



# Review of ITV Networking Arrangements 2007

Statement

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## Section 1

# Summary

### The requirements upon Ofcom

- 1.1 The ITV Networking Arrangements (the 'NWA') are a set of arrangements between ITV Network Ltd ('ITV Network') and the 15 regional Channel 3 licensees. These 15 licensees are currently under the control of ITV plc, SMG plc, Ulster Television plc ('UTV') and Channel Television Ltd ('Channel').
- 1.2 The NWA, which currently comprise five main documents, are intended to apply to all holders of regional Channel 3 licences and provide for programmes made, commissioned or acquired by or on behalf of any such licensee to be available for broadcasting in all regional Channel 3 services.
- 1.3 Their purpose is to coordinate the provision of a national television service that is capable of competing effectively with other television programme services in the UK.
- 1.4 Under section 293 of the Communications Act 2003 (the 'Act'), we have a statutory duty to carry out from time to time, reviews of the NWA, in particular, to consider:
  - Whether the NWA enable regional Channel 3 services to be a nationwide system that can compete effectively with other UK television programme services; and
  - The impact of the NWA on competition – in particular whether they prevent, restrict or distort competition in the UK.
- 1.5 In addition, we are also required to consider the effect of the arrangements on the ability of the regional Channel 3 licensees to maintain the quality and range of regional programmes and other programmes contributing to the regional character of the services.
- 1.6 We are required to conduct such a review no more than a year after the previous review and having done so, consider whether any modifications to the arrangements are required.. We published our final recommendations on the 2006 NWA review in February 2007.

### Developments in 2007

- 1.7 The 2006 Review recognised that there would be a need to update the Network Centre Code of Practice to take into account changes to Ofcom's Guidance to broadcasters for drawing up Codes of Practice relating to the commissioning of independent producers. However, because we were in the process of consulting on that new Guidance, we did not make specific recommendations as to how the Network Centre Code of Practice needed to change at that stage: we simply stated that it would need to be amended in the light of that revised Guidance and the new agreements on new media rights. Similarly, the Network Programme Licence ('NPL') and Tri-partite Agreement ('TA') would also need to be amended in the light of the changes made to the ITV Network Centre Code of Practice.
- 1.8 The 2006 Review also indicated that we intended to look to streamline the process of future NWA reviews using a more informal consultation process where the proposed

changes were not material. This was intended to comply with the legal requirement for frequent reviews of the NWA whilst minimising the burden on stakeholders.

- 1.9 We also indicated that we anticipated that it might be possible to streamline the documentation that comprises the NWA by removing at least the NPL and TA once the changes indicated above had been made.
- 1.10 Since the 2006 Review, we have completed our consultation on Guidance to broadcasters and published revised Guidance in June 2007<sup>1</sup>. We are now waiting for ITV Network to submit its revised Code of Practice for us to approve and similarly for the appropriate changes to the NPL and the TA to be made.
- 1.11 We have also adopted a more streamlined process for this, the 2007, Review. We wrote to ITV plc, Channel, SMG and UTV to invite them to comment on the scope of the 2007 Review. We also asked them to provide an update on the position in respect of the implementation of the recommendations of both the 2005 and 2006 Reviews.
- 1.12 A new (and ongoing) development in the course of 2007 has been issues around "Participation TV". This led to us commissioning an inquiry following significant compliance failures by broadcasters. The inquiry, led by Richard Ayre (a member of the Ofcom Content Board), was charged with making recommendations on actions needed to restore confidence and trust in the use of Premium Rate Telephony Services ("PRS") by television broadcasters<sup>2</sup>. The Ayre Report published its findings in July 2007.
- 1.13 Following a period of consultation on implementing the recommendations of the Ayre Report, in February 2008 we made a number of changes to broadcasting licences. Those changes not only provide that when licensees invite audiences to participate in programmes, responsibility for handling all communications rests with the licensee but also that there should be independent third-party verification of all systems used in PRS voting and competitions. These changes could have an impact on ITV1's compliance arrangements and in particular the role of ITV Network.
- 1.14 There are also a number of on-going investigations into the use of PRS by broadcasters and some of those investigations involve ITV1.
- 1.15 Also in 2007 we began<sup>3</sup> our Second Review of Public Service Broadcasting, having brought the timing forward in light of changes to the broadcasting environment. This review is considering the period through digital switchover and afterwards to 2016 and will focus on traditional public service television services provided by the BBC, ITV, Channel 4 and Five, S4C and Teletext. It will also consider non-traditional audio-visual services offered by the existing public service broadcasters on other platforms. The review also considers public service broadcasting in the Nations and English regions where ITV's regional licences are key to the provision of plurality with the BBC. The licensees' ability to deliver regional and national obligations is underpinned by the NWA. The PSB review could therefore raise issues which have an impact on the scope and operation of the ITV NWA.

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<sup>1</sup> *Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from Independent Producers (Ofcom: June 2007).*

<sup>2</sup> The published version of the Inquiry's report is available on the Ofcom website at: <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport>

<sup>3</sup> See press release for publication of terms of reference at [www.ofcom.org.uk/media/news/2007/09/nr\\_20070911](http://www.ofcom.org.uk/media/news/2007/09/nr_20070911).

## Conclusions of 2007 Review

- 1.16 In broadcasters' responses on the scope of the current Review and the implementation of the 2005 and 2006 recommendations, they indicated that although progress has been made with the process of implementation of the recommendations of the 2005 Review, sign-off on final legal drafting has still not been achieved. We remain very concerned by the fact that the regional C3 licensees have still not been able to come forward with the revised documentation which would complete the process of implementing the recommendations of the 2005 Review. In addition, in terms of implementing the recommendations of the 2006 Review, there is an outstanding obligation on ITV Network to submit a revised Code of Practice for Ofcom to approve.
- 1.17 Given the outstanding issues in implementing the recommendations of the 2005 and 2006 Review, we have not been in a position to evaluate how those changes have bedded down as we would have hoped. It is important therefore that these actions are completed without further delay to avoid the need for us to consider what further action may have to be taken.
- 1.18 Having considered the current position and assessed the responses received from the regional C3 licensees, whilst we do not consider it necessary to require any additional modifications to the NWA at this point in time, we do consider there are a number of areas which could warrant a more detailed review going forward e.g. the need to consider how intra-licensee arrangements and communications might need to develop in a multi-platform world.
- 1.19 Moreover, as noted above, the issue of participation TV and compliance arrangements has been an important topic in the course of 2007. The process by which programmes for ITV Network are complied is an issue that is addressed in the ITV Network Code of Practice. Given that there was a consultation on licence changes to implement the recommendations of the Ayre Report and there are specific cases currently under investigation, it would have been premature for us to undertake a review of ITV Network compliance arrangements as part of the 2007 Review. However, we would expect to look in more detail at the impact of the new licence conditions e.g. on ITV Network's role in putting in place arrangements for third-party verification, as well as the issue of compliance for ITV1, more generally as part of the 2008 Review.
- 1.20 Ofcom's Second Review of Public Service Broadcasting also raises issues about the scope and operation of the ITV NWA. However, it would have been premature to consider these issues as part of the 2007 Review. It would be more appropriate in the course of the 2008 Review to consider how the emerging thinking from the Second PSB Review could impact on the ITV NWA and whether any specific changes to the NWA would be needed.
- 1.21 As a result of all these considerations, we have confined the scope of the 2007 review to being a general assessment of the overall operation of the NWA. However, we anticipate that the 2008 Review will need to be a more extensive review of all these aspects of the NWA. We will of course continue to conduct formal consultations where we consider it appropriate to do so and, in particular, where modifications are proposed to the NWA which are considered material.

## Section 2

# Introduction

## Background to the Networking Arrangements

- 2.1 Channel 3 is a free-to-air, commercially funded national television broadcast channel. Channel 3 is made up of 15 regional licensed areas, the licences for which are currently held by four companies: ITV plc (11 licences), SMG (two licences), UTV and Channel. Throughout this document, SMG, UTV and Channel are referred to collectively as the 'non-consolidated licensees'.
- 2.2 A key public policy objective for Channel 3 is to provide competition to other national broadcasters. The Channel 3 licensees were mandated under section 39 of the Broadcasting Act 1990 to conclude a set of arrangements that would enable them to work together to produce a national television service. This set of arrangements is known as the ITV Networking Arrangements. However, the Broadcasting Act 1990 did not dictate the structure or content of the arrangements.
- 2.3 ITV Network is a key organisation in the administration of the NWA. ITV Network is a company limited by guarantee, with a membership composed of the 15 licensees. The board of ITV Network is known as the Network Council and was set up to agree the ITV strategy and budget. A separate management structure known as the ITV Network Centre ('NWC') was created as a result of the initial NWA as the body to execute the instructions of the Network Council (to run the ITV network on behalf of all the licensees). The NWC exists within ITV Network.
- 2.4 The Networking Arrangements currently comprise five documents:
  - Network Supply Contract ('NSC') - specifies each regional licensee's share of contribution to the Network Programme Budget ('NPB');
  - Network Programme Licence (NPL) – is the standard form of contract for use by the NWC when it commissions a programme from a regional licensee;
  - Tripartite Commissioning, Production and Compliance Agreement (TA) – is the contractual arrangement used by the NWC when it commissions a programme from an independent producer;
  - Network Centre Statement of Principles - deals with the control of network policy by the licensees, the implementation of that policy by the NWC, the selection of programmes, and the budget and the supply of a network schedule. It also provides for the NWC to be organised within the management structure of ITV Network Ltd; and
  - Network Centre Code of Practice - ensures that information about all the above procedures is disseminated fully to guarantee an even-handed treatment of in-house and external (independent) producers with respect to programme commissioning. The NWC Code of Practice also sets out the process by which licensees are appointed for programme compliance and production monitoring.

## ITV Network activities and governance

- 2.5 There are three broad areas of activity in the ITV Network 'supply chain'. These were set out in some detail in the 2005 consultation and statement on the NWA<sup>4</sup>, but in brief they are:
- i) Programme commissioning and acquisition. Content for ITV1 comprises a combination of original commissions and acquisitions (of programmes already made). New commissions (or programme production) can be purchased from both the licensees' in-house production divisions and external sources. There is a safeguard in commissioning in that the Network Centre Code of Practice sets out the principles to be applied by it when agreeing terms for the commissioning of independent productions. The Network Programme Licence and the Tripartite Agreement are based on this Code;
  - ii) Channel operation services. These arrangements - either between the licensees, and/or between the licensees and third parties - are the 'nuts and bolts' of producing a national schedule and broadcasting it. They cover areas such as marketing and outsourced services (e.g. support services), interactive and on-line services, and transmission. A key recommendation of the 2005 Review was that these intra-licensee arrangements were put on a formal footing; and
  - iii) Viewers, advertisers and programme sponsors - who are the ultimate consumers of the ITV Network output. The ITV channel is broadcast on a nationwide basis with differences in schedule resulting from specific obligations for hours of regional programming. Licensees earn revenue from selling airtime to advertisers, and from programme sponsors who pay to sponsor national networked programmes. ITV plc sells the network's airtime and network programme sponsorship on behalf of all licensees.
- 2.6 The involvement of the NWC in the above activities is relevant to assessing the potential competition and policy concerns that could arise with the NWA. The core activities of the NWC (also set out in more detail in the 2005 Review publications – see footnote 4) are:
- i) Commissioning and acquisition of programmes: decisions are made centrally on behalf of all licensees, and processes and contracts are governed by the NWA;
  - ii) Scheduling: NWC schedules ITV1. The ITV2-4 channel management, who are housed within ITV Network, also have access to ITV1 schedule data which enables them to create complementary schedules. So that non-consolidated licensees can meet their regional programming obligations they are able to opt out of the national schedule at any time in order to schedule regional programmes. Currently there is limited coordination of the scheduling of regional programming between licensees, and in particular the higher volumes of regional programmes shown in the Nations as compared with the English regions are scheduled independently by the three bodies holding respective Channel 3 licences there (SMG, UTV and HTV (part of ITV plc)); and
  - iii) Rights and Business affairs: this team negotiates the terms of commissions and acquisitions for ITV1 on behalf of all licensees although programme rights are then held collectively by the licensees, and ITV Network Ltd holds no rights itself.

<sup>4</sup> See <http://www.ofcom.org.uk/consult/condocs/itv1/main/itv.pdf> and <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/>



This team is also responsible for negotiating sports rights deals, which may be shared between ITV1 and ITV2-ITV4. It also negotiates the terms for programmes commissioned by ITV2-ITV4 and the contracts and commercial arrangements associated with ITV's on-line activities and interactivity.

## **Purpose of the Annual Reviews**

- 2.7 Whilst the NWA were introduced under the 1990 Broadcasting Act, the Communications Act 2003 introduced a requirement for periodic reviews of the NWA. Section 293 of that Act requires Ofcom to carry out from time to time a general review of the NWA and Ofcom can review whether the arrangements continue to satisfy one of the two competition tests set out in Schedule 11 of the Act and summarised in Annex 1. This sets out a number of statutory tests which Ofcom must take into account, alongside its wider statutory duties, when carrying out this review. Essentially, these tests concern:
- The ability of regional Channel 3 services to be a nationwide system that can compete effectively with other UK television programme services; and
  - The impact of the NWA on competition.
- 2.8 In addition, Ofcom is also required to consider the effect of the arrangements on the ability of the regional Channel 3 licensees to maintain the quality and range of regional programmes and other programmes contributing to the regional character of the services.
- 2.9 Ofcom reviews the NWA in this document from the perspective of these statutory tests and duties. In addition Ofcom must also be mindful of its wider statutory duties and public policy objectives.
- 2.10 Such reviews are required to be carried out no more than a year after the previous review and consider whether any modifications to the arrangements are required. Ofcom may also, at any other time, carry out a review of the NWA if prompted to do so by a licensee.
- 2.11 The first general NWA review under the provisions of the Act was concluded in June 2005 ('the 2005 Review'), with a further statement in October 2005 principally on matters relating specifically to UTV<sup>5</sup>. In those documents, Ofcom set out its recommendations on how the NWA should be revised in order to address the concerns identified by Ofcom. Before the 2005 Review, the NWA had been largely unchanged since 1993.

## **The 2005 Review**

- 2.12 The 2005 Review considered both arrangements in relation to external third parties ('external arrangements') and arrangements or agreements between the ITV licensees ('intra-ITV arrangements') although it focused primarily on the intra-ITV arrangements. This was because issues relating to the arrangements between ITV

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<sup>5</sup> For these statements, see <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/> and [http://www.ofcom.org.uk/consult/condocs/itv1/further\\_statement/further\\_statement.pdf](http://www.ofcom.org.uk/consult/condocs/itv1/further_statement/further_statement.pdf)

Network and independent producers had recently been addressed through another statutory requirement<sup>6</sup>.

- 2.13 Ofcom notes that there is agreement in principle between the regional C3 licensees on the recommendations of the 2005 Review, However, we remain very concerned that they have still not been able to come forward with the revised documentation which would complete the process of implementing the recommendations of the 2005 Review.

### **The 2006 Review**

- 2.14 Following on from Ofcom's Television Production Sector Review ('TPSR')<sup>7</sup> and the agreement of new Terms of Trade between ITV Network and Pact, the trade body representing independent producers, the 2006 Review focused on the need to update the Network Centre Code of Practice to take into account changes to Ofcom's Guidance to broadcasters for drawing up Codes of Practice relating to the commissioning of independent producers.
- 2.15 The 2006 Review indicated that the Network Programme Licence ('NPL') and Tri-partite Agreement ('TA') would also need to be amended in the light of the changes made to the Network Centre Code of Practice but that there might be scope to remove these documents from the NWA once those changes had been made and approved.

### **Conduct of 2007 Review**

- 2.16 As indicated in the 2006 Review, we have used a more stream-lined process to assess the operation of the NWA in 2007. We wrote to ITV plc, Channel, SMG and UTV to provide a clear update on the progress with implementing the recommendations of the 2005 and 2006 Reviews and also to invite them to comment on the scope of the 2007 Review.

### **Structure of this document**

- 2.17 The rest of this document comprises the following:
- Section 3 assesses the current NWA;
  - Section 4 addresses other issues raised in the course of the 2007 Review but which have not been addressed directly by the review;
  - Annex 1 describes the statutory framework for reviewing the NWA; and
  - Annex 2 is a glossary of technical terms used in this document.

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<sup>6</sup> Section 285 of the Act had put in place a framework for each public services broadcaster ('PSB') to have a code of practice for commissioning programmes from independent suppliers. ITV Network Limited produced its own Code of Practice in 2004, covering qualifying independent producers. A qualifying independent producer is one whose programming counts towards fulfilment of the independent production quota.

<sup>7</sup> See [http://www.ofcom.org.uk/consult/condocs/tpsr/statement/review\\_tv.pdf](http://www.ofcom.org.uk/consult/condocs/tpsr/statement/review_tv.pdf)

## Section 3

# Assessment of Networking Arrangements

## Introduction

- 3.1 This section sets out Ofcom's review of the current NWA. After describing the general framework for assessing the NWA, we look at developments since the 2005 Review and then assess the current NWA documents.
- 3.2 Given the time taken so far to implement the recommendations of the 2005 review and the fact that no respondents indicated that developments had taken place in respect of intra-ITV arrangements, Ofcom has not carried out an assessment of the impact of the 2005 changes on intra-ITV arrangements. In the absence of any other clear changes in the market that would alter the basis on which Ofcom had made its recommendations in the 2005 Review, Ofcom believes that it would be premature at this stage, to recommend further changes to the relevant parts of the NWA. Ideally, the changes arising from the 2005 Review, which represented a major reappraisal of the NWA, should have time to 'bed down' before their efficacy is tested.
- 3.3 However, our intention is to return to this issue in the context of the 2008 review of the NWA.
- 3.4 Given the agreement on new Terms of Trade between ITV Network and Pact, the trade body representing independent producers, the 2006 Review recognised that there would be a need to update the Network Centre Code of Practice to take account of these developments. There would also be a need to take into account changes to Ofcom's Guidance to broadcasters for drawing up Codes of Practice relating to the commissioning of independent producers.
- 3.5 However, because we were in the process of consulting on that new Guidance, we did not make specific recommendations as to how the Network Centre Code of Practice needed to change at this stage: we simply stated that it would need to be amended in the light of that revised Ofcom guidance and the new media rights agreements. The Network Programme Licence ('NPL') and Tri-partite Agreement ('TA') would also need to be amended in the light of the changes made to the Network Centre Code of Practice;
- 3.6 Since the 2006 Review, we have completed our consultation on Guidance to broadcasters and published revised Guidance in June 2007<sup>8</sup>. We are now waiting ITV Network to submit its revised Code of Practice for Ofcom to approve and also for the NPL and the TA to be amended as well.
- 3.7 In light of these issues, the 2007 Review has focused on a more general assessment of the operation of the NWA, rather than seeking a detailed review of the changes which are still in a process of being codified and implemented.

## The framework for the Annual Reviews

- 3.8 The framework for reviewing the NWA is set out in Schedule 11 of the Act. Ofcom must not approve revised NWA (or propose modifications to the existing

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<sup>8</sup> *Guidance for Public Service Broadcasters in drawing up Codes of Practice for commissioning from Independent Producers* (Ofcom: June 2007)

arrangements), unless it is satisfied that the revised arrangements (or proposed modifications) satisfy the competition test set out in paragraphs 6(3) and 6(4) respectively of Schedule 11 of the Act.

- 3.9 The Act sets out the three statutory tests that Ofcom must take into account, alongside its wider statutory duties, when carrying out this review. These tests, whose precise details are explained in Annex 1 concern:
- The ability of regional Channel 3 services to be a nationwide system of services which is able to compete effectively with other television programme services provided in the United Kingdom;
  - The impact of the NWA on competition; and
  - The ability of Channel 3 licensees to maintain the quality and range of regional programmes and other programmes contributing to the regional character of the services.
- 3.10 In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act states that Ofcom must not approve, impose or propose arrangements and/or modifications if such arrangements/modifications would be likely to be prejudicial to the ability of the Channel 3 licensees, or any of them, to comply with:
- a) their public service remits;
  - b) their regional production obligations<sup>9</sup>;
  - c) their regional programming obligations; or
  - d) conditions imposed on them following a change of control.
- 3.11 Ofcom has reviewed the NWA from the perspective of these specific statutory tests and duties. In addition Ofcom must also be mindful of its wider statutory duties and public policy objectives. Ofcom has also taken into account broader issues stemming from ITV plc's position of strength within the ITV network.
- 3.12 Ofcom also believes that the following public policy objectives, set out in the 2005 Review, are appropriate guiding principles to use when reviewing the NWA. These objectives cover issues relating to either intra-ITV or external arrangements:
- The documents that together comprise the NWA should continue to reflect accurately the actual operational arrangements;
  - Organisational arrangements should be robust to changes in corporate ownership;
  - All of the Channel 3 licensees should be able to continue to meet their specific licence obligations efficiently and effectively;
  - The principles which underlie the relevant cost sharing arrangements should be transparent and clearly understood by all parties to the NWA; and

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<sup>9</sup> In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act requires Ofcom to take into account the impact of the arrangements or modifications to the arrangements on the ability of the Channel 3 licensees to comply with certain of their licence obligations

- There should be an appropriate degree of non-discrimination between parties to the NWA and (where appropriate) any relevant third parties.

### **Assessment of the need for revisions to the NWA**

3.13 We set out below our assessment of current NWA looking at the three broad areas of activity in the ITV Network supply chain identified above. We have considered both the arrangements governing the relationships between the Channel 3 licensees and third parties (external arrangements) and those relating solely to the relationships between the licensees themselves (intra-ITV arrangements).

### **Programme commissioning and acquisition**

#### **The Network Centre Code of Practice**

3.14 The main issue for the Network Centre Code of Practice is that – following the recommendations of the 2006 Review – it is updated to take into account the new arrangements agreed between Pact and ITV Network and also Ofcom’s revised Guidance to broadcasters on drawing up Codes of Practice arrangements. At this point in time we do not consider that other changes to the Code of Practice are required and so there are no specific amendments to assess against the statutory tests.

#### **Other issues**

3.15 Ofcom is not aware that there have not been any other substantive changes in programme commissioning and acquisition since the 2006 NWA review that would lead it to propose any changes to the relevant parts of the NWA documents. This view applied to both external arrangements and intra-ITV arrangements. At this stage, we do not consider any further changes to the relevant provisions in the NWA are required beyond those recommended in the 2005 and 2006 Reviews.

### **Channel operation services**

3.16 From our perspective, there have not been any substantive changes to the working of channel operation services since the 2006 Review that would lead us to propose any changes to the relevant parts of the NWA documents. This applies to both external arrangements and intra-ITV arrangements. As discussed above, the recommendations of the 2005 Review in respect of intra-ITV arrangements are still in the process of being implemented. We therefore do not consider that any further changes to the relevant provisions in the NWA beyond those recommended in the 2005 Review are required at this stage.

### **Viewers, airtime sales and sponsorship**

3.17 As with channel operation services, to the best of our knowledge, there have not been any substantive changes to the arrangements for airtime sales and sponsorship since the 2005 NWA review that would lead us to propose any changes to the relevant parts of the NWA documents. This applies to both external arrangements and intra-ITV arrangements. We therefore do not propose to make any further changes to the relevant provisions in the NWA beyond those recommended in the 2005 Review.

## Conclusion

- 3.18 Having reviewed the arrangements in accordance with the statutory requirements and in light of the matters set out in this document, Ofcom is satisfied for the purposes of the 2007 review that the existing NWA continue to satisfy the tests of Schedule 11 of the Act and, in particular, the competition test set out at paragraph 6 of that Schedule. On that basis we propose to approve the NWA at this point without requiring any immediate amendments to the documents comprising the NWA except for those set out previously in the recommendations of the 2005 and 2006 Reviews. The NWA will be subject to a fuller review in 2008

## Section 4

# Other Issues

- 4.1 In response to our letter to the licensees inviting comments on the scope of 2007 Review, licensees raised a broad range of issues. Although some of these issues do not appear to us to be relevant to the immediate operation of the NWA at this point in time, we do recognise that some of these issues might warrant further examination in future reviews if they do come to have a more significant bearing on the operation of the NWA.
- 4.2 Since some of the responses we have received were submitted on a confidential basis, we have grouped these issues into a number of broad themes so that particular views cannot be attributed to individual respondents. We report the issues raised and, in some cases, make a number of comments although we do not reach any specific conclusions on the issues themselves.
- 4.3 In addition we flag up the fact that there are some other regulatory issues which have arisen in the course of 2007 and where the operation of the NWA could have a bearing, once those issues have been resolved. We have not addressed these issues in the course of the 2007 review but we anticipate the need to take account of these issues in the course of the 2008 review.

## Interaction between Network Centre and Licensees

- 4.4 A number of the non-consolidated licensees raised issues about the way in which ITV Network and the minority licensees interact in terms of information sharing, transparency over the contractual arrangements negotiated by ITV Network, communications in respect of financial contributions to the Network Budget etc.
- 4.5 The main vehicle for providing an opportunity for licensees to comment on the overall broadcasting and programme strategy for ITV1 is the Network Council. Network Council meetings therefore provide the main forum for formally consulting and informing the non-consolidated licensees on strategic issues. We note that Chair of the Network Council has been held by a senior executive from one of the non-consolidated licensees for a number of years. Indeed from before the Carlton-Granada merger in 2003 to very recently, the chair of Network Council was held by the Chief Executive of SMG Television. It is now held by the Managing Director of Channel – both executives with considerable knowledge and experience of ITV.
- 4.6 In addition to this Ofcom understands that – outside of Council meetings - there are regular telephone calls between licensees. This pattern of informal consultation should help to facilitate discussion of day-to-day issues around the NWA that arise between meetings of Network Council.
- 4.7 On that basis it does appear to us that the non-consolidated licensees do have access to information about the operation of ITV Network. The key issue is therefore whether those arrangements are working as effectively as they might or whether they might need to be adjusted in light of developments in the operation of the NWA.
- 4.8 In the first instance, we would expect the non-consolidated licensees to use the opportunities available to them and to be pro-active about the way in which they engage with Network Centre. For instance, we would suggest that through the Chair of Network Council, the non-consolidated licensees have the opportunity to set the



agenda for meetings, and to indicate which topics they want to be reported on at the Network Council level. If it were felt necessary, it seems to us that the Network Council could increase the frequency of its meetings if that would assist in facilitating constructive dialogue between the licensees.

- 4.9 We recognise that there could be an issue about the voting arrangements at the Network Council level in that there is clearly an issue that the voting block controlled by ITV plc clearly outweighs the voting block of the non-consolidated licensees. At the same time, it would not seem appropriate for all decisions of Network Council to require unanimity. We would suggest that the licensees should engage in a debate about the role of Network Council going forward and what voting arrangements are needed to support that role. The issue of intra-licensee communications could be an issue to which we return in subsequent annual reviews.

### **Scope of the NWA**

- 4.10 A concern was expressed by some licensees that the removal of NPL, Tri-partite Agreement and Code of Practice from the set of documents that comprise the NWA could result in ITV plc using its influence on ITV Network to secure changes to the drafting of these documents to the detriment of the non-consolidated licensees. Some respondents felt that the requirement that changes to the documents that made up the NWA had to be approved by Ofcom provided an important element of regulatory protection.
- 4.11 An alternative view was expressed that Ofcom should follow through on the suggestion put forward in the 2006 Review that these documents could be removed from the NWA in order to streamline the review process.
- 4.12 At this point in time, Ofcom regards this issue as largely academic. As flagged up in the 2006 Review of the NWA, the existing Network Code of Practice, NPL and Tri-Partite Agreement need to be updated to take into account changes to Ofcom's revised Guidance to broadcasters and the agreement of new Terms of Trade and then submitted to Ofcom for approval. Until there is a revised set of documents that have been formally approved by Ofcom, we do not consider that it is appropriate to consider the composition of the NWA.

### **The move to a multi-channel, multi-platform world**

- 4.13 Licensees raised a number of matters in relation to the way in which ITV Network operated as broadcasters were increasingly developing and implementing strategies in a multi-channel, multi-platform environment. The key issues appear to focus on clarity about the nature of rights that ITV Network is acquiring and the need for cost-sharing/pricing arrangements to be developed to deal with those issues.
- 4.14 Recognising that different licensees are pursuing different commercial models in the exploitation of programming content in a multi-channel/multi-platform environment, the licensees are keen to ensure that they are paying an appropriate amount for content which could be used not just on ITV1 but also exploited across other channels and/or other platforms.
- 4.15 As indicated in the 2006 review, the focus of the NWA has been the provision of a network service that can compete with other television programme services across the UK. We acknowledged that the delivery of a Channel 3 service by broadband raised a number of interesting questions and indicated that the 2007 NWA Review



could provide a vehicle to consider what the effect of the ITV Broadband service on the NWA had been.

- 4.16 However, given the re-launch the itv.com service as a streaming, video-service and its roll-out in terms of functionality over Summer 2007, we have not been in a position to make a considered evaluation of the impact of this service on the delivery of PSB in the nations and regions or indeed on regional or national services offered by the minority licensees.
- 4.17 Given the desire on all sides to establish clear rules in this area, it would seem sensible for licensees to seek to make arrangements between themselves for the cross-platform use of content and also the appropriate pricing arrangements to support those uses according to their different commercial models. Within the scope of the Code of Practice and the new Terms of Trade, ITV Network will be acquiring content on behalf of all the regional C3 licensees. In the first instance, it should be a matter for licensees to establish arrangements for deciding how those rights are then exploited in the licensed regions.
- 4.18 However, we are also aware that the issue of the delivery of PSB across different platforms and in the Nations and Regions going forward is something that is being looked at as part of Ofcom's Second Public Service Broadcasting Review. The interaction with this review is discussed in more detail below.

### **Refinements to “No Play, No Pay” Arrangements**

- 4.19 The 2005 Review of the NWA established the “No Play, No Pay” arrangements in relation to licensees opting out of the network schedule.
- 4.20 Some licensees have expressed the concern that there were still some operational issues that were still being worked through before Ofcom could regard these arrangements as being formalised. However, at the same time, it was indicated proposals have been made to ITV Network in respect of notification periods to ensure that both sides had an appropriate degree of flexibility.
- 4.21 We have not received any further communication to suggest that there are any outstanding issues in relation to this issue and so assume that this issue has been resolved satisfactorily between the parties.

### **Participation TV and the ITV Compliance Process**

- 4.22 A specific (and ongoing) development in the course of 2007 was the issue of “Participation TV”. This led to us commissioning an inquiry following significant compliance failures by broadcasters. The inquiry, led by Richard Ayre (a member of the Ofcom Content Board), was charged with making recommendations on actions needed to restore confidence and trust in the use of Premium Rate Telephony Services (“PRS”) by television broadcasters<sup>10</sup>. The Ayre Report published its findings in July 2007.
- 4.23 Following a period of consultation on implementing the recommendations of the Ayre Report, in February 2008 we made a number of changes to broadcasting licences. Those changes not only provided that when licensees invite audiences to participate in programmes, responsibility for handling all communications rests with the licensee

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<sup>10</sup> The published version of the Inquiry's report is available on the Ofcom website at: <http://www.ofcom.org.uk/tv/ifi/prsinquiry/ayrereport>

but also that there should be independent third-party verification of all systems used in PRS voting and competitions. These changes could have an impact on ITV1's compliance arrangements and in particular the role of ITV Network.

- 4.24 There are also a number of on-going investigations into the use of PRS by broadcasters and some of those investigations involve ITV1.
- 4.25 The process by which programmes for ITV Network are complied is an issue that is addressed in the ITV Network Code of Practice. Given that there was a consultation on licence changes to implement the recommendations of the Ayre Report and there are specific cases currently under investigation, it would be premature for us to undertake a review of ITV Network compliance arrangements as part of this 2007 Review. However, we would expect to look in more detail at the impact of the new licence conditions e.g. on ITV Network's role in putting in place arrangements for third-party verification, as well as the issue of compliance for ITV1 more generally as part of the 2008 Review.

### **Ofcom's Second Review of Public Service Broadcasting**

- 4.26 In 2007 we began<sup>11</sup> our Second Review of Public Service Broadcasting, having brought the timing forward in light of changes to the broadcasting environment. This review is considering the period through digital switchover and afterwards to 2016 and will focus on traditional public service television services provided by the BBC, ITV, Channel 4 and Five, S4C and Teletext. It will also consider non-traditional audio-visual services offered by the existing public service broadcasters on other platforms.
- 4.27 The review also considers public service broadcasting in the Nations and English regions where ITV's regional licences are key to the provision of plurality with the BBC. The licensees' ability to deliver regional and national obligations is undepinned by the NWA. These are issues which could have an impact on the scope and operation of the ITV NWA.
- 4.28 Again, it would be premature to make recommendations in respect of these matters in the course of this 2007 review. It would be more appropriate in the course of the 2008 Review to consider how the emerging thinking from the Second PSB Review could impact on the ITV NWA and whether any specific changes to the NWA would be needed.

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<sup>11</sup> See press release for publication of terms of reference at [www.ofcom.org.uk/media/news/2007/09/nr\\_20070911](http://www.ofcom.org.uk/media/news/2007/09/nr_20070911).

## Annex 1

# The statutory framework for reviewing the NWA

## Introduction

- A1.1 The framework for this review is set out in Schedule 11 of the Act. Ofcom must not approve revised NWA (or propose modifications to the existing arrangements), unless it is satisfied that the revised arrangements (or proposed modifications) satisfy the competition test set out in paragraphs 6(3) and 6(4) respectively of Schedule 11 of the Act.
- A1.2 The Act sets out the three statutory tests - described below - that Ofcom must take into account, alongside its wider statutory duties, when carrying out this review. Ofcom reviews the ITV Networking Arrangements in this document from the perspective of these statutory tests and duties. In addition Ofcom must also be mindful of its wider statutory duties and public policy objectives. As a general rule, Ofcom must not propose, impose or approve arrangements or modifications to the arrangements unless it considers that such arrangements or modifications are satisfactory.
- A1.3 The statutory competition test is focused on restrictions of competition arising from the arrangements themselves, as opposed to restrictions of competition arising from the unilateral behaviour of one of the parties to the arrangements. When this test was conceived, the Channel 3 licensees were not so unevenly matched. ITV plc now owns 11 of the 15 licences, affording it a position of strength within the ITV network that creates different competition issues, which we believe are not covered by the statutory competition test, but which are nevertheless relevant to the arrangements between ITV licensees.

## The 'Competition Test'

- A1.4 The statutory Competition Test set out in paragraph 6 of Schedule 11 of the Act is in two parts:
- Arrangements satisfy the first Competition Test if they do not have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom. If the arrangements satisfy this test, there is no need to consider the second test; and
  - Arrangements satisfy the second Competition Test if (a) they do have such an object or effect; but (b) they would satisfy the criteria set out in section 9 of the Competition Act 1998.
- A1.5 Before making a decision about whether a competition test is satisfied or not, Ofcom must consult the Office of Fair Trading. In determining whether arrangements or modified arrangements would satisfy either of the tests, Ofcom must ensure the principles it applies and the decisions it reaches are consistent with the EC Treaty and any relevant decisions of the European Court. In addition, it must have regard to any relevant decisions or statements of the European Commission.

- A1.6 The NWA are excluded from the application of the Chapter I Prohibition under Schedule 2 to the Competition Act 1998 to the extent that they fulfil the relevant competition tests set out in Schedule 11 of the Act. However, the licensees are still prevented from engaging in any practice which is prejudicial to fair and effective competition (towards external parties and to each other) by conditions in their licences. The licensees also remain subject to the Chapter II prohibition in the Competition Act 1998.

### **The ‘Effectiveness Test’**

- A1.7 Ofcom must not approve, impose or propose arrangements and/or modifications unless Ofcom considers those arrangements / modifications to be satisfactory for the purpose of enabling regional Channel 3 services (taken as a whole) to be a nationwide system of services which is able to compete effectively with other television programme services provided in the United Kingdom.

### **The ‘Regional Programming Test’**

- A1.8 Ofcom must not approve, impose or propose arrangements and/or modifications unless Ofcom considers those arrangements/ modifications to be satisfactory, including the likely effect of the arrangements/ modifications on the ability of Channel 3 licensees to maintain the quality and range of regional programmes and other programmes which contribute to the regional character of the services.
- A1.9 It should be noted that the second and third statutory tests relate to public policy rather than specifically to competition law.
- A1.10 In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act states that Ofcom must not approve, impose or propose arrangements and/or modifications if such arrangements/modifications would be likely to be prejudicial to the ability of the Channel 3 licensees, or any of them, to comply with:
- a) their public service remits;
  - b) their regional production obligations<sup>12</sup>;
  - c) their regional programming obligations; or
  - d) conditions imposed on them following a change of control.

### **Ofcom’s other duties and objectives**

- A1.11 Section 3 of the Act sets out Ofcom’s general duties and the matters that Ofcom must take into account in performing its duties. These matters include:
- a) the desirability of promoting the fulfilment of the purposes of public service television broadcasting in the United Kingdom;
  - b) the desirability of promoting competition in relevant markets;

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<sup>12</sup> In addition to the above statutory tests, paragraph 8 of Schedule 11 of the Act requires Ofcom to take into account the impact of the arrangements or modifications to the arrangements on the ability of the Channel 3 licensees to comply with certain of their licence obligations

- c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation; and
  - d) the desirability of encouraging investment and innovation in relevant markets.
- A1.12 Ofcom also has a general regulatory principle that it will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.
- A1.13 Ofcom also believes that the following public policy objectives (as articulated in the 2005 Review) are appropriate guiding principles to follow when reviewing the NWA:
- the documents that together comprise the NWA should continue to reflect accurately the actual operational arrangements;
  - organisational arrangements should be robust to changes in corporate ownership;
  - all of the Channel 3 licensees should be able to continue to meet their specific licence obligations efficiently and effectively;
  - the principles which underlie the relevant cost sharing arrangements should be transparent and clearly understood by all parties to the NWA; and
  - there should be an appropriate degree of non-discrimination between parties to the NWA and (where appropriate) any relevant third parties.

## Annex 2

## Glossary

<b><i>Act, the</i></b>	Communications Act 2003
<b><i>Channel</i></b>	Channel Television Ltd: Owner of the Channel Islands regional Channel 3 licence
<b><i>Channel 3</i></b>	Free-to-air, commercially funded, national television broadcast channel, made up of 15 regional licensed areas
<b><i>Code of Practice</i></b>	(1993) - Network Centre Code of Practice: NWA document intended to guarantee an even-handed treatment of in-house and independent producers with respect to programme commissioning
<b><i>Code of Practice</i></b>	(2004) – ITV Network Limited Code of Practice for Commissioning Programmes from Independent Producers: Code of Practice concerning the commissioning from independent producers, drawn up in line with requirements under section 285 of the Act
<b><i>Competition Test</i></b>	Statutory Competition Test set out in paragraph 6 of Schedule 11 of the Act
<b><i>Effectiveness Test</i></b>	Statutory Public Policy Test set out in Schedule 11 of the Act
<b><i>External Arrangements</i></b>	arrangements in relation to external third parties, such as external programme producers
<b><i>Intra-ITV Arrangements</i></b>	Arrangements or agreements between the ITV licensees
<b><i>ITV1</i></b>	ITV national broadcast channel comprising the Channel 3 licensees (as distinguished from ITV plc wholly-owned channels, e.g., ITV2, ITV3)
<b><i>Non-consolidated Licensees</i></b>	SMG, UTV and Channel
<b><i>NPB</i></b>	Network Programme Budget: Budget for the ITV1 network programming made up from contributions from each Channel 3 licensees
<b><i>NPL</i></b>	Network Programme Licence: the standard form of contract for use by the NWC when it commissions a programme from a regional licensee
<b><i>NSC</i></b>	Network Supply Contract: Part of NWA, specifying each regional licensee's share of contribution to the Network Programme Budget
<b><i>NWA</i></b>	Networking Arrangements: Set of arrangements between ITV Network and ITV plc, SMG, UTV and Channel to coordinate the

	provision of a national television service capable of competing with other broadcasters in the UK
<b>NWC</b>	ITV Network Centre: Management structure within ITV Network Ltd, responsible for executing instructions of the Network Council
<b>Network Council</b>	(‘Council’): The Board of the NWC, responsible for agreeing the strategy and budget for ITV1
<b>Pact</b>	Producers Alliance for Cinema and Television – UK trade association that represents the commercial interests of independent feature film, television, animation and interactive media companies
<b>PSB</b>	Public Service Broadcaster licensed under the Act
<b>Regional Programming Test</b>	Statutory Public Policy Test set out in Schedule 11 of the Act
<b>SMG</b>	SMG plc: Owners of stv North and stv Central, the two Scottish regional Channel 3 licensees
<b>Statement of Principles</b>	Network Centre Statement of Principles: NWA document dealing with the control of network policy by the licensees, the implementation of that policy by the NWC, the selection of programmes, the budget and the supply of a network schedule and provides for the NWC to be organised within the management structure of ITV Network Ltd
<b>Tripartite Agreement</b>	Tripartite Commissioning, Production and Compliance Agreement: Contractual arrangement as part of the NWA, used by the NWC when commissioning a programme from an independent producer
<b>UTV</b>	Ulster Television Plc: Owner of the Ulster regional Channel 3 licence