

CONSULTATION LETTER SENT TO ALL HOLDERS OF RESTRICTED TELEVISION SERVICE LICENCES ON 19 SEPTEMBER 2003

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

Restricted Service Licence

A. Consultation on Amendments proposed to be made to your Restricted Service Licence

1. As a result of the entry into force of the relevant provisions of the Communications Act (the “Act”), your current restricted service (“RS”) licence will be varied. Further to this variation, your licence will be called a restricted television service (“RTS”) licence.
2. In accordance with its duty under Section 3(4) of the Broadcasting Act 1990 (the “1990 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 RTS licence which Ofcom will issue to all new RTS 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 17 of your current licence, and in accordance with Section 3(4) of the 1990 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 RS licence, both in ‘clean’ form and in ‘marked-up’ form showing changes from the current RS 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 RS licensees prior to finalising the variation of the RS 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 RTS 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 RS licence does not necessarily mean it has been omitted, as it may be found elsewhere in the varied RS licence (see for example paragraph 23 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 RS 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.hmso.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

Deregulation and Contracting Out Act 1994

7. 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.

Provision of restricted television service by the Licensee

8. *Current RS licence Condition 2; varied RS licence Condition 2*

Fees

9. *Current RS licence Condition 3; varied RS 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 RS licence Condition 4; varied RS 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 23 of the varied RS 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 RS licence Condition 5; varied RS licence Condition 5*

Current RS licence Condition 7; varied RS licence Condition 7

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 RS licence).

In particular, you should note Condition 5(1)(h) of the varied RS 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 7(3) of the varied RS licence which describes what would be considered 'political' in the context of advertising and sponsorship requirements and Condition 7(6) of the varied RS 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 7(4) of the current RS licence (arrangements to enable the Commission to preview advertisements) is included in the varied RS licence in Condition 14(2)(c).

Listed events

12. *Current RS licence Condition 6; varied RS licence Condition 6*

Amendments are proposed to this Condition to take account of new provisions introduced by the Act. You will see there are new statutory provisions, in particular relating to Group B events, which reflect the current provisions of the ITC Code on Sports and other Listed and Designated Events 2002.

The Act provides for the existing concept of "listed events" to be divided into two categories, "Group A" and "Group B", which are then made subject to separate requirements. For example, Section 99(1) of the Broadcasting Act 1996, which makes a contract void if it purports to grant exclusive rights to televise a listed event live for reception in the UK, will apply only to Group A events. It will therefore become possible for valid contracts to be made granting such exclusive rights in relation to Group B events.

Also in relation to Group B events, the Act introduces a new ground upon which live coverage of a listed event can be included in the Licensed Service, specifically where rights to provide adequate alternative coverage have been acquired by one or more other persons who satisfy the requirements of new Regulations that may be made by Ofcom. Note also that such Regulations may also determine the circumstances in which the televising of listed events is, or is not, to be treated as live. By virtue of the transitional provisions in the Act, the ITC's existing Code shall continue to have effect.

Condition 6(6) of the varied RS licence is a new provision reflecting the amendment to the Broadcasting Act 1996 made by the Television Broadcasting Regulations SI 2000/54 and currently reflected in the ITC Code. It provides for restrictions on the televising of events designated by other EEA States. See also Condition 24(4) of the varied RS licence.

Provision of information

13. *Current RS licence Condition 8; varied RS licence Conditions 4, 8, 9 and 10*

It is proposed that the existing Condition 8 be largely replaced in the varied RS 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 RS licence.

The requirement to provide information in relation to listed events (Condition 8(4)(c) of the current RS licence) may now be found at Condition 6(8) of the varied RS licence. The requirement to provide details of advertisements (Condition 8(4)(b) of the current RS licence) may now be found in Condition 8(8) of the varied RS 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 RS 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 RS licence). Note further in this regard the requirements of Condition 16(2) of the varied RS licence.

Information required for the purposes of determining or revising tariffs is dealt with in Condition 4 of the varied RS licence.

Fair and effective competition

14. *Current RS licence Condition 9; varied RS licence Condition 11*

Further to Section 316(1) of the Act, Condition 9 of your licence in relation to fair and effective competition will be varied. The revised Condition differs from the existing one in that it specifically requires you to comply with any code or guidance (as well as any direction) issued by Ofcom for the purpose of ensuring fair and effective competition. This variation is proposed for two reasons. First, it will make this Condition of your licence consistent with the substantive provision in the equivalent condition in other Ofcom Broadcasting Act licences. Secondly, the variation provides clarity in specifying that any codes or guidance on competition matters are directly enforceable by Ofcom (subject to the provisions set out in Section 317 of the Communications Act). The proposed variation, therefore, does not significantly affect your current obligations as any code or guidance issued by the ITC has been enforceable by them through direction.

Ofcom considers that it is more appropriate to make the proposed variation than proceed under the Competition Act 1998. The Competition Act does not in itself enable a variation to the licence condition. Ofcom also considers it relevant that, in any event, before taking enforcement action under the licence, Ofcom would then need to consider whether, in the circumstances, proceeding under the Competition Act would be more appropriate. For the avoidance of doubt, you are hereby notified under the provisions of Section 317(5) of the Act that you may appeal a decision to make this variation to the Competition Appeal Tribunal.

Compliance with ownership restrictions

15. *Current RS licence Condition 10; varied RS licence Condition 12*

Note that Condition 12 of the varied RS 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 RS licence Condition 11; varied RS licence Condition 13*

Compliance

17. *Current RS licence Condition 12; varied RS licence Condition 14*

The existing 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 RS licence (see Condition 8(6) of the current RS licence). Condition 14 of the varied RS licence would also reflect your duty to comply with relevant international obligations.

Government directions and representations

18. *Current RS licence Condition 13; varied RS licence Condition 15*

Provision of airtime to the Commission

19. *Current RS licence Condition 14; varied RS licence Condition 18*

Please see paragraph 22 below.

Standards Complaints

20. *Current RS licence Condition 15; varied RS licence Condition 16*

As a result of the entry into force of the relevant provisions of the Act, it is proposed that Condition 15 (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 7 above).

Fairness and privacy complaints

21. *Current RS licence Condition 16; varied RS 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 RS licence).

New condition on Publicising Ofcom's functions

22. *Varied RS licence Condition 18*

Please note that the obligation contained in Condition 14 of your current licence to provide airtime 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 RS licence Condition 17; varied RS licence Condition 19*

Notices and service

24. *Current RS licence Condition 18; varied RS licence Condition 20*

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

New condition on equal opportunities and training

25. *Varied RS 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

26. *Current RS licence Condition 19; varied RS licence Condition 24*

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 24(3)(b) of the Schedule to the varied RS licence.

Where a financial penalty imposed pursuant to Condition 24(3)(a) relates to a failure to comply occurring before the commencement of paragraph 4 of Part 1, 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 24(3)(d) of the varied RS 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

27. *Current RS licence Condition 20; varied RS licence Condition 25*

In Conditions 20(2)(b) and (d) of the current RS licence (see Conditions 25(2)(a) and (c) of the varied RS licence) references would be inserted to compliance with the requirements imposed by or under Schedule 14 of the Act. Condition 20(2)(f) of the current RS licence (see Condition 25(2)(e) of the varied RS 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 25 of the varied RS licence.

In addition, it is proposed that if the service provided by the Licensee does not constitute a restricted television service, this may also lead to revocation (see Condition 25(2)(f) of the varied RS licence). Condition 20(2)(a) of the current RS licence (Licensee agrees in writing with the Commission that licence should be revoked) would be omitted.

Yours faithfully,

Kip Meek
Senior Partner, Content and Competition