free-to-view broadcasters, implementing any programme listings, coordination of transmission facilities, definitions of services for Free-to-View customers and direct legal costs of preparing contracts.
- 6.35 On the other hand the LRIC of the  $\text{TPS}_{\text{pay}}$  platform is likely to be relatively high. In particular two costs are likely to be significantly higher when compared to the  $\text{TPS}_{\text{free}}$  platform – encryption costs and set top box costs.
- 6.36 Whilst a free-to-view platform will need to offer geographic masking and regionalisation services, it will not need to provide an encrypted service to restrict services only to paying customers. The costs of operating and maintaining encryption service for pay-TV are significant and include, for example software development and licence fees, viewing cards and their replacement.
- 6.37 Sky has chosen to promote its business by offering relatively sophisticated set top boxes compared to a more basic model which would be sufficient for a  $\text{TPS}_{\text{free}}$  platform. For example, a basic set top box for  $\text{TPS}_{\text{free}}$  would not require a built in modem or the proprietary hardware and licensed software to support a sophisticated conditional access solution.

<sup>14</sup> SAC : Stand alone cost

<sup>15</sup> LRIC : Long Run Incremental Cost



## Provision of Technical Platform Services

- 6.38 Having established both LRIC  $TPS_{pay}$  and LRIC of  $TPS_{free}$ , common costs such as consumer equipment costs can be allocated in proportion to these LRIC costs.
- 6.39 Such an approach has some drawbacks – first it relies on an estimate of the cost of a notional  $TPS_{free}$  platform which will require assumptions to be made regarding alternative costs to those incurred by Sky. Secondly, it assumes that a proportionate mark up of the substantial common costs based on the proportion of relatively small LRIC costs will be appropriate. However, the number of alternative costs which need to be considered is small – potentially only set top boxes (if encryption is regarded as wholly incremental to the  $TPS_{pay}$  platform). Proportionate mark-ups for common cost recovery are widely used in the telecoms sector and in the absence of an obviously preferable approach, in Ofcom's view may provide a fair and reasonable allocation.

## Evaluation of options

- 6.40 In evaluating the options described above Ofcom has considered the assessment criteria set out in section 4.
- 6.41 It is Ofcom's initial view that a closed, commercial negotiation (Option 1), whilst providing flexibility, lacks the transparency and predictability that is necessary for a pricing regime to be considered FRND; as TPS Customers are unable to compare the prices that they have negotiated with those paid by other, comparable customers. Uncertainty in TPS pricing may dis-incentivise investment by a potential TPS Customer and hence may adversely affect the range and plurality of service available to consumers.
- 6.42 A benefits approach (Option 2) has merits from an economic cost recovery perspective (as it is the least distortive way of recovering common costs associated with the provision of a bottleneck service) but there is no obvious way to measure objectively the relative benefits across different TPS customers. Consequently, objectively defining common cost allocation on an individual customer basis is impractical.
- 6.43 A review of Sky's decision making and business motives (Option 3) suggests Sky's decision to incur customer equipment costs may be solely aimed at increasing its own Pay-TV revenues and that therefore an allocation of these costs solely to Pay-TV TPS Customers would have some merit, but would ignore the benefits of free-to-view broadcasters and arguably therefore over recover from Pay-TV customers.
- 6.44 A costing approach (Option 4) based on the differences in LRIC costs between a notional pay-TV only platform and a notional Free-to-View only platform indicates that a very small proportion of common costs (such as customer equipment costs) should be allocated to Free-to-View customers.
- 6.45 On balance, consistent with the discussion on Options 2, 3 and 4, and taking into account the key criteria of transparency and predictability, it is Ofcom's proposed view that only a very small proportion of customer equipment costs should be recovered from Free-to-View broadcasters. However, how this proportion is determined is highly problematic, and in the absence of any approach that would provide transparency, predictability and practicability, there may be merits in setting a fixed percentage of costs that should be recovered from TPS used by Free-to-View broadcasters based on consideration of the benefits that they receive.
- 6.46 In summary, Ofcom proposes that the TPS Provider should allocate a specified percentage of customer equipment costs to be recovered from TPS purchased by

Free-to-View broadcasters and that the level of customer equipment costs recovered from these customers should reflect the net benefits they receive from having their services available on the platform and, where appropriate, of continued growth of the platform.

*Question 6.3 Do you agree with Ofcom's assessment of alternative approaches to the allocation of customer equipment costs?*

*Question 6.4 Do you agree that the option of setting a fixed percentage of customer equipment costs to be allocated to free-to-air services is preferable to the alternative approaches?*

*Question 6.5 Do you consider that a move away from an approach which relies on commercial negotiation between a TPS Provider and TPS Customers to determine TPS charges and terms will have an adverse affect on (i) you (ii) Ofcom's duty to promote plurality and range of television and radio services and service providers.*

## Marketing costs

- 6.47 Advertising and promotion of the vertically integrated broadcaster, distributor and TPS Provider will include material which promotes all three lines of the business. In determining whether any such cost can reasonably be recovered from third party users of the platform it would need to be established that those other users of the platform either benefited from or caused such costs. The Current Guidelines state this as follows:

“Of tel also accepts that it is legitimate in principle to recover marketing expenditure through conditional access and access control charges, where it can be demonstrated that such expenditure relates to wholesale activities that promote the platform generally (and not any particular broadcaster), and where the method of cost recovery is competitively neutral between different broadcasters. In an investigation, Of tel may therefore require visibility of marketing material and costs in order to assess the extent to which individual market campaigns were purely platform-related and, if so, to what extent it is legitimate to recover some or all of the costs of such marketing via charges<sup>16</sup>.”

- 6.48 Ofcom's initial view is that it is important that the allocation of marketing costs by a vertically integrated TPS Provider does not place third party users of the platform at a competitive disadvantage. This could arise if, for example, a competing Pay-TV distributor was in some way contributing to the marketing costs of the vertically integrated supplier. In the case of Sky, this issue is compounded by the use of the “Sky” brand by all of its businesses.

## Consolidated approach to treatment of customer acquisition costs

- 6.49 It is Ofcom's proposed view that marketing costs and customer equipment costs are all incurred with the intention of acquiring new customers to Sky's retail distribution business or persuading existing customers of Sky's retail distribution business not to churn.

<sup>16</sup> “Terms of supply of conditional access: Of tel guidelines” (22 October 2002).paragraph 3.3.

## Provision of Technical Platform Services

- 6.50 To some extent at least it is likely that the decision to allocate funds between the different approaches to customer acquisition – reduced/free subscriptions, additional marketing or promotional spend or customer equipment subsidies will depend on the expected returns of different types of expenditure at any particular point of time.
- 6.51 Ofcom considers that there is a good case for treating all customer acquisition costs in the same way on the basis that it reflects the underlying rationale for incurring the cost and is consistent and simple. Ofcom therefore proposes that those marketing costs that have been allocated to the TPS business be treated in the same way as customer equipment costs and allocated on the basis of a fixed percentage as discussed in paragraph 6.46 above.

*Question 6.6 Do you agree with Ofcom's proposed treatment of common marketing costs?*

*Question 6.7 Do you agree that Ofcom's proposal to allocate common marketing costs between Pay TV and Free-to-View customers in the same way as customer equipment costs?*

## Section 7

# The allocation and recovery of other TPS costs

- 7.1 Section 5 discussed the proposed treatment of incremental and common costs of a platform business and Section 6 looked at the allocation of customer acquisition costs. This section presents the principles Ofcom proposes to apply in assessing whether the allocation and recovery of costs (other than customer acquisition costs) are FRND. The section describes the different types of costs to be recovered, considers alternative approaches to their allocation and then sets out Ofcom's proposed approach.

### Costs incremental to each TPS Customer

- 7.2 Using the cost recovery principle of “cost causation”, Ofcom considers that the incremental cost of each new customer (“TPS Customer Incremental Costs”) should be borne by that customer. These costs are likely to include activities such as the cost of preparing legal documentation, credit vetting, implementing changes in software and systems and physically arranging for connection of the customer to the network.

### Costs incremental to each TPS

- 7.3 Costs which are incremental to a particular service (“TPS Incremental Costs”) should be allocated to that service and recovered from all customers using that service. It should be noted that these costs are effectively common costs to be recovered from customers of that TPS, hence the use of the term “common costs” in the remainder of this section.
- 7.4 In considering which costs to apply to particular services, a long run incremental approach is preferable to a short run approach as in a short run approach a higher proportion of costs are likely to be found common to a number of different services.
- 7.5 Additionally, the TPS Provider should take as disaggregated a view as is practical in identifying incremental costs. For example it may be the case that certain costs associated with the encryption services should be viewed as incremental to the Pay-TV service and not necessary for a Geographic Masking service. In assessing the reasonableness of the allocation of such costs Ofcom may take into account the costs of using alternative technologies or any benchmark costs if there are other TPS Providers in order to assess whether or not the allocation was reasonable.

### Allocating TPS common costs between users of each service

- 7.6 As discussed in section 5, a number of different methodologies can be used to allocate common costs. These include, for example, allocation based on volumes, in proportion to incremental costs, other direct costs or benefits received.
- 7.7 An economically efficient allocation methodology will be one which least distorts the implied allocation of economic resources. The theoretical solution to this problem is Ramsey pricing which, as discussed in paragraph 5.15, has a number of practical

difficulties in this context. An alternative is to consider an allocation based on the relative benefits of the service attained by different customers.

- 7.8 Ofcom has considered which methodology of common cost allocation is most likely to meet the criteria discussed in section 4 for each TPS. These are set out below:

### Common cost allocation for Basic EPG Listing TPS

- 7.9 A benefits based approach to allocating common costs between all broadcasters purchasing Basic EPG listings would suggest an approach in which costs are allocated to individual customers in proportion to the relative benefit they gain from the service.
- 7.10 However, measuring the relative benefit received by customers of the EPG service is complex. This is due to the wide range of business models that TPS Customers are able to operate as a result of having an EPG listing. Some examples include:

- Advertising funded channels which use the EPG service to gain access to a large number of TV viewers
- TV Shopping channels which generate revenues from retailing
- Channels which are primarily funded by premium rate telephone services
- Pay TV services that require an EPG listing to allow users to access content which they have purchased through a subscription or wish to purchase on a pay per view basis

Ofcom notes that some TPS Customers combine elements of all of the above revenue models.

- 7.11 Ofcom considers that precisely measuring the relative benefits received by each TPS Customer from purchasing an EPG listing would require them to share commercial confidential business information with the TPS Provider, would be complex to implement and would lack transparency for TPS Customers as they try to assess whether the terms they were offered were FRND.
- 7.12 Having considered the complexity of the situation Ofcom has considered three options for allocating common costs between customers of the Basic EPG Listing TPS:

<b>Option 1</b>	Allocate common costs based on a simple “per EPG listing” basis
<b>Option 2</b>	Allocate common costs in proportion to the share of viewing the channel receives
<b>Option 3</b>	A combination of options 1 & 2 – a “two tier” charging structure

- 7.13 Ofcom notes that a “per EPG listing” charging structure (Option 1) is currently used on the Sky DSat platform and appears to have provided a limited amount of the transparency and predictability that Ofcom considers is appropriate. However, Option 1 does not reflect the relative benefits that different customers gain from using the service. For example, it results in a small niche channel paying the same EPG Listing charge as a large commercial public service broadcaster.

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- 7.14 In identifying more applicable proxies for benefits and in considering the wide range of business models enabled by an EPG Listing (as described above) Ofcom has identified the average share of platform viewing as a common driver for benefits received by individual TPS customers (Option 2). Ofcom considers that such a proxy is applicable to both Free-to-View and Pay-TV services and, furthermore, that viewing data is independently measured and publicly available and hence better meets Ofcom's criteria of achieving transparency and reflecting benefits received more accurately than Option 1.
- 7.15 However, Ofcom notes that the majority of channels on the Sky DSat platform receive less than 1% of viewing share and hence the complexity of measuring and calculating exact charges for every individual TPS Customer would be unlikely to exceed the benefits of such a precise approach and hence would be impractical.
- 7.16 In Option 3, Ofcom has considered a "two tier" charging structure for the Basic EPG Listing TPS. In this solution all TPS Customers would pay a fixed charge per EPG listing (as per Option 1) and only those channels whose viewing share exceeded a specified percentage (over a specified period) would pay an additional charge in proportion to its viewing share. Ofcom considers that this solution combines the practicability of Option 1 with the more precise measurement of benefits received of Option 2.
- 7.17 Ofcom considers the Basic EPG Listing TPS to be an "entry level" service and as such, in order to promote plurality and range, Ofcom would expect that the fixed charge element of the proposed charging structure would be set such that it was affordable to smaller TPS Customers. Ofcom notes that the charge currently set for Basic EPG Listing by Sky appears to meet this criteria, and would not expect this to increase significantly going forward.
- 7.18 In summary, for Basic EPG Listings Ofcom proposes a charging structure which has a fixed component paid by all TPS Customers on a "per EPG listing basis" plus a variable charge based on the average platform viewing share which is only payable by operators of channels which exceed a specified viewing share threshold. This threshold would be set at a level such that the number of TPS Customers for whom this additional charge must be calculated is sufficiently small as to be practicable.

## Common cost allocation for Regionalisation

- 7.19 Ofcom has considered the following options for allocating common costs to Regionalisation customers:

<b>Option 1</b>	Based on an ad-hoc, customer-specific assessment of the benefits received by the customer in using the service
<b>Option 2</b>	Based on a simple "per Regionalisation customer" average, irrespective of the number of channels or regions operated by each customer
<b>Option 3</b>	Based on the number of regions and regionalised channels operated by each customer

- 7.20 Ofcom's analysis of data provided during the pre-consultation stage has concluded that the incremental costs associated with providing this TPS on the Sky DSat

platform are relatively low and that exact proxies for benefits are impractical to define or require the customer to divulge confidential business information. In addition, it is not clear that the TPS Provider will necessarily have the incentive to secure charges which do aim to track the relative benefits accrued to each customer. As such, Ofcom believes that Option 1 is not likely to lead, in practice, to charges that track relative benefits to each customer. The lack of transparency of a negotiated approach may also reduce the confidence of TPS Customers over whether they are receiving an FRND charge. Ofcom therefore does not consider that the theoretical benefits of precision that following a customer-specific approach as in Option 1 would provide are sufficient to outweigh the simplicity and transparency of Options 2 and 3.

- 7.21 Ofcom notes that some channels only operate with a small number of regions whereas others operate with many regions, for example Channel 4 currently broadcast 6 variants of C4 (London, South and East, Midlands, North, Northern Ireland and Scotland) whereas the BBC broadcast 18 variants of BBC1. Ofcom considers that the number of regions and the number of regionalised channels is a transparent and simple proxy to measure the relative benefits that customers of the service receive and that there is a material difference in the “amount” of the service customers are using. Ofcom therefore considers that Option 3 is a more appropriate method for allocating the common costs of Regionalisation service than Option 2.
- 7.22 Ofcom therefore proposes that an allocation of the common costs associated with the Regionalisation TPS should be recovered from customers of the service in a manner that is proportionate to the number of regions and regionalised channels they operate (Option 3).

### Common cost allocation of Pay-TV Conditional Access TPS

- 7.23 Ofcom’s analysis has initially concluded that the incremental costs associated with operating a Pay-TV CA service on the Sky DSat platform may be high relative to Basic EPG Listing and Regionalisation. It is therefore important that these costs be allocated to customers based on the benefits they receive to ensure the allocation is FRND. Consistent with the objectives of ensuring transparency, predictability and practicability Ofcom has considered the following options for allocating common costs to the individual customer of the TPS:

<b>Option 1</b>	A fixed charge per pay-TV channel
<b>Option 2</b>	A fixed charge per subscriber
<b>Option 3</b>	A fixed charge per pound of subscriber revenue
<b>Option 4</b>	A charge reflective of both advertising and subscription revenues

- 7.24 Ofcom considers that Option 1, whilst simple and transparent, does not sufficiently reflect the benefit received by the broadcaster from using the service. A per channel charge does not reflect the revenues the service generates and would result in a small, niche Pay-TV channel contributing the same amount to common costs as a mass market channel with a high retail price. This is likely to lead to many small channels being unable to afford the common cost allocation and therefore reducing plurality. Similarly, Option 2 does not reflect the retail price the viewer pays. This may



dis-incentivise broadcasters from reducing retail prices to increase take up and would therefore be inconsistent with Ofcom's duties to promote consumer access to services.

- 7.25 Ofcom recognises that, given the range of pay-TV broadcaster business models, currently and prospectively, a charge related to subscription or Pay Per View (PPV) revenue (Option 3) would not constitute an exact measure of the benefit derived by these broadcasters from pay-TV Conditional Access. However, such a charge would be relatively straightforward to calculate, and hence transparent and predictable. Further, it is likely to be reflective of the benefit a broadcaster would gain from access to the platform, as the main reason to seek access is to be able to charge viewers for access to content. Linking charges to revenues would also incentivise broadcasters to adjust retail price points to maximise profits and potentially reduce retail prices paid by consumers. Ofcom considers that such a proxy would be equally applicable to broadcasters who are offering a service to residential and commercial premises.
- 7.26 On the surface, Option 4 looks to be a more precise proxy of benefit than Option 3. However, in looking at the appropriate benefit from purchasing a Pay-TV CA service, the broadcaster is purchasing a service that allows it to offer a Pay-TV service to viewers. The benefit, therefore, that is appropriate to each TPS Customer is uniquely the benefit of being able to sell Pay-TV services to end users that this TPS provides. As such, it would not be appropriate to consider advertising revenue in setting charges for Pay-TV CA. In addition, Option 4 would require a great deal of information being provided by the broadcaster to the TPS Provider that is not typically in the public domain and is not easy to calculate – i.e. the incremental advertising revenue from being available on the platform. As such, Option 4 is not likely to meet Ofcom's criteria of simplicity, transparency and practicability.
- 7.27 In summary, Ofcom's preferred and proposed proxy for FRND allocation of common costs for the Pay-TV CA service on Sky DSat is a "pence per subscription or PPV pound of revenue" charge. Ofcom would expect this proxy to apply equally to both residential and commercial Pay-TV revenues. Ofcom would not expect the charge per subscriber pound to vary between customers without objective justification.

### Common cost allocation of Geographic Masking TPS

- 7.28 Ofcom's analysis of information provided during the pre-consultation stage has lead it to conclude initially that the incremental costs associated with providing a Geographic Masking service on the Sky DSat platform to be relatively low compared to Pay-TV CA services.
- 7.29 Further, Ofcom has concluded that defining exact proxies for benefits received from using this service is impractical and it would require the customer to divulge confidential business information. For example, for some broadcasters the service may be mandatory in order to comply with distribution agreements they have with rights holders, whereas other broadcasters may choose not to use the service and instead compensate rights holders for any potential loss of revenue arising due to its channels being available "free to air" outside of the intended geographic territory.
- 7.30 Due to the relatively low common costs associated with the service and the complexity of defining transparent and simple proxies for benefits Ofcom proposes that a recovery of common costs based on a "per encrypted channel" basis would be considered FRND for the Geographic Masking service offered on the Sky DSat platform.



### Common cost allocation of Access Control TPS

- 7.31 Ofcom recognises that the market for interactive TV services continues to evolve and new revenue models are constantly emerging. Consequently, Ofcom recognises that attempting to define a single proxy to measure the benefits broadcasters receive from operating interactive TV applications may not be practical and, in the worst case, may constrain innovation.
- 7.32 However, Ofcom would still expect the pricing and terms for AC services to reflect Ofcom's duties of promoting plurality and range of service and service providers and, to this end, Ofcom would expect AC pricing methodologies to be transparent, predictable and based on simple, objectively measurable proxies of benefit.
- 7.33 Additionally, Ofcom would expect the TPS Provider to apply the cost recovery principle of "cost causation" and "distribution of benefits" to ensure customers pay a fair proportion of the costs that they have been partly responsible for causing.
- 7.34 Ofcom recognises the efforts made by Sky in publishing indicative charges for various types of interactive service. However, Ofcom expects that Sky would offer these published charges to all AC customers unless there were objective justifications for not doing so and, if such justifications were demonstrated, the difference in terms would be proportionate to the difference in requirements of the customers. Terms that did not meet these criteria may be considered to be discriminatory.
- 7.35 Due to the high levels of innovations and change possible with AC services, Ofcom notes that ensuring non-price terms are FRND is especially important for these services.

### TPS Provider Common costs

- 7.36 Certain costs of the TPS Provider are likely to be common to all TPS. For example, the costs of administrative support and general management (but not including customer acquisition costs, the allocation of which is discussed in section 6).
- 7.37 In Ofcom's view the most appropriate approach to allocation of these costs across services is in proportion to the incremental costs of each particular service (subject to no customer being priced off). This is consistent with the approach typically taken in other regulated industries such as telecommunications.

*Question 7.1 Do you agree that Ofcom's proposed charging structures for TPS would result in charges that would be FRND?*

## Section 8

# Non price terms and conditions

- 8.1 This section presents some basic principles that Ofcom proposes to consider in assessing whether particular non-price terms and conditions associated with the provision of a TPS service are FRND.

### Basic principles

- 8.2 The principles of transparency, predictability and practicability apply equally to price and non-price terms relating to TPS. Any differences in non-price terms and conditions offered to different customers would be considered discriminatory unless the TPS Provider was able to demonstrate that the differences were proportionate and objectively justified.
- 8.3 Non price terms and conditions which Ofcom would expect to be offered on an FRND basis include (but are not limited to):
- Lead times associated with the provision of a TPS
  - Product information including knowledge of new product development, changes to existing products, pricing packages or investment plans
  - Support levels, availability and performance of the TPS
  - Renewal rights and/or termination rights within contracts

### Risk sharing

- 8.4 Ofcom is aware that in the past some TPS Customers were offered lower TPS pricing on the basis that this reflected the risk that they had undertaken as an early entrant on a new and unproven digital platform.
- 8.5 It is Ofcom's view that digital TV has proven to be a success in the UK, with over 60% of households receiving a digital TV service, and that there is no longer a material risk that Pay-TV and Free-to-View television broadcasters will not achieve access to sufficient homes to support their business cases. Ofcom therefore proposes that, going forward, pricing differentials between TPS Customers justified on the basis that one customer purchased access to the platform earlier than the other (and hence took on a higher commercial risk) would no longer be considered sufficient justification to allow price discrimination.
- 8.6 However, Ofcom recognises the possibility that TPS Providers and prospective TPS Customers may wish to share the risk of developing a new TPS, or a retail service based on a new TPS, in the future. To ensure the objectives of transparency and predictability are maintained, Ofcom proposes that the costs and benefits of risk sharing associated with technology or platform development are accounted for outside of the TPS terms and conditions. Consequently, parties who invest in the development of new TPS related technologies in conjunction with the TPS Provider would subsequently purchase the TPS service on equal terms to all other customers and recover any financial return associated with the investment from the total revenues generated by the new TPS.
- 8.7 Ofcom considers that this approach would provide transparency and predictability for third party TPS Customers whilst ensuring investment in new technologies and

services is not dis-incentivised. Regulatory requirements on TPS Providers to provide separate accounts for CA and AC services, and appropriate information on EPG services, will help to ensure that the financial arrangements associated with risk sharing are transparent to Ofcom and that excessive returns are not earned.

### TPS bundling

- 8.8 Ofcom expects that TPS Providers will strive to ensure that TPS are not unnecessarily “bundled” such that TPS Customers are forced to purchase TPS that they do not require in order to gain access to services they do require. Ofcom may not consider terms that unnecessarily required TPS Customers to purchase TPS that they did not require, to be fair and reasonable.
- 8.9 Ofcom expects that TPS Providers will make reasonable effort to consider the requirements of potential customers when developing a new TPS to ensure that unnecessary bundling of functionality is avoided. Ofcom might consider a situation in which one potential TPS Customer was given significantly more input to the design of a new TPS than another customer could potentially be discriminatory unless there was objective justification.

### Economies of Scale

- 8.10 Ofcom acknowledges that the incremental costs incurred by a TPS Provider in providing multiple instance of a service to a customer may benefit from economies of scale. For example, the provision of incremental equipment to support encryption services for a new pay-TV TPS Customer may be the same for one channel as it is for multiple channels. In such an instance Ofcom would expect the benefits of economies of scale to be passed onto the TPS Customer.
- 8.11 However, Ofcom would not normally expect that TPS Customers would receive discounts on charges that relate to the recovery of common costs in situations where they purchase multiple instances of a service. Under the principles set out in this document common costs should be recovered on the basis of benefits received and linked to transparent and simple proxies. It is Ofcom’s proposed view that any deviation away from charges that are directly linked to these proxies, such as offering a discount to customers who purchase multiple instances of a service, are unlikely to be regarded as FRND because they no longer meet the objectives of transparency and predictability.

### Non TPS contracts

- 8.12 Ofcom is aware that some TPS Customers must acquire other services from third parties to enable them to operate their service. For example, operators of interactive TV services on the DSat platform are required to put in place insurance policies to cover any claims made against them for harm their services might do to the integrity or operation of the platform and pay-TV operators require customer management services to manage subscribers.
- 8.13 Ofcom may be minded to consider the charges that TPS Customers are required to pay for non-TPS services that are related to accessing TPS in the event of a dispute. In such circumstances Ofcom may pay particular attention to situations in which the non-TPS services were provided by the TPS Provider or its associated companies and terms were such that customers were dis-incentivised from investing in new television, radio or interactive services.

## Section 9

# Accounting separation and publication of charges

- 9.1 In addition to the conditions placed on TPS Providers to offer services on FRND terms, other conditions apply. This section sets out options that Ofcom has considered in interpreting the conditions placed on TPS Providers to keep separate financial accounts. It also re-states the TPS Provider's obligation to publish charges and terms and conditions. Ofcom's assessment of these options and its proposed approach are presented. Details of the relevant condition are provided in annex 5.

## Separation of financial accounts

- 9.2 The regulatory regime obliges the TPS Provider to keep separate financial accounts regarding its operation of Conditional Access and Access Control services. Ofcom has in the past requested these accounts when complaints have been brought to it. However, Ofcom does have the power, amongst other things, to direct a TPS Provider to prepare and deliver such accounts to it on an annual basis.
- 9.3 In reviewing the Current Guidelines, Ofcom has considered the following options relating to the publication of accounting documents and has considered whether changes to the current practices would better enable TPS Customers and TPS Providers to judge whether terms are FRND:

<b>Option 1</b>	TPS Provider to annually publish audited financial statement of the business
<b>Option 2</b>	No change to existing practice i.e. no publication of accounts

- 9.4 In Option 1 Ofcom has considered whether an obligation on a TPS Provider to publish a set of independently audited financial statements would provide TPS Customers increased transparency of charging structures and allow them to better judge whether terms they were offered are FRND.
- 9.5 Historically, Ofcom (and its predecessors) has assessed the reasonableness of returns and of attribution of costs to individual TPS on the basis of a discounted cash-flow (DCF) model. In these circumstances publication of annual financial statements would not provide sufficient transparency to enable an assessment of the reasonableness or otherwise of a particular charge which was based on the recovery of costs over a longer period, including forecasts of future costs and revenues which would need to remain confidential.
- 9.6 However, under the proposed approach to assessment of cost recovery based on financial accounts (set out in Section 5), the publication of financial statements is more likely to provide a meaningful level of transparency.
- 9.7 This said, the regulatory costs associated with requiring the TPS Provider to produce financial statements on a regular basis is not insignificant and as a consequence Ofcom is not proposing to require the TPS Provider to publish financial statements at

this present time. However, Ofcom may still request separated financial statements in the event of a dispute and may review the need for publication of separated financial statements in the future if this was viewed as necessary for securing a pricing regime that was FRND.

### Publication of charges, terms and conditions

- 9.8 Under the Conditions, TPS Providers are obliged to publish their charges or the methodology for determining charges, terms and conditions.
- 9.9 In the past Sky has stated that the published charges are “a starting point for negotiation” and that the charging methodology that they had adopted was to enter into commercial negotiation with the customer. Ofcom considers that such an approach does not necessarily result in the levels of transparency and predictability required to meet Ofcom’s duties in that it does not allow customers to assess whether the charges they are offered are FRND.
- 9.10 In order to achieve its statutory duties set out in section 4, Ofcom expects that charges, or methodology for determining charges, published by the TPS Provider should be those that all TPS Customers would pay. Ofcom may consider any different charges offered to a TPS Customer, whether above or below the published charges, to be discriminatory unless there is an objective justification for the different charge.

## Annex 1

# Responding to this consultation

## How to respond

Ofcom invites written views and comments on the issues raised in this document, to be made by **5pm on 1 February 2006** (Deadline extended on 18 January 2005).

Ofcom strongly prefers to receive responses as e-mail attachments, in Microsoft Word format, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response cover sheet (see Annex 3), among other things to indicate whether or not there are confidentiality issues. The cover sheet can be downloaded from the 'Consultations' section of our website.

Please can you send your response to first [richard.moore@ofcom.org.uk](mailto:richard.moore@ofcom.org.uk).

Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.

### Richard Moore

Floor 2  
New Media Technology  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

Fax:020 7981 3730

Note that we do not need a hard copy in addition to an electronic version. Also note that Ofcom will not routinely acknowledge receipt of responses.

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, and how Ofcom's proposals would impact on you.

## Further information

If you have any 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

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](http://www.ofcom.org.uk), ideally on receipt (when respondents confirm on their response cover sheet that this is acceptable).

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.

## Provision of Technical Platform Services

Ofcom reserves its power to disclose any information it receives where this is required to carry out its legal requirements. Ofcom will exercise due regard to the confidentiality of information supplied.

Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use, to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website, at [www.ofcom.org.uk/about\\_ofcom/gov\\_accountability/disclaimer](http://www.ofcom.org.uk/about_ofcom/gov_accountability/disclaimer).

## Next steps

Following the end of the consultation period, Ofcom intends to publish a statement around the end of March 2006.

Please note that you can register to get automatic notifications of when Ofcom documents are published, at [http://www.ofcom.org.uk/static/subscribe/select\\_list.htm](http://www.ofcom.org.uk/static/subscribe/select_list.htm).

## Ofcom's consultation processes

Ofcom is keen to make responding to consultations easy, and has published some consultation principles (see Annex 2) which it seeks to follow, including on the length of consultations.

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](mailto: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, whose views are less likely to be obtained in a formal consultation.

If you would like to discuss these issues, or Ofcom's consultation processes more generally, you can alternatively contact Vicki Nash, Director, Ofcom Scotland, who is Ofcom's consultation champion:

Vicki Nash  
Ofcom Scotland  
Sutherland House  
149 St Vincent St  
Glasgow G2 5NW  
Tel: 0141 229 7401  
Fax: 0141 229 7433  
E-mail: [vicki.nash@ofcom.org.uk](mailto: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 organisations 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](http://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 cover sheet for responses (see below) and would be very grateful if you could send one with your response. 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 cover sheets 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 cover sheet 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 in the form of a Microsoft Word attachment to an email. Our website therefore includes an electronic copy of this cover sheet, which you can download from the 'Consultations' section of our website.
- 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 cover sheet only so that we don't have to edit your response.

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

**BASIC DETAILS**

Consultation title: Provision of Technical Platform Services

To (Ofcom contact): Richard Moore

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?

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

**DECLARATION**

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. 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

*Question 2.1 – How do you think the transition from Current Guidelines to the New Guidelines could be best managed?*

*Question 2.2 – Do you agree that it is appropriate and beneficial that Ofcom issues revised guidelines at this time?*

*Question 2.3 – Do you agree that it is better to issue revised guidelines rather than to retract the Current Guidelines and not replace them?*

*Question 4.1: Do you agree with Ofcom's view that transparency and predictability of charging methodologies are key in determining whether pricing and terms for TPS are FRND?*

*Question 4.2: Do you agree that the transparency and reduced regulatory burden provided by practicability is sufficiently beneficial to justify sacrificing some of the accuracy of creating individual terms for individual customers that may be achieved through commercial negotiation?*

*Question 5.1: Do you agree with Ofcom's proposed view that a financial accounts based approach to the assessment of cost recovery on the Sky DSat platform is the most appropriate?*

*Question 6.1 Do you agree that an approach requiring Sky to recover customer equipment costs directly from residential customers is not appropriate or justified at the current time?*

*Question 6.2 Do you think that Ofcom should consider alternative approaches to the allocation of customer equipment costs?*

*Question 6.3 Do you agree with Ofcom's assessment of alternative approaches to the allocation of customer equipment costs?*

*Question 6.4 Do you agree that the option of setting a fixed percentage of customer equipment costs to be allocated to free-to-air services is preferable to the alternative approaches?*

*Question 6.5 Do you consider that a move away from an approach which relies on commercial negotiation between a TPS Provider and TPS Customers to determine TPS charges and terms will have an adverse affect on (i) you (ii) Ofcom's duties to promote plurality and range of television and radio services and service providers.*

*Question 6.6 Do you agree with Ofcom's proposed treatment of common marketing costs?*

## Provision of Technical Platform Services

*Question 6.7 Do you agree that Ofcom's proposal to allocate common marketing costs between Pay TV and Free-to-View customers in the same way as customer equipment costs?*

*Question 7.1 Do you agree that Ofcom's proposed charging structures for TPS would result in charges that would be FRND?*

## Annex 5

# The legal framework

A5.1 This Annex provides a summary of the legislation relevant to each of the services this Consultation Document applies to.

## A) CONDITIONAL ACCESS

### Conditional Access Framework

A5.2 The regulation of conditional access services is harmonised at the EU level through the Access Directive<sup>17</sup>. Article 6 of the Access Directive provides as follows:

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

2. In the light of market and technological developments, Annex I may be amended in accordance with the procedure referred to in Article 14(3).

3. Notwithstanding the provisions of paragraph 1, Member States may permit their national regulatory authority, as soon as possible after the entry into force of this Directive and periodically thereafter, to review the conditions applied in accordance with this Article, by undertaking a market analysis in accordance with the first paragraph of Article 16 of Directive 2002/21/EC (Framework Directive) to determine whether to maintain, amend or withdraw the conditions applied.

Where, as a result of this market analysis, a national regulatory authority finds that one or more operators do not have significant market power on the relevant market, it may amend or withdraw the conditions with respect to those operators, in accordance with the procedures referred to in Articles 6 and 7 of Directive 2002/21/EC (Framework Directive), only to the extent that:

(a) accessibility for end-users to radio and television broadcasts and broadcasting channels and services specified in accordance with Article 31 of Directive 2002/22/EC (Universal Service Directive) would not be adversely affected by such amendment or withdrawal, and

(b) the prospects for effective competition in the markets for:

(i) retail digital television and radio broadcasting services, and

(ii) conditional access systems and other associated facilities,

would not be adversely affected by such amendment or withdrawal.

<sup>17</sup> Directive 2002/19/EC.

## Provision of Technical Platform Services

An appropriate period of notice shall be given to parties affected by such amendment or withdrawal of conditions.

4. Conditions applied in accordance with this Article are without prejudice to the ability of Member States to impose obligations in relation to the presentational aspect of electronic programme guides and similar listing and navigation facilities.”

A5.3 Article 6 (1) of the Access Directive specifically requires Member States to ensure that, in relation to conditional access to digital television broadcast to viewers, the conditions laid down in Annex I, Part I of that Directive apply.

A5.4 Specifically, Annex I (b), Part 1 Access Directive states that:

“(b) all operators of conditional access services, irrespective of the means of transmission, who provide access services to digital television and radio services and whose access services broadcasters depend on to reach any group of potential viewers or listeners are to: offer to all broadcasters, on fair, reasonable and non-discriminatory basis compatible with Community competition law, technical services enabling the broadcasters’ digitally-transmitted services to be received by viewers or listeners authorised by means of decoders administered by the service operators, and comply with Community competition law.”

A5.5 These provisions of the Access Directive set out above have been implemented in the UK by sections 45(5), 73(5), 75(2) and 76 of the Act. Section 45 of the Act generally allows Ofcom to set ex ante conditions on various persons, including ‘access-related’ conditions, which, pursuant to subsection (5), are conditions authorised by section 73. Section 73(5) of the Act provides that an access related condition may be one which is set under section 75(2) of the Act.

A5.6 Section 75(2) of the Act imposes a duty on Ofcom:

“to ensure:

(a) that access-related conditions are applied to every person who provides a conditional access system in relation to a protected programme service<sup>18</sup>.”

A5.7 A protected programme service is defined as:

“a programme service the programmes included in which cannot be viewed or listened to in an intelligible form except by the use of a conditional access system<sup>19</sup>.”

A5.8 A conditional access system is defined as:

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

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

<sup>18</sup> Section 75 (2) (a) of the Communications Act 2003.

<sup>19</sup> Section 75 (3) of the Communications Act 2003.

(b) an authorisation to view it, or to listen to it, on a particular occasion,<sup>20</sup>

A5.9 In order to fulfil the duty imposed by section 75 of the Act, the Director General of Telecommunications determined under section 45 of the Act in his conditional access conditions notification (the 'Conditional Access Notification') that various conditional access conditions ('CA Conditions') applied only to Sky Subscriber Services Limited ('SSSL').<sup>21</sup>

### Relevant Conditional Access Conditions

A5.10 The following paragraphs consider the application of the CA Conditions relevant to this consultation:

#### i) Provision of access on fair and reasonable terms

A5.11 **CA Condition 1** requires the Provider to provide to a Broadcaster a Conditional Access Service in relation to Protected Programme Services<sup>22</sup>:

"1.1 Where a Broadcaster reasonably requests in writing Conditional Access Services in relation to the provision of Protected Programme Services, the Provider shall provide those Conditional Access Services. The Provider shall also provide such Conditional Access Services in relation to the provision of Protected Programme Services as the Director may from time to time direct.

1.2 The provision of Conditional Access Services in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct.

1.3 The Provider shall comply with any direction the Director may make from time to time under this Condition."

#### ii) Not to unduly discriminate

A5.12 In addition, **CA Condition 5** imposes on the Provider a specific prohibition not to unduly discriminate in matters connected with the provision of CA Services to Broadcasters:

"5.1 The Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with the provision of Conditional Access Services.

<sup>20</sup> Section 75 (3) of the Communications Act 2003.

<sup>21</sup> *The regulation of conditional access: setting of regulatory conditions*, explanatory statement and formal notification pursuant Section 48 (1) of the Communications Act 2003 published by Ofcom on 24 July 2003, [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/2003/condac0703.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/condac0703.pdf).

<sup>22</sup> A 'Broadcaster' is defined as, including the British Broadcasting Corporation, "any person to whom a licence has been granted to provide, deliver or diffuse television services under one or more of the Wireless Telegraphy Act 1949, Cable and Broadcasting Act 1984 (and continued in force by the Broadcasting Act 1990), Broadcasting Act 1990, Broadcasting Act 1996, or any person acting on behalf of such a person."

5.2 In this Condition, the Provider shall be unduly discriminating where the discrimination has a material adverse effect on competition and has no objective justification.”

### iii) Publication of charges

A5.13 The Provider is obliged to publish its charges or the method for determining its charges, terms and conditions as set out by **CA Condition 6** and to ‘do those things’ set out in Condition 6 (a) (i) to (iii) (e.g. provide Conditional Access Services) at the charges and on the other terms and conditions so published.

“6.1 The Provider shall except in so far as the Director may otherwise consent in writing:

(a) publish in the manner and at all times specified in paragraph 6.2(a) a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and condition on which it offers:

(i) to provide each Conditional Access Service, or package of such Services;

(ii) to connect to any part of the Conditional Access System in accordance with an obligation imposed by or under these conditions; or

(iii) to grant permission to connect Electronic Communications Networks to or to provide Conditional Access Services by means of any of the Conditional Access Systems; and

(b) where it does any of the things mentioned in paragraph 6.1(a)(i) to 6.1(a)(iii), do those things at the charges and on the other terms and conditions so published. [...]”

### iv) Keeping of financial accounts

A5.14 The Provider is obliged to keep separate financial accounts regarding its activities as a provider of CA Services as set out in **CA Condition 3**.

“3.1 Except in so far as the Director may consent otherwise in writing, the Provider shall keep separate financial accounts regarding its activities as a provider of Conditional Access Services in the manner set out below. [...]”

3.5 The Provider shall comply with Conditions 3.6 to 3.18 from 24 December 2003 as appropriate.

3.6 The Provider shall ensure that its accounting and reporting arrangements (including Accounting Separation Systems) are sufficient to enable the Provider, at all times, to be capable of preparing in relation to any period a financial statement in accordance with the Accounting Documents. These accounting and reporting arrangements shall be, in the opinion of the Director, suitable and sufficiently transparent to demonstrate at any, or over, time and in relation to any period that the Provider’s charges for



Conditional Access Services are, or have been, non discriminatory, fair and reasonable.

3.7 The Provider shall maintain a separation for accounting purposes of Accounting Separation Activities from other activities, so as to:

(a) identify all elements of revenue, cost, assets and liabilities, with the basis of their calculation and the Detailed Attribution Methods used, related to the Accounting Separation Activities including an itemised breakdown of fixed assets; and

(b) ensure that Accounting Separation Activities are identified and are recorded at an appropriate amount in accordance with the Accounting Documents.

3.8 The Provider shall maintain accounting records in a form which, on a historic cost basis and on a current cost basis:

(a) enables each of the Accounting Separation Activities to be separately identified and the revenues, costs, assets and liabilities of the Accounting Separation Activities to be separately attributable; and

(b) which shows and explains the transactions of each of the Accounting Separation Activities.

3.9 The accounting records referred to in paragraph 3.8 and all associated documentation shall be:

(a) maintained in accordance with the Accounting Documents;

(b) maintained in order to ensure compliance with this Condition;

(c) sufficient to enable the Financial Statements to have expressed upon them a Standard Audit Opinion; and

(d) sufficient to ensure that charges for Conditional Access Services can be shown to be fair and reasonable and not to be unduly discriminatory.

[...]"

A5.15 For further text and definitions, see the full text of the CA Conditions and defined terms at:

[www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/cont0903.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/cont0903.pdf)

## **B) THE ELECTRONIC PROGRAMME GUIDE AND ACCESS CONTROL CONDITIONS**

### **Electronic Programme Guide and Access Control Services Framework**

A5.16 Article 5 of the Access Directive makes specific provision for the regulation of electronic programme guide ('EPG') and access control ('AC') services as follows:

“1. National regulatory authorities shall [...], encourage and where appropriate ensure, in accordance with the provisions of this Directive, adequate access and interconnection, interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users.

In particular, [...] national regulatory authorities shall be able to impose [...]:

(a) to the extent that is necessary to ensure end-to-end connectivity, obligations on undertakings that control access to end-users, including in justified cases the obligation to interconnect their networks where this is not already the case;

(b) to the extent necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms.”

A5.17 The facilities referred to in Article 5 (1) (b) at Annex I, Part II of the Access Directive are:

“(a) Access to application program interfaces (APIs);

(b) Access to electronic programme guides (EPGs).”

A5.18 Article 5(1)(b) of the Access Directive is implemented in the UK by Sections 73(2) and 74(2) of the Act. Section 45 of the Act allows Ofcom to set different types of conditions, including access-related conditions. Section 45(5) provides that an access-related condition is one that is authorised by Section 73, and Section 74(2) states that the conditions that may be set under Section 73(2) includes those conditions set out in Section 74(2) of the Act.

A5.19 Section 74(2) of the Act enables Ofcom to impose:

“[...] conditions imposing obligations on a person providing facilities for the use of application programme interfaces or electronic programme guides as OFCOM consider to be necessary for securing:

(a) that persons are able to have access to such programme services provided in digital form as OFCOM may determine; and

(b) that the facility for using those interfaces or guides is provided on terms which –

(i) are fair and reasonable; and

(ii) do not involve, or tend to give rise to, any undue discrimination against any person or description of persons<sup>23</sup>.”

<sup>23</sup> Section 74 (2) of the Communications Act 2003.

A5.20 An application programme interface is defined in Section 74 (3) and (4) of the Act as:

“[...] a facility for allowing software to make use, in connection with any of the matters mentioned [below], of facilities contained in other software”;

The matters mentioned [above], in the definition of "application programme interface", are-

- (a) allowing a person to have access to programme services;
- (b) allowing a person, other than a communications provider or a person who makes associated facilities available, to make use of an electronic communications network by means of which a programme service is broadcast or otherwise transmitted;
- (c) allowing a person to become the end-user of a description of public electronic communications service.”

A5.21 An electronic programme guide is defined in s 74 (3) of the Act as:

“a facility by means of which a person has access to any service which consists of-

- (a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes included in any one or more programme services; and
- (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide;”

A5.22 The Director duly imposed on SSSL a number of regulatory conditions relating to the provision of EPG (the ‘EPG Conditions’) and Access Control (the ‘AC Conditions’) services, which were carried over by means of “continuation notices” from the regulatory regime that was in place until 24 July 2003<sup>24</sup>. The Director further explained in a statement in September 2003, his reasons for Continuing Licence Conditions after 25 July 2003, (see specifically paragraphs 3.121 and 3.122).<sup>25</sup> For the purpose of this Annex, the continuation notices are referred to as the EPG Continuation Notice<sup>26</sup> and the AC Continuation Notice.<sup>27</sup>

<sup>24</sup> Continuation notice to a class of persons defined as the licensee for the purposes of the provision of electronic programme guide services under paragraph 9 of schedule 18 to the communications act 2003, 23 July 2003, which continued certain provisions of the class licence to run telecommunications systems for the provision of conditional access services granted by the Secretary of State for Trade and Industry on 1 August 2001 under section 7 of the Telecommunications Act 1984.

<sup>25</sup> *Continuing Licence Conditions after 25 July*, 10 September 2003, [http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/cont0903.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/cont0903.pdf).

<sup>26</sup> *Continuation Notice to a class of persons defined as the licensee for the purposes of the provision of electronic programme guide services under paragraph 9 of schedule 18 to the Communications Act 2003*, 23 July 2003.

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/index.htm](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/index.htm).

<sup>27</sup> *Continuation Notice to a class of persons defined as the licensee for the purposes of the provision of access control services under paragraph 9 of schedule 18 to the Communications Act 2003*, 23 July 2003.

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/acs\\_class.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/acs_class.pdf).

## Relevant Electronic Programme Guide Conditions

A5.23 The following paragraphs consider the application of the EPG Conditions relevant to this consultation:

### i) Provision of access on fair reasonable and non-discriminatory basis

A5.24 EPG **Condition 1** requires the Licensee (i.e. currently SSSL) to provide an EPG Service to Third Parties in respect of decoders administered by it on a fair reasonable and non-discriminatory basis.<sup>28</sup>

“1.1 Where a Third Party requires the provision of an Electronic Programme Guide Service in respect of decoders administered by the Licensee, the Licensee shall offer that Service to that person on a fair reasonable and non-discriminatory basis. [...]”

A5.25 An EPG Service is defined in the Conditions as:

“a service which consists of -

(a) the listing or promotion, or both the listing and promotion, of some or all of the programmes included in any more or more programme services the providers of which are or include persons other than the provider of the guide; and

(b) a facility for obtaining access, in whole or part, to the programme service or services listed or promoted in the guide<sup>29</sup>.”

### ii) Not show undue preference or exercise undue discrimination

A5.26 In addition, EPG **Condition 11** imposes on the Licensee a specific prohibition on undue preference or discrimination in the provision of EPG Services to third parties:

“11.1 The Licensee shall not (whether in respect of the charges or other terms or conditions applied or otherwise) show undue preference to or exercise undue discrimination against particular persons or persons of any class or description as respects:

(a) the provision of any Electronic Programme Guide Services, or

(b) the connection to any of the Applicable Systems of any other Conditional Access System or Transmission System which is not and is not to be comprised in any of the Applicable Systems.

11.2 The Licensee shall be deemed to have shown such undue preference or to have exercised such undue discrimination if it unfairly favours to a material extent a business carried on by it in

<sup>28</sup> A ‘Third Party’ is defined as “a Broadcaster”. A ‘Broadcaster’ is defined as, including the British Broadcasting Corporation, “any person to whom a licence has been granted to provide, deliver or diffuse television services under one or more of the Wireless Telegraphy Act 1949, Cable and Broadcasting Act 1984 (and continued in force by the Broadcasting Act 1990), Broadcasting Act 1990, Broadcasting Act 1996, or any person acting on behalf of such a person, and any person providing Digital Television Services.”. ‘Digital Television Services’ has the same meaning as in Directive 95/47/EC on the use of standards for the transmission of television signals which was in force prior to its repeal by the Framework Directive.

<sup>29</sup> Schedule 1, EPG Conditions.

relation to the doing of any of the things mentioned in paragraph 11.1 so as to place at a significant competitive disadvantage persons competing with that business.

11.3 Any question relating to whether any act done or course of conduct pursued by the Licensee amounts to such undue preference or such undue discrimination shall be determined by the Director, but nothing done in any manner by the Licensee shall be regarded as undue preference or undue discrimination if and to the extent that the Licensee is required or expressly permitted to do such thing in that manner by or under any provision of this Licence.”

### iii) Publication of Charges

A5.27 The Licensee is obliged to publish its charges or the method for determining its charges, terms and conditions as set out by EPG **Condition 14** and to do those things mentioned in Condition 14.1(a) (i) to 14.1(a) (iii) (e.g. to provide EPG Services) at the charges and on the other terms and conditions so published.

“14.1 The Licensee shall except in so far as the Director may otherwise consent in writing:

(a) publish in the manner and at the times specified in paragraph 14.2(a) a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and condition on which it offers:

(i) to provide each Electronic Programme Guide Service, or package of such services:

(ii) to connect to any of the Applicable Systems any other telecommunication system (which is not and not to be comprised in any of the Applicable Systems) in accordance with an obligation imposed by or under this Licence: or

(iii) to grant permission to connect other telecommunication systems to or to provide Electronic Programme Guide Services by means of any of the Applicable Systems:

and

(b) where it does any of the things mentioned in paragraph 14.1(a)(i) to 14.1(a)(iii) do those things at the charges and on the other terms and conditions so published. [...]”

### iv) Keeping of financial accounts

A5.28 There is no condition requiring the Licensee to keep separate financial accounts.

A5.29 For further text and definitions, see the full text of the EPG Conditions and defined terms at:

[www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/epg\\_class.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/epg_class.pdf)

A5.30 On 15 January 2004, Ofcom proposed new access conditions for providers of EPG Services<sup>30</sup>. At the time of writing, these new EPG Conditions have not been finalised and the existing EPG Conditions referred to above remain in force.

### Relevant Access Control Conditions

A5.31 The following paragraphs consider the application of the AC Conditions relevant to this consultation:

#### i) Provision of access on fair and reasonable terms

A5.32 AC **Condition 10** requires that where the “Licensee is a Regulated Supplier” (i.e. currently SSSL) it must provide an Access Control Service to any Third Party who requests it.<sup>31</sup>

“10.1 [...] at the request of any Third Party who requires Access Control Services in order to supply a Relevant Other Telecommunication Service of any description, the Licensee shall supply such Access Control Services to that Third Party on fair and reasonable terms. [...]”

A5.33 Access Control Services are defined as:

“telecommunication services, other than Network Services, Electronic Programme Guide Services or Conditional Access Services, by means of which the supply to end-users of a Relevant Other Telecommunication Service is controlled and which are provided to any person, including the Licensee, providing telecommunication services and without prejudice to the generality of the foregoing includes:

(i) Message Processing Services, that is to say any encryption, scrambling or other processing of Messages associated with or incorporated in a Relevant Other Telecommunication Service of any description prior to a transmission to an Access Device;

(ii) Authentication Services, that is to say either or both of:

(A) services which identify an end-user or an Access Device in order to permit or deny access of that end-user or access device to a Relevant Other Telecommunication Service; or

(B) services which identify a Relevant Other Telecommunication Service in order to permit it to operate with an Access Device;

(iii) Access Device Management Services, that is to say the actuation, control or operation, or the remote actuation, control or operation of Access Devices;

(iv) Selection Services, that is to say the processing by an Access Device or the preparation and transmission to an Access Device of

<sup>30</sup> See *The regulation of Electronic Programme Guides*, published at [http://www.ofcom.org.uk/consult/condocs/epg/epg/condoc\\_150104.pdf](http://www.ofcom.org.uk/consult/condocs/epg/epg/condoc_150104.pdf)

<sup>31</sup> “Third Party” is defined as “a person who provides Relevant Other Telecommunications Services”. For a definition of a Relevant Other Telecommunications Services, see paragraph A5.34 of this annex.

Messages which allow an end-user to initiate access to a Relevant Other Telecommunication Service or to select from a number of Relevant Other Telecommunication Services;

(v) Subscriber Management Services, that is to say either or both of:

(A) the preparation of and the preparation and supply, adaptation of, or adaptation and supply to end-users of Essential Components; or

(B) the preparation and transmission to Access Devices of Messages giving effect to end-users' decisions to subscribe to a Relevant Other Telecommunication Service;"

A5.34 Relevant Other Telecommunications Services are defined as:

"telecommunication services, whether supplied by the Licensee or any other party, but not including:

(i) any of the services specified in Section 72(2)(a) to (f), of the Broadcasting Act 1990 other than licensable programme services specified in Section 46(1) of that Act which are conveyed for reception at different times in response to requests made by different users of the service;

(ii) Digital Television Services; or

(iii) Network Services;"

## ii) Not unduly discriminate or show undue preference

A5.35 In addition, AC **Condition 14** imposes on the Licensee a specific prohibition on undue preference or discrimination in the provision of EPG Services to Third Parties.

"14.1 The Licensee shall not unduly discriminate or show undue preference in the manner set out below:

(a) the Licensee shall not (whether in respect of the charges or other terms or conditions applied or otherwise) show undue preference to, or exercise undue discrimination against, particular persons or persons of any class or description (in any market) as respects:

(i) the provision by means of the Applicable Systems of any Access Control Service provided by the Licensee (including offers of terms on which such services are to be provided) in the market determined by the Director for the purposes of the Regulated Supplier Determination;

(ii) the maintenance, adjustment, repair or replacement of any apparatus comprised in the Applicable Systems which is used for the provision of any Access Control Service in the market determined by the Director for the purposes of Regulated Supplier Determination;

(b) the Licensee may be deemed to have shown such undue preference or to have exercised such undue discrimination if it unfairly favours to a material extent a business carried on by it in



relation to the provision of any Access Control Service referred to in paragraph 14.1(a) above so as to place at a significant competitive disadvantage persons competing with that business; and

(c) any question relating to whether any act done or course of conduct pursued by the Licensee amounts to such undue preference or such undue discrimination shall be determined by the Director, but nothing done in any manner by the Licensee shall be regarded as undue preference or undue discrimination if and to the extent that the Licensee is required or permitted to do such thing in that manner by or under any provision of this Licence.”

### iii) Publication of charges

A5.36 The Licensee is obliged to publish its charges or the method for determining its charges, terms and conditions set out by AC **Condition 15.2** and not to depart from the published charges, terms and conditions (except as set out in Condition 15.4 which sets out Notice periods for changing charges, terms and conditions).

“15.1 The Licensee shall, except in so far as the Director may otherwise consent in writing, publish prices and act in the manner set out below.

15.2 Within 28 days after the date the Director has made the Regulated Supplier Determination above, the Licensee shall send to the Director a notice specifying, or specifying the method that is to be adopted, for determining the charges, terms and conditions on which it offers to:

(a) provide each description of Access Control Service in the market determined by the Director for the purposes of the Regulated Supplier Determination above;

(b) maintain, adjust, repair or replace any apparatus comprised in the Applicable Systems which is used in the provision of any telecommunication service comprised in such a specified Access Control Service.

15.3 The Licensee shall provide the services referred to in paragraph 15.2 above at the charges, terms and conditions so published, and shall not depart there from except in the circumstances set out in paragraph 15.4 below. [...]”

### iv) Keeping of financial accounts

A5.37 The Licensee is obliged to keep separate financial accounts regarding its operation of AC Services as set out in CA **Condition 12**.

12.1 [...] the Licensee shall keep separate financial accounts regarding its operation of Access Control Services save that where the Licensee also runs a Conditional Access System it shall not be obliged by this Condition to keep accounts in respect of Access Control Services separate from those in respect of Conditional Access Services provided by means of a Conditional Access System.



12.2 The Licensee shall maintain such accounting records dealing separately with its Access Control Services Business as will enable it to show separately and explain, in response to any request from the Director under paragraph 12.5, all the transactions to which paragraph 12.3 refers.

12.3 This paragraph refers to all transactions between the Licensee's Access Control Services Business and:

(a) any other business carried on by the Licensee whether in the United Kingdom or elsewhere;

(b) the business of any Associated Person whether in the United Kingdom or elsewhere;

(c) the business of any Third Party; and

(d) any other person or class of persons notified to the Licensee by the Director.

12.4 The Licensee shall update the accounting records referred to in paragraph 12.1 no less frequently than six monthly and those records shall include in particular the costs (including capital costs), revenue and a reasonable assessment of assets employed in and liabilities attributable to the Access Control Services Business, and separately, the amount of any material item of revenue, cost, asset or liability which has been either:

(a) charged from or to any other business of the Licensee or the business of an Associated Person or Third Party together with a description of the basis of the value on which the charge was made; or

(b) determined by apportionment or attribution from an activity common to the business and any other business of the Licensee or any Associated Person and, if not otherwise disclosed, the basis of the apportionment or attribution. [...]"

A5.38 For further text and definitions, see the full text of the AC Conditions and defined terms at:

[http://www.ofcom.org.uk/static/archive/oftel/publications/eu\\_directives/cont\\_notices/acs\\_class.pdf](http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/acs_class.pdf)

A5.39 On 14 November 2003, Ofcom proposed new access conditions for providers of Access Control Services<sup>32</sup>. At the time of writing, these new AC Conditions have not been finalised and the existing AC Conditions referred to above remain in force.

<sup>32</sup> See, *The future regulation of access control services*, published at [http://www.ofcom.org.uk/consult/condocs/access\\_control\\_services/access\\_control\\_condoc](http://www.ofcom.org.uk/consult/condocs/access_control_services/access_control_condoc)

## Annex 7

# Glossary of terms

Technical Platform Services (TPS)		Technical services offered by Digital TV platforms operators on regulated terms. They include Conditional Access services, Access Control services and EPG services (see Annex 5 for definitions)
TPS Provider		Digital TV operators who provide TPS services to 3 <sup>rd</sup> parties
TPS Customer		Television and radio broadcasters and operators of interactive TV services who purchase TPS from TPS Providers
Conditions		The regulatory conditions that TPS Providers must comply with (see Annex A for details)
Current Guidelines		The guidelines issues by Oftel in 2002 (see paragraph 2.5 for details)
Proposed Guidelines		The new guidelines that are proposed in this consultation document
New Guidelines		The guidelines that Ofcom will issue at the end of the consultation process
Pay-TV		Television or radio services provided to consumers on a subscription or pay per view (PPV) basis.
Free-to-View		Television or radio services provided to consumers free of subscription or pay per view charges. Free-to-view channels may be encrypted.

