

CONSULTATION LETTER SENT TO ALL HOLDERS OF DIGITAL ADDITIONAL SERVICE LICENCES ON 19 SEPTEMBER 2003

Copies of the “marked-up” version of the proposed DTAS licence referred to in this letter are available by request. Please email simon.collison@itc.org.uk

A. Consultation on Amendments proposed to be made to your Digital Additional Services Licence

1. As a result of the entry into force of the relevant provisions of the Communications Act (the “Act”), your current digital additional services (“DAS”) licence will be varied. Further to this variation, your licence will be called a digital additional television services (“DATS”) licence.
2. In accordance with its duty under Section 3(4) of the Broadcasting Act 1996 (the “1996 Act”), Ofcom intends to vary your licence by means of a notice of variation. In particular, it is proposed that the notice of variation will replace the Schedule of Conditions to your existing licence with a new Schedule of Conditions. The proposed amendments reflect changes to the regulatory regime brought about by the Act¹ and, so far as is possible within the provisions of the regulatory regime, attempt to ensure consistency across all classes of Ofcom licences, both for television and radio services. Overall, the proposed amendments will result in your licence to all intents and purposes being the same as the standard form DATS licence which Ofcom will issue to all new DATS licensees. The notice of variation, which will be issued upon the completion of the consultation process, will come into effect on the date of commencement of the relevant statutory provisions (expected to be 29 December 2003), from which date you will have to comply with the terms and conditions of your licence as amended by the notice of variation.
3. Under Condition 15 of your current licence, and in accordance with Section 3(4) of the 1996 Act, your licence cannot be varied unless you have been given a reasonable opportunity to make representations concerning the proposed variations. You will find enclosed with this letter a copy of the varied Schedule of Conditions to your DAS licence, both in ‘clean’ form and in ‘marked-up’ form showing changes from the current DAS licence. Please submit any representations you may have on the amendments to be made to your licence to Peter Bourton by 27 October 2003. We will consider all representations received from DAS licensees prior to finalising the variation of the DAS licence.
4. You will find below a description of some of the amendments (including deletions) that Ofcom proposes to make to your licence by the notice of variation (as described above at paragraph 2, the Schedule to the notice of variation will be identical to the Schedule to the standard form DATS licence). Please note that this description is only illustrative and is not exhaustive: it is only an indication of certain amendments which may affect your current rights and obligations. The fact that a provision has been crossed out in the ‘marked-up’ form of the varied DAS licence does not necessarily mean it has been omitted, as it may be found elsewhere in the varied DAS licence (see for example paragraph 25 below). Furthermore the fact that a provision has been deleted does not necessarily mean it is no longer enforceable. It may still be enforceable under another licence condition or by other means such as a code of practice. It is your responsibility to read the varied DAS licence carefully, and take appropriate legal advice, if necessary, to determine how your licence, as amended by the proposed notice of variation, would affect your business.

¹ A copy of the Act can be downloaded from www.legislation.hms.gov.uk or purchased from The Stationery Office Ltd (TSO).

5. You should bear in mind when making representations about the proposed amendments that Ofcom is obliged by the Act to make certain amendments to your licence. Representations are therefore sought on areas where Ofcom will be able to exercise some discretion in its interpretation of the statutory provisions and the incorporation of those provisions in the licence.

B. General and/or Minor Amendments to your Licence

6. Ofcom proposes to make certain general and/or minor amendments to your licence. For example, as a result of the entry into force of the relevant provisions of the Act, references to the Independent Television Commission and the Broadcasting Standards Commission will be replaced by references to Ofcom. To ensure consistency with all classes of licence granted by Ofcom, the order and headings of some of the conditions in your licence will be changed and some minor variations will be made to the text of some of the conditions.

C. Main Proposed Amendments to your Licence Conditions

Country of Establishment

7. *Current DAS licence Conditions 6(1)(a)(v), 6(5)(f) and 19(2)(f); varied DAS licence Conditions 9(1)(e) and 26(2)(g)*

Please note that it is proposed that the obligation contained in Condition 6(5)(f) of your current licence be retained by way of the more general requirement set out in proposed Condition 9(1) of your varied licence.

Deregulation and Contracting Out Act 1994

8. The Communications Act (Section 1(7)) allows the functions conferred on Ofcom to be contracted out under the Deregulation and Contracting Out Act 1994. It is proposed that your licence be amended to include a reference to this in Condition 1(6), so that in the event of an Order under the Deregulation and Contracting Out Act 1994 authorising a person to exercise any functions of Ofcom, relevant references in the licence to Ofcom would include a reference to that person.

Fees

9. *Current DAS licence Condition 2; varied DAS licence Condition 3*

Note that it is proposed that the wording of this Condition be amended to facilitate Ofcom's use of its discretion to alter present arrangements.

V.A.T.

10. *Current DAS licence Condition 3; varied DAS licence Condition 4*

No changes are proposed to the provisions on V.A.T.. You should note that V.A.T. is not currently chargeable on licence fees. Provisions on interest on late payments may now be found in Condition 24 of the varied DAS licence. Note that in the proposed Condition the interest rate, at three per cent, has not changed (although the reference bank has).

Programme, advertising and sponsorship standards and requirements

11. *Current DAS licence Condition 4; varied DAS licence Condition 5*

Current DAS licence Condition 5; varied DAS licence Condition 6

As a result of the entry into force of the relevant provisions of the Act, new conditions in relation to general standards and requirements and advertising and sponsorship standards and requirements are proposed to replace your existing licence conditions. Under these proposed Conditions you would need to comply with a number of general standards and specific advertising and sponsorship standards and observe the provisions of the Standards Code (as defined in the varied DAS licence).

In particular, you should note Condition 5(1)(h) of the varied DAS licence which would require you to ensure that the inclusion of advertising which may be misleading, harmful or offensive is prevented. In addition, you should note Condition 6(3) of the varied DAS licence which describes what would be considered ‘political’ in the context of advertising and sponsorship requirements and Condition 6(6) of the varied DAS licence which would require you to observe the Ofcom code on premium rate services (or, in the absence of such a code, the terms of any order made by Ofcom under Section 122 of the Act).

Finally, you should note that a similar provision to Condition 5(4) of the current DAS licence (arrangements to enable the Commission to preview advertisements) is included in the varied DAS licence in Condition 14(2)(c).

New condition on electronic programme guides

12. *Varied DAS licence Condition 7*

As a result of the entry into force of the relevant provisions of the Act, Ofcom proposes to include a new condition in relation to electronic programme guides in your licence.

Provision of information

13. *Current DAS licence Condition 6; varied DAS licence Conditions 3, 8, 9 and 10*

It is proposed that the existing Condition 6 be largely replaced in the varied DAS licence by Condition 9 (general information) and Condition 10 (information relating to a change of control). The requirement to provide Ofcom with information as it may require for the purpose of exercising its functions under the Broadcasting Acts would be extended by reference to the Communications Act.

In addition to your current information obligations, you would be required to inform Ofcom if you, or your parent company, suffered an insolvency-type event or if you, or any individual having control over you (as defined in that Condition), were sentenced to a term of imprisonment on conviction of a criminal offence. The requirements for the supply of specific corporate information documents would be replaced by a requirement for a declaration to be provided at such intervals as Ofcom may determine. In addition, the requirement to provide statements of qualifying revenue at monthly intervals and also in respect of each entire accounting period would be included in Condition 9 of the varied DAS licence.

In addition, in respect of agreements entered into with multiplex providers, there would be an additional requirement to notify Ofcom of the characteristics of the service (see Condition 9(2)(a)(ii) of the varied DAS licence). The requirement to provide details of advertisements (Condition 6(5)(c) of the current DAS licence) may now be found in Condition 6(8) of the varied DAS licence.

As concerns change of control, you would have an additional obligation to notify Ofcom of proposed changes in control. In addition, it is proposed that the thresholds at which a change in control must be notified be changed to reflect the relevant provisions of the Act.

Condition 8 of the varied DAS licence would make provision for the retention and production of recordings. Note the new requirement in proposed Condition 8(1) to adopt procedures acceptable to Ofcom: (i) for the retention of recordings of any programme which is the subject of a Standards Complaint and (ii) in relation to the production of recordings of any programme which is the subject of a fairness complaint (see also Condition 17 of the varied DAS licence). Note further in this regard the requirements of Condition 15(2) of the varied DAS licence.

Information required for the purposes of determining or revising tariffs is dealt with in Condition 3 of the varied DAS licence.

The obligation to supply post-transmission data to Ofcom (Condition 6(5)(d) of the current DAS licence) is now incorporated in Condition 14 (Compliance) of the varied DAS licence.

Fair and effective competition

14. *Current DAS licence Condition 7; varied DAS licence Condition 11*

Minor amendments are proposed to Condition 7 of your licence. The amendments do not extend your obligations under the present Condition.

Compliance with ownership restrictions

15. *Current DAS licence Condition 8; varied DAS licence Condition 12*

Note that Condition 12 of the varied DAS licence would add a duty to inform Ofcom of any circumstances which might give rise to a breach of the licensee's obligations thereunder.

Transferability of the Licence

16. *Current DAS licence Condition 9; varied DAS licence Condition 13*

Compliance

17. *Current DAS licence Condition 10; varied DAS licence Condition 14*

Note that additional requirements in relation to relevant international obligations are dealt with in proposed Condition 14. The requirements to adopt procedures to ensure compliance are proposed to be extended to include those relating to advance clearance of advertisements. The requirement to supply Ofcom with details of the procedures so adopted would be incorporated in Condition 14(3) of the varied DAS licence (see Condition 6(7) of the current DAS licence).

Government directions and representations

18. *Current DAS licence Condition 11; varied DAS licence Condition 15*

Provision of Digital Capacity

19. *Current DAS licence Condition 12; varied DAS licence Condition 18*

Please see paragraph 22 below.

Standards Complaints

20. *Current DAS licence Condition 13; varied DAS licence Condition 16*

As a result of the entry into force of the relevant provisions of the Act, it is proposed that Condition 13 (Complaints) of your licence be replaced with a new condition in relation to standards complaints. Although not yet finalised, work is currently underway to establish co-regulatory mechanisms for handling advertising standards complaints. This may involve an Order being made under the Deregulation and Contracting Out Act 1994 (see paragraph 8 above).

Fairness and privacy complaints

21. *Current DAS licence Condition 14; varied DAS licence Condition 17*

As a result of the entry into force of the relevant provisions of the Act, Ofcom will be the body responsible for exercising functions relating to the consideration of fairness and privacy complaints which are presently exercised by the Broadcasting Standards Commission. Accordingly, your licence will be amended to include, for example, an obligation to comply with certain information requests from Ofcom and to observe the Fairness Code (as defined in the varied DAS licence).

New condition on Publicising Ofcom's functions

22. *Varied DAS licence Condition 18*

Please note that the obligation contained in Condition 12 of your current licence to provide digital capacity to the ITC would be retained by way of the more general requirement set out in proposed Condition 18, reflecting the requirements of Section 328 of the Communications Act.

Power of Ofcom to vary licence conditions

23. *Current DAS licence Condition 15; varied DAS licence Condition 19*

Notices and service

24. *Current DAS licence Condition 16; varied DAS licence Condition 20*

Note that under the varied DAS licence, notices could be served or given in electronic form (see Condition 20(4) of the varied DAS licence).

Surrender

25. *Current DAS licence Condition 20; varied DAS licence Condition 21*

New condition on equal opportunities and training

26. *Varied DAS licence Condition 22*

As a result of the entry into force of the relevant provisions of the Act, it is proposed to include a new condition in relation to equal opportunities and training in your licence. For example, companies which, individually, have over twenty employees or are part of a group having in aggregate over twenty employees, would be expected to make arrangements to promote, in relation to employment with the licence holder, the equalisation of opportunities for disabled persons.

Sanctions for breach of licence conditions

27. *Current DAS licence Condition 18; varied DAS licence Condition 25*

Some amendments have been proposed to this Condition. For example, the amount of the financial penalty that can be imposed by Ofcom for breach of a licence condition is increased from £50,000 to £250,000. Note that the Secretary of State would still be able to specify another sum by order; see Condition 25(3)(b) of the Schedule to the varied DAS licence.

Where a financial penalty imposed pursuant to Condition 25(3)(a) relates to a failure to comply occurring before the commencement of paragraph 15 of Part 2, Schedule 13 to the Act, the penalty will be imposed in accordance with the amounts specified in your current licence. This is reflected in Condition 25(3)(d) of the varied DAS licence.

You should also note Section 346 of the Act, under which amounts payable or penalties imposed under your licence are recoverable by Ofcom as a debt due and your liability for such amounts is not affected by your licence ceasing to have effect.

Revocation

28. *Current DAS licence Condition 19; varied DAS licence Condition 26*

In Conditions 19(2)(a) and (c) of the current DAS licence (see Conditions 26(2)(a) and (c) of the varied DAS licence) references would be inserted to compliance with the requirements imposed by or under Schedule 14 of the Act. Condition 19(2)(e) of the current DAS licence (see Condition 26(2)(e) of the varied DAS licence) would also be updated by reference to the Act. It is envisaged that the occurrence of insolvency type events would be caught by Condition 26 of the varied DAS licence.

In addition, it is proposed that if the service provided by the Licensee does not constitute a DATS service, this may also lead to revocation (see Condition 26(2)(f) of the varied DAS licence).

Yours faithfully,

Kip Meek
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