



Review of ITV Networking Arrangements 2006

Consultation

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Contents

Section		Page
1	Summary	1
2	Introduction	3
3	Background to this review	6
4	Assessment of current Networking Arrangements	11
5	Future reviews of the Networking Arrangements	15
Annex		Page
1	Responding to this consultation	17
2	Ofcom's consultation principles	19
3	Consultation response cover sheet	20
4	Consultation questions	22
5	The statutory framework for reviewing the NWA	23
6	Glossary	26

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') and the 15 regional Channel 3 licensees. These 15 licensees are currently under the ownership 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 coordinate the provision of a national television service that is capable of competing effectively with other broadcasters in the UK.
- 1.3 Ofcom has a statutory duty to carry out from time to time a general review of the NWA, under section 293 of the Communications Act 2003 (the 'Act'). Essentially, such a review is intended to assess:
 - Whether regional Channel 3 services can be a nationwide system that can compete effectively with other UK television programme services; and
 - The impact of the NWA on competition
- 1.4 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.
- 1.5 Ofcom must conduct such a review no more than a year after the previous review. Ofcom published its final recommendations on the 2005 NWA review in Autumn 2005. This consultation document is part of the 2006 review of the NWA.

Ofcom's proposals

- 1.6 The consultation proposals are as follows:
 - On the current NWA, there will be a need to update the Network Centre Code of Practice to take into account any changes to Ofcom's Guidance to broadcasters for drawing up Codes of Practice relating to the commissioning of independent producers. Following on from Ofcom's Television Production Sector Review (TPSR)¹, Ofcom will be consulting separately on revised Guidance to broadcasters. Ofcom, therefore, does not recommend in this document how the Network Centre Code of Practice needs to change, simply that it will need to be amended in the light of that revised Ofcom guidance and the new media rights agreements. The Network Programme Licence and Tri-partite Agreement will need to be amended as well in the light of any changes to the Network Centre Code of Practice;
 - There are no other changes necessary at this time to the current NWA, as there are no other significant changes to the operation of the NWA and, because the recommendations of the 2005 Review have yet to be fully implemented, it would

¹ See http://www.ofcom.org.uk/consult/condocs/tpsr/statement/review_tv.pdf

not be meaningful to assess the operation of the new arrangements given that they have not yet had time to bed in; and

- To comply with the legal requirement for frequent reviews of the NWA whilst minimising the burden on stakeholders, Ofcom proposes that the process of future NWA reviews be streamlined using a more focused consultation process.

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 (the 'NWA'). However, the Broadcasting Act 1990 did not dictate the structure or content of the arrangements.
- 2.3 ITV Network Ltd ('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 is a part of ITV Network Ltd.
- 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 (the 'Tripartite Agreement' or '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 independent producers with respect to programme commissioning.

Purpose of this review

- 2.5 Section 293 of the Act requires Ofcom to carry out from time to time a general review of the NWA. The framework for this review is set out in Schedule 11 of the Act and summarised in Annex 5. 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.

2.6 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.

2.7 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.

2.8 Such reviews are required to be carried out no more than a year after the previous review. Ofcom may also, at any other time, carry out a review of the NWA if prompted to do so by a licensee.

2.9 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 on matters relating specifically to UTV². In those documents, Ofcom set out its recommendations on how the NWA should be revised in order to address the concerns identified by Ofcom. The regional Channel 3 licensees have since then been engaged in the agreement and drafting of the necessary amendments to the NWA and other documentation. Given the complexity of the issues which have needed to be addressed, this has taken longer than expected and some of the formal revisions on arrangements between licensees are not yet finalised, although Ofcom understands that there is agreement on the underlying principles.

2.10 This document sets out Ofcom's preliminary conclusions for the 2006 Review of the NWA, taking into account developments in the sector since the 2005 Review. In the light of any subsequent recommendations by Ofcom, Channel 3 licensees will need to re-draft the NWA, in consultation with Ofcom, to incorporate any confirmed amendments. Ofcom will then need to review the proposed set of revised ITV NWA before giving its final approval.

2.11 Ofcom also considers in this consultation process possible ways to streamline the NWA review process, given the legal requirement to conduct NWA reviews at regular intervals.

Structure of this document

2.12 The rest of this document comprises the following:

- Section 3 provides background for this review
- Section 4 assesses the current NWA

² 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

- Section 5 suggests possible future changes to the NWA and the process for reviewing them
- Annexes 1-4 cover the consultation process, including details of how to respond
- Annex 5 describes that statutory framework for reviewing the NWA
- Annex 6 is a glossary of technical terms used in this document.

Section 3

Background to this review

3.1 This section provides brief background information for this NWA review, covering:

- Arrangements in place between the Channel 3 licensees, and between licensees and third parties, which together facilitate the production of the ITV1 channel;
- A brief summary of the 2005 Review; and
- Relevant developments since the 2005 Review.

ITV Network activities and governance

3.2 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 ITV Networking Arrangements³, but in brief they are:

- i) Programme commissioning and acquisition. Content for ITV1 is sourced from new 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 requirement to provide direct access for independent producers to the ITV NWC: this provides for equal access to the ITV Network Centre for all producers. Another safeguard in commissioning is the Code of Practice which 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 relatively minor differences in schedule due to 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.

3.3 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 3) are:

³ See <http://www.ofcom.org.uk/consult/condocs/itv1/main/itv.pdf> and <http://www.ofcom.org.uk/consult/condocs/itv1/statement/261207/>

- 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: the NWC schedules ITV1. The ITV2-4 channel management, who are housed within ITV Network Ltd, 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 Channel 3 licences; 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. 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.

The 2005 NWA review: context and conclusions

- 3.4 Whilst the NWA were introduced under the 1990 Broadcasting Act, the Communications Act 2003 introduced a requirement for periodic reviews of the NWA. The 2005 Review was the first such review to take place under the requirements of the Act. Before the 2005 Review, the NWA had been largely unchanged since 1993.
- 3.5 The 2005 Review needed to consider wider factors in the relationships between licensees. The 2003 merger of Carlton-Granada and the launch of ITV plc's new channels (at that time, ITV2, ITV3 and the ITV News Channel) were clearly relevant. Also, various arrangements between licensees existed outside the NWA but nevertheless affected their ability to produce a nationwide channel able to compete with other national broadcasters, and to meet obligations on regional programming.
- 3.6 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 a separate statutory requirement to the NWA, had already addressed a number of issues relating to the arrangements between ITV Network and independent producers⁴.
- 3.7 In the 2005 Review, Ofcom recommended various changes to the NWA for both external and internal arrangements, including:
 - a) ITV Network Centre incorporating the 2004 Code of Practice for commissioning from independent producers or the principles contained within it into the NWA and extending it so that all producers would be treated on an equivalent basis;

⁴ 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.

- b) ITV plc incorporating the commitments made to the ITC at the time of the Carlton-Granada merger in relation to the independence of the commissioning process, including the arms-length nature of the process for programme price negotiations between the ITV Network Centre and all programme suppliers into the NWA. This could be done through incorporating the principle of an independent commissioning process into the ITV Network Statement of Principles, and removing the ability of Council to amend the Statement of Principles without Ofcom's approval;
 - c) Measures to ensure that employees within the core functions of ITV Network Centre are employees of ITV Network Centre and have clear management reporting lines within Network Centre;
 - d) Ensuring that the Code of Practice provides for independent dispute resolution;
 - e) Underpinning the intra-ITV arrangements by high level principles to:
 - safeguard non-consolidated licensees from unfair treatment by ITV plc on sharing costs for services purchased from third parties, fees for services purchased from ITV plc, sharing programme costs between ITV1- and ITV plc-owned channels, and providing ITV Network services to ITV plc-owned channels; and
 - strengthen commitments to support regional programming obligation;
 - f) Requiring various steps on cost sharing transfers between ITV licensees, including transparent budget information and audit rights for licensees;
 - g) Helping to meet regional programming obligations by the NSC reflecting the principle of "no play, no pay", such that where a national licensee opts out of the network schedule to meet its regional programme licence obligations, the licensee will not have to pay for a programme it does not transmit in another slot; and
 - h) For programme compliance, that the choice of compliance licensee should be made by the producer, whilst the compliance fee should be cost-oriented so that an efficient competitor or new entrant would be able to compete.
- 3.8 The implementation of the 2005 Review recommendations by the licensees involved many detailed changes and, as referred to above, some of the changes to intra-ITV arrangements have yet to be fully implemented. Whilst this delay is unfortunate, Ofcom does not consider the unresolved issues to be major points of contention. Rather, it seems that final implementation of what are complex issues has simply dragged on. This interpretation is supported by the fact that licensees have not expressed clear concerns to Ofcom about this delay. However, Ofcom strongly encourages licensees to fully implement all of the 2005 Review conclusions as soon as possible.

Developments since the 2005 Review

- 3.9 From Ofcom's perspective, there has only been one significant development in relation to the operation of the NWA since the 2005 Review that would suggest a need to amend the NWA documents. This issue, which is explained in more detail below, concerns the acquisition of so-called 'new media rights' from independent producers at the time of commissioning of programmes from those producers.

Ofcom's Television Production Sector Review

- 3.10 Ofcom's Television Production Sector Review ('TPSR') examined the UK production sector as a whole, looking at both in-house and external (independent) production. There was a specific focus on the commissioning of original content, i.e., the material that broadcasters commission from producers for first transmission on their channels.
- 3.11 The TPSR looked again at the rationale for intervention in this sector. One of the three main factors which could require intervention was negotiating strength. The TPSR confirmed that there are relatively few buyers of originated programming – the PSBs accounting for over 90 per cent of all commissioning - but a very large number of producers. This imbalance was considered likely to provide PSBs with a relatively strong negotiating position with producers. Furthermore, given the current market structure, it might not be possible to rely on effective competition to ensure that PSBs were incentivised to use their negotiating strength in the interests of viewers. Although sources of demand for original content were growing, it was expected that the main terrestrial channels would remain the main buyers of originated content going forward.
- 3.12 The Codes of Practice required for each PSB under section 285 of the Communications Act had sought to address this negotiating position when commissioning programmes from independent producers⁵. The Codes (introduced in 2004) aimed to establish a principle that rights in a programme resided with the producer unless explicitly sold to a broadcaster, and set out a more transparent basis for commissioning deals to mitigate the exercise of broadcasters' negotiating strength. The Codes (and any changes to them) are subject to Ofcom approval.
- 3.13 The TPSR found that the Codes of Practice and the associated terms of trade were generally seen as working well for scheduled broadcast television. However, there was concern over rights for cross-platform distribution and the exploitation of content originally commissioned for TV broadcast⁶. Both broadcasters and producers argued that there was a lack of clarity on these issues in the existing Codes of Practice: rights traditionally had been defined in terms of exploitation by platform but were largely silent about emerging new media platforms. There was a concern that PSBs were using this uncertainty to obstruct exploitation of new media rights.
- 3.14 Ofcom set PSBs and the representatives of independent producers the challenge to resolve matters for themselves through commercial negotiation. Subsequently, Heads of Agreement were reached between the Pact and the BBC, ITV1 and Channel 4 in early Summer 2006.
- 3.15 In light of the development of a new windowing framework for commissioning from independent producers, Ofcom will need to amend its Guidance to broadcasters and this will be the subject of a separate consultation process. Once the new Guidance has been put in place then PSBs will need to amend their Codes of Practice and submit them to Ofcom for approval.

⁵ The Codes only apply to programming commissioned from third parties. Where BBC and ITV commission from their in-house production arms, they retain all rights in those programmes. Channel 4 and five do not have any in-house production – they follow a broadcaster-publisher model.

⁶ It should be noted that the Codes of Practice do **not** apply to content commissioned specifically for new media platforms.

- 3.16 In the TPSR Statement⁷, Ofcom stated that it would be updating its Guidance to broadcasters on drawing up Codes of Practice to take account of developments in relation to new media rights⁸. Ofcom expects to do this by means of a short consultation, which it aims to issue early in 2007. Once Ofcom has amended its Guidance, PSBs will be in a position to amend their Codes of Practice and to finalise new Terms of Trade which take into account both the agreements on Heads of Terms and the new Codes of Practice.
- 3.17 In the case of ITV Network plc this specifically would entail changes to the NWA Code of Practice and the Network Programme Licence and Tripartite Agreements.

Question 1 Since the conclusion of the 2005 Review, do you consider there to have been any other major developments that might suggest a need to revise the contents of any of the NWA documents?

⁷ See http://www.ofcom.org.uk/consult/condocs/tpsr/statement/review_tv.pdf

⁸ See http://www.ofcom.org.uk/consult/condocs/tpsr/statement/review_tv.pdf

Section 4

Assessment of current Networking Arrangements

- 4.1 This section sets out Ofcom's review of the current NWA and proposals for how they might need to change. After describing the general framework for assessing the NWA, we assess the current NWA documents.
- 4.2 The current review of the NWA needs to take place now, despite the significant time that has been taken to implement the recommendations of the 2005 Review. Given that the detailed implementation of those recommendations has not yet been finalised by the licensees, Ofcom does not consider that it would be possible to make an assessment as to how the 2005 changes on intra-ITV arrangements have worked. In the absence of any other clear changes in the market that would alter the basis on which Ofcom made its recommendations in the 2005 Review, Ofcom believes that it would be premature to recommend further changes to the relevant parts of the NWA at this time. Instead, the changes arising from the 2005 Review, which represented a major reappraisal of the NWA, should be given time to 'bed down' before their efficacy can be properly tested. This would tend to suggest a relatively limited scope to the 2006 Review.
- 4.3 In scoping this NWA review, Ofcom has shared that view with licensees and Pact, and the comments received suggest that stakeholders accept the reasoning for limiting the scope of the 2006 review in this way. Notwithstanding this broad approach, Ofcom has considered in a structured way each of the elements of the current NWA.

The framework for this review

- 4.4 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 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.
- 4.5 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 5, 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.

- 4.6 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 obligations⁹;
 - c) their regional programming obligations; or
 - d) conditions imposed on them following a change of control.
- 4.7 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.
- 4.8 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;
 - The non-consolidated 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.

Assessment of the need for revisions to the NWA

- 4.9 Ofcom sets out below its assessment of the changes necessary to the current NWA, by looking at the three broad areas of activity in the ITV Network supply chain identified in paragraph 3.2. Ofcom considers 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).

⁹ 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

Programme commissioning and acquisition

The Network Centre Code of Practice

- 4.10 The outcome of Ofcom's TPSR has prompted a move to a windowing framework for the exploitation of rights in content commissioned by the PSBs from independent producers. Ofcom intends to carry out a separate consultation on changes to the Guidance that it is required to have in place under section 285 of the Act to take into account those changes. Once that Guidance has been updated, there will be a need for PSBs' Codes of Practice and terms of trade to be amended to reflect the changes in the Guidance and the new arrangements for the exploitation of new media rights.
- 4.11 As the Code of Practice required under section 285 of the Act is the same document as Code of Practice included in the NWA, the change in Ofcom's Guidance will affect the contents of the NWA.
- 4.12 However, the specific content of the changes needed to the Code of Practice is not yet clear. Ofcom will shortly be publishing revised Guidance for consultation. At this time, therefore, there are no specific amendments to assess against the statutory competition tests.
- 4.13 Ofcom's proposal is therefore limited to recommending that the Network Centre Code of Practice be amended, and that consequent changes also be made to the Network Programme Licence and Tripartite arrangements.

Question 2 Do you agree with Ofcom's proposal that the Network Centre Code of Practice, the Network Programme Licence and the Tripartite Agreement should in due course be amended to reflect developments following Ofcom's Television Production Sector Review?

Other issues

- 4.14 From Ofcom's perspective, there have not been any other substantive changes in programme commissioning and acquisition since the 2005 NWA review that would lead it to propose any changes to the relevant parts of the NWA documents. This applies to both external arrangements and intra-ITV arrangements.
- 4.15 Ofcom therefore proposes no further changes to the relevant provisions in the NWA beyond those recommended in the 2005 Review.

Channel operation services

- 4.16 From Ofcom's perspective, there have not been any substantive changes to the working of channel operation services since the 2005 Review that would lead it 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.
- 4.17 Ofcom therefore proposes no further changes to the relevant provisions in the NWA beyond those recommended in the 2005 Review.

Viewers, airtime sales and sponsorship

- 4.18 As with channel operation services, to the best of its Ofcom's knowledge, there have not been any substantive changes to the arrangements for airtime sales and sponsorship since the 2005 NWA review that would lead it to propose any changes to the relevant parts of the NWA documents. This applies to both external arrangements and intra-ITV arrangements.
- 4.19 Ofcom therefore proposes no further changes to the relevant provisions in the NWA beyond those recommended in the 2005 Review.

Conclusion

- 4.20 Ofcom considers that the existing NWA meet the tests of Schedule 11 of the Act and, in particular, the competition test set out at paragraph 6 of that Schedule. On this basis, Ofcom is proposing to approve the NWA without requiring any amendment to the documents comprising the NWA.

Question 3 Do you have any other comments on Ofcom's preliminary assessment of the need for changes to any of the NWA documents?

Section 5

Future reviews of the Networking Arrangements

5.1 The 2005 Review was a wide-scale review of the NWA after over ten years of limited change. But despite the major changes arising from the 2005 Review, there remains a legal requirement for annual NWA reviews. Ofcom believes that it is appropriate to consider measures to ensure that future reviews follow a streamlined review process, where possible. Ofcom has therefore been considering possible changes to the NWA review process.

Focused consultations

- 5.2 Ofcom has obligations in the Act to bring possible changes to the NWA to the attention of parties who, in Ofcom's opinion, are likely to be affected¹⁰. Ofcom must then allow a reasonable time for representations between publishing those potential changes and deciding whether or not to approve the NWA.
- 5.3 Ofcom considers that this requirement can be met within a flexible approach whereby a formal consultation stage is included only where there is cause to believe it is necessary. The process in this situation would be:
- Informal consultation with the most directly interested parties – licensees and the representatives of independent producers¹¹ - on the operation of the NWA and any changes they would like to see; followed by
 - Publication of a brief Ofcom statement that would: refer to the analysis in the last NWA review; assess whether the legal tests are met in respect of any proposed minor modifications to the NWA; and confirm how and when the NWA should change in the event that further representations are not received.
- 5.4 In circumstances where there is argued to be a need for more material changes to the NWA, due to a change in the market or experience of how the NWA are working, a wider formal consultation process would be more suitable. However, with changes that are considered to be minor and uncontroversial it is reasonable to retain the ability to amend the NWA without unnecessarily formal steps.
- 5.5 Avoiding in-depth formal reviews of the NWA may also encourage a focus on the pragmatic and effective implementation of the NWA rather than regular and detailed redesign of the NWA documents. In Ofcom's view, changes to NWA documents and processes should generally be assessed only once they have been operating for a reasonable period of time.
- 5.6 It is important to note that, in proposing this approach, Ofcom is mindful that the Act also allows it to review the NWA at any time in response to a request to do so from a licensee. Ofcom can therefore decide at any point to conduct a formal consultation if major issues are raised.

¹⁰ see Paragraph 3 of Schedule 11

¹¹ and the OFT, who must be consulted under the Act

Question 4 Do you agree with Ofcom's proposal that future NWA reviews should combine focused informal consultations with an opportunity to comment on conclusions, where proposed changes to the NWA are not material? Can you suggest any 'rules of thumb' for when a more formal consultation process is needed?

Scope of the NWA documents

- 5.7 In planning the scope of this review, Ofcom considered whether any of the documents currently within the NWA could be moved outside the scope of the NWA. The Act does not specify the form that the NWA should take, so there is no absolute requirement that the NWA documents should remain in their current form.
- 5.8 For example, removing the Network Programme Licence and the Tripartite Agreement from the NWA could allow greater flexibility in how the NWC commissions programmes from regional licensees and independent producers respectively, in that necessary changes to those documents would not first require Ofcom scrutiny and public consultation.
- 5.9 Ofcom has raised with key stakeholders the possibility of examining this issue. It does not, however, appear that there is an appetite to consider this issue within this NWA review. This seems understandable given that the changes to the NWA documents arising out of the 2005 Review are only now being finalised.
- 5.10 Ofcom therefore is not making any specific proposals on this issue within this consultation. However we would welcome any stakeholder views on this issue.

Question 5 Is there a case for changing the set of documents that comprise the NWA? In what circumstances would such a change be appropriate?

Question 6 Do you have any other comments or suggestions concerning this review of the NWA?

Annex 1

Responding to this consultation

How to respond

- A1.1 Ofcom invites written views and comments on the issues raised in this document, to be made **by 5pm on 11 January 2007**. Ofcom considers that this issue is of interest to a limited number of stakeholders and the issues covered to be of very limited scope, so a 10 week consultation period is not considered to be necessary in this case.
- A1.2 Ofcom strongly prefers to receive responses using the online web form at http://www.ofcom.org.uk/consult/condocs/itv_network/howtorespond/form, as this helps us to process the responses quickly and efficiently. We would also be grateful if you could assist us by completing a response (see Annex 3), to indicate whether or not there are confidentiality issues. This response coversheet is incorporated into the online web form questionnaire.
- A1.3 For larger consultation responses - particularly those with supporting charts, tables or other data - please email nic.green@ofcom.org.uk attaching your response in Microsoft Word format, together with a consultation response coversheet.
- A1.4 Responses may alternatively be posted or faxed to the address below, marked with the title of the consultation.
- Nic Green
4th Floor
Competition Group
Riverside House
2A Southwark Bridge Road
London SE1 9HA
- Fax: 020 7783 4109
- A1.5 Note that we do not need a hard copy in addition to an electronic version. Ofcom will acknowledge receipt of responses if they are submitted using the online web form but not otherwise.
- A1.6 It would be helpful if your response could include direct answers to the questions asked in this document, which are listed together at Annex 4. It would also help if you can explain why you hold your views.

Further information

- A1.7 If you want to discuss the issues and questions raised in this consultation, or need advice on the appropriate form of response, please contact Nic Green on 020 7783 4154.

Confidentiality

- A1.8 We believe it is important for everyone interested in an issue to see the views expressed by consultation respondents. We will therefore usually publish all responses on our website, www.ofcom.org.uk, ideally on receipt (when respondents

confirm on their response coversheet that this is acceptable).

- A1.9 All comments will be treated as non-confidential unless respondents specify that part or all of the response is confidential and should not be disclosed. Please place any confidential parts of a response in a separate annex so that non-confidential parts may be published along with the respondent's identity.
- A1.10 Ofcom reserves its power to disclose any information it receives where this is required to facilitate the carrying out of its statutory functions.
- A1.11 Please also note that copyright and all other intellectual property in responses will be assumed to be licensed to Ofcom to use in order to meet its legal requirements. Ofcom's approach on intellectual property rights is explained further on its website at <http://www.ofcom.org.uk/about/accoun/disclaimer/>

Next steps

- A1.12 Following the end of the consultation period, Ofcom intends to publish a statement in February 2007.
- A1.13 Please note that you can register to receive free mail Updates alerting you to the publications of relevant Ofcom documents. For more details please see: http://www.ofcom.org.uk/static/subscribe/select_list.htm

Ofcom's consultation processes

- A1.14 Ofcom seeks to ensure that responding to a consultation is easy as possible. For more information please see our consultation principles in Annex 2.
- A1.15 If you have any comments or suggestions on how Ofcom conducts its consultations, please call our consultation helpdesk on 020 7981 3003 or e-mail us at consult@ofcom.org.uk. We would particularly welcome thoughts on how Ofcom could more effectively seek the views of those groups or individuals, such as small businesses or particular types of residential consumers, who are less likely to give their opinions through a formal consultation.
- A1.16 If you would like to discuss these issues or Ofcom's consultation processes more generally you can alternatively contact Vicki Nash, Director Scotland, who is Ofcom's consultation champion:

Vicki Nash
Ofcom
Sutherland House
149 St. Vincent Street
Glasgow G2 5NW

Tel: 0141 229 7401
Fax: 0141 229 7433

Email vicki.nash@ofcom.org.uk

Annex 2

Ofcom's consultation principles

A2.1 Ofcom has published the following seven principles that it will follow for each public written consultation:

Before the consultation

A2.2 Where possible, we will hold informal talks with people and organisations before announcing a big consultation to find out whether we are thinking in the right direction. If we do not have enough time to do this, we will hold an open meeting to explain our proposals shortly after announcing the consultation.

During the consultation

A2.3 We will be clear about who we are consulting, why, on what questions and for how long.

A2.4 We will make the consultation document as short and simple as possible with a summary of no more than two pages. We will try to make it as easy as possible to give us a written response. If the consultation is complicated, we may provide a shortened version for smaller organisations or individuals who would otherwise not be able to spare the time to share their views.

A2.5 We will normally allow ten weeks for responses to consultations on issues of general interest.

A2.6 There will be a person within Ofcom who will be in charge of making sure we follow our own guidelines and reach out to the largest number of people and organizations interested in the outcome of our decisions. This individual (who we call the consultation champion) will also be the main person to contact with views on the way we run our consultations.

A2.7 If we are not able to follow one of these principles, we will explain why. This may be because a particular issue is urgent. If we need to reduce the amount of time we have set aside for a consultation, we will let those concerned know beforehand that this is a 'red flag consultation' which needs their urgent attention.

After the consultation

A2.8 We will look at each response carefully and with an open mind. We will give reasons for our decisions and will give an account of how the views of those concerned helped shape those decisions.

Annex 3

Consultation response cover sheet

- A3.1 In the interests of transparency, we will publish all consultation responses in full on our website, www.ofcom.org.uk, unless a respondent specifies that all or part of their response is confidential. We will also refer to the contents of a response when explaining our decision, without disclosing the specific information that you wish to remain confidential.
- A3.2 We have produced a coversheet for responses (see below) and would be very grateful if you could send one with your response (this is incorporated into the online web form if you respond in this way). This will speed up our processing of responses, and help to maintain confidentiality by allowing you to state very clearly what you don't want to be published. We will keep your completed coversheets confidential.
- A3.3 The quality of consultation can be enhanced by publishing responses before the consultation period closes. In particular, this can help those individuals and organisations with limited resources or familiarity with the issues to respond in a more informed way. Therefore Ofcom would encourage respondents to complete their coversheet in a way that allows Ofcom to publish their responses upon receipt, rather than waiting until the consultation period has ended.
- A3.4 We strongly prefer to receive responses via the online web form which incorporates the coversheet. If you are responding via email, post or fax you can download an electronic copy of this coversheet in Word or RTF format from the 'Consultations' section of our website at www.ofcom.org.uk/consult/.
- A3.5 Please put any confidential parts of your response in a separate annex to your response, so that they are clearly identified. This can include information such as your personal background and experience. If you want your name, address, other contact details, or job title to remain confidential, please provide them in your coversheet only so that we don't have to edit your response.

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: Review of ITV Networking Arrangements 2006

To (Ofcom contact): Nic Green

Name of respondent:

Representing (self or organisation/s):

Address (if not received by email):

CONFIDENTIALITY

What do you want Ofcom to keep confidential?

Nothing	<input type="checkbox"/>	Name/contact details/job title	<input type="checkbox"/>
Whole response	<input type="checkbox"/>	Organisation	<input type="checkbox"/>
Part of the response	<input type="checkbox"/>	If there is no separate annex, which parts?	

DECLARATION

I confirm that the correspondence supplied with this cover sheet is a formal consultation response. It can be published in full on Ofcom's website, unless otherwise specified on this cover sheet, and I authorise Ofcom to make use of the information in this response to meet its legal requirements. If I have sent my response by email, Ofcom can disregard any standard e-mail text about not disclosing email contents and attachments.

Ofcom seeks to publish responses on receipt. If your response is non-confidential (in whole or in part), and you would prefer us to publish your response only once the consultation has ended, please tick here.

Name

Signed (if hard copy)

Annex 4

Consultation questions

Question 1 Since the conclusion of the 2005 Review, do you consider there to have been any other major developments that might suggest a need to revise the contents of any of the NWA documents?

Question 2 Do you agree with Ofcom's proposal that the Network Centre Code of Practice, the Network Programme Licence and the Tripartite Agreement should in due course be amended to reflect developments following Ofcom's Television Production Sector Review?

Question 3 Do you have any other comments on Ofcom's preliminary assessment of the need for changes to any of the NWA documents?

Question 4 Do you agree with Ofcom's proposal that future NWA reviews should combine focused informal consultations with an opportunity to comment on conclusions, where proposed changes to the NWA are not material? Can you suggest any 'rules of thumb' for when a more formal consultation process is needed?

Question 5 Is there a case for changing the set of documents that comprise the NWA? In what circumstances would such a change be appropriate?

Question 6 Do you have any other comments or suggestions concerning this review of the NWA?

Annex 5

The statutory framework for reviewing the NWA

Introduction

- A5.1 The framework for this review is set out in Schedule 11 of the Act. Ofcom must not approve revised ITV Networking Arrangements (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.
- A5.2 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.
- A5.3 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”

- A5.4 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.
- A5.5 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.

A5.6 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”

A5.7 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”

A5.8 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.

A5.9 It should be noted that the second and third statutory tests relate to public policy rather than specifically to competition law.

A5.10 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 obligations¹²;
- c) their regional programming obligations; or
- d) conditions imposed on them following a change of control.

Ofcom’s other duties and objectives

A5.11 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;

¹² 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.
- A5.12 Ofcom also has a general regulatory principle that it will always seek the least intrusive regulatory mechanisms to achieve its policy objectives.
- A5.13 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;
 - the non-consolidated 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 6

Glossary

<i>Act, the</i>	Communications Act 2003
<i>Channel</i>	Channel Television Ltd: Owner of the Channel Islands regional Channel 3 licence
<i>Channel 3</i>	Free-to-air, commercially funded, national television broadcast channel, made up of 15 regional licensed areas
<i>Code of Practice</i>	(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
<i>Code of Practice</i>	(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
<i>Competition Test</i>	Statutory Competition Test set out in paragraph 6 of Schedule 11 of the Act
<i>Effectiveness Test</i>	Statutory Public Policy Test set out in Schedule 11 of the Act
<i>External Arrangements</i>	arrangements in relation to external third parties, such as external programme producers
<i>Intra-ITV Arrangements</i>	Arrangements or agreements between the ITV licensees
<i>ITV1</i>	ITV national broadcast channel comprising the Channel 3 licensees (as distinguished from ITV plc wholly-owned channels, e.g., ITV2, ITV3)
<i>Non-consolidated Licensees</i>	SMG, Ulster and Channel
<i>NPB</i>	Network Programme Budget: Budget for the ITV1 network programming made up from contributions from each Channel 3 licensees
<i>NPL</i>	Network Programme Licence: the standard form of contract for use by the NWC when it commissions a programme from a regional licensee
<i>NSC</i>	Network Supply Contract: Part of NWA, specifying each regional licensee's share of contribution to the Network Programme Budget
<i>NWA</i>	Networking Arrangements: Set of arrangements between ITV and ITV plc, SMG, Ulster and Channel to coordinate the provision of a

	national television service capable of competing with other broadcasters in the UK
NWC	ITV Network Centre: Management structure within ITV Network Ltd, responsible for executing instructions of the Network Council
Network Council	(‘Council’): The Board of the NWC, responsible for agreeing the strategy and budget for ITV1
Pact	Producers Alliance for Cinema and Television – UK trade association that represents the commercial interests of independent feature film, television, animation and interactive media companies
Programme Code	A code set up by statute that sets out the editorial standards which audiences are entitled to expect from commercial television services in the UK
PSB	Public Service Broadcaster licensed under the Act
Regional Programming Test	Statutory Public Policy Test set out in Schedule 11 of the Act
SMG	SMG plc: Owners of Grampian Television Ltd and Scottish Television Ltd, the two Scottish regional Channel 3 licensees
Statement of Principles	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
Tripartite Agreement	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
Ulster	Ulster Television Plc: Owner of the Ulster regional Channel 3 licence