

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 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 manner¹. 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 Access² ('CA'), Access Control³ ('AC') and Electronic Programme Guide⁴ ('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:

¹ The Communications Act 2003, Section 3 (3).

² 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

³ 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

⁴ 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

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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 powers⁵ 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

⁵ Under Part 2 Chapter 3 of the Communications Act 2003

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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 1984⁶, has been replaced by the EC Communications Directives and the Communications Act 2003, and Ofcom has

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

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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:

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Application Signing Services	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.
Authentication Services	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.
Customer Data Sets	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.

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 Directive¹⁷. 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.

¹⁷ Directive 2002/19/EC.

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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 service¹⁸.”

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 system¹⁹.”

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

¹⁸ Section 75 (2) (a) of the Communications Act 2003.

¹⁹ Section 75 (3) of the Communications Act 2003.

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

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').²¹

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 Services²²:

"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.

²⁰ Section 75 (3) of the Communications Act 2003.

²¹ *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.

²² 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."

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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

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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

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:

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“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 persons²³.”

²³ Section 74 (2) of the Communications Act 2003.

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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 2003²⁴. 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).²⁵ For the purpose of this Annex, the continuation notices are referred to as the EPG Continuation Notice²⁶ and the AC Continuation Notice.²⁷

²⁴ 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.

²⁵ *Continuing Licence Conditions after 25 July*, 10 September 2003,

http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/cont_notices/cont0903.pdf.

²⁶ *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.

²⁷ *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.

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.²⁸

“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 guide²⁹.”

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

²⁸ 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.

²⁹ Schedule 1, EPG Conditions.

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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

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A5.30 On 15 January 2004, Ofcom proposed new access conditions for providers of EPG Services³⁰. 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.³¹

“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

³⁰ See *The regulation of Electronic Programme Guides*, published at http://www.ofcom.org.uk/consult/condocs/epg/epg/condoc_150104.pdf

³¹ “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.

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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

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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.

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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

A5.39 On 14 November 2003, Ofcom proposed new access conditions for providers of Access Control Services³². At the time of writing, these new AC Conditions have not been finalised and the existing AC Conditions referred to above remain in force.

³² See, *The future regulation of access control services*, published at http://www.ofcom.org.uk/consult/condocs/access_control_services/access_control_condoc