Further Statement on the ITV Networking Arrangements

Issues relating to exclusivity of ITV transmission

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Executive Summary

1.1 Ofcom's review of the ITV Networking Arrangements established a number of important principles to be applied to the arrangements by which ITV Network commissions programming both from in-house and external producers.

1.2 One of those principles was equality of treatment as between in-house and external producers. In its Final Statement, Ofcom required ITV Network to extend the 2004 ITV Code of Practice for commissioning programming from independent producers ("2004 CoP") to cover all producers, including in-house producers, and make changes to the 2004 CoP to accommodate this principle of equal treatment.

1.3 In the course of discussions with ITV licensees about the implementation of the requirements of the Ofcom review a number of issues have arisen in relation to the exploitation of programming commissioned by ITV Network. These issues relate both to the exploitation of programming within the UK on channels other than ITV1 and to the exploitation of programming within overseas markets, notably the Republic of Ireland ("RoI") where issues arise due to the broadcasting of television services from the RoI into Northern Ireland ("NI") and vice versa.

1.4 Ofcom considers that it is important that there is a clear commitment by ITV Network that programming commissioned by ITV Network and which is paid for by the Network Programme Budget should be intended to have its exclusive first transmission on ITV1. If ITV1's exclusivity is waived, either in advance of the first ITV1 transmission, or during the exclusive UK licence period, Ofcom would expect such waivers to be available in principle to all producers, both in house and external, and on equivalent terms;

1.5 Where the first run transmission of a programme on ITV1 is significantly delayed after delivery to ITV Network, then in-house and external producers should have an ability to approach ITV Network to negotiate a waiver of the exclusive first transmission on ITV1 in order to enable programme sales to countries other than the RoI. In the case of the RoI Ofcom considers that a waiver might be also be appropriate in certain circumstances.

1.6 In the specific case of programme sales to the RoI, Ofcom considers that the immediate impact on UTV of allowing ITV Network to retain the flexibility to waive the principle of exclusive first transmission on ITV1 for programming commissioned by ITV Network is likely to be small. Ofcom therefore considers that ITV Network should retain the ability to exercise a waiver for programme sales to the RoI, provided that, in principle, it is applied equally to all producers.

1.7 However, if a waiver is granted, then UTV no longer enjoys exclusivity in its own territory and there is the need to consider whether some form of remedy might be appropriate to compensate for this.

1.8 Ofcom considers that the appropriate measure of compensation due to UTV is to calculate the value of the commercial impacts delivered in NI on TV3 by ITV1 programmes scheduled simultaneously with UTV and to net off from that figure the value of the commercial impacts delivered by those same simultaneously scheduled programmes in the RoI to UTV.

1.9 Given the relative sizes of the Irish and NI markets, and the relative viewing shares of UTV in the RoI and TV3 in NI, this means that in the near term the value of compensation payable to UTV would be zero. However, it would be open to UTV to approach ITV Network for payment of compensation at any time should the value of commercial impacts delivered in NI to TV3 approach the value delivered to UTV in the RoI.

Section 2

Introduction & Background

Background

2.1 On 9 June 2005, Ofcom published a Final Statement on the ITV Networking Arrangements (“NWA”)[1]. Prior to issuing the Final Statement, a number of issues were raised by the ITV licensees relating to the exclusivity of the first transmission of programmes on ITV1 commissioned by ITV Network, within and outside the UK. In particular, UTV and SMG raised issues relating to the transmission of programmes commissioned by ITV Network on channels other than ITV1 and in non-UK territories, as well as the situation where programmes commissioned for broadcast on ITV1 are not in fact scheduled for broadcast within 6 months of acceptance of the programme by ITV Network. These issues were raised after publication of Ofcom’s consultation document in February 2005[2] and were outside the scope of the issues consulted on with stakeholders in that document.

2.2 Rather than delay publication of the Final Statement to address the issues raised by the ITV licensees, Ofcom sought further information from the ITV licensees with a view to issuing a separate statement on those issues in time to incorporate any necessary changes into the redrafted NWA.

2.3 This statement represents Ofcom’s conclusions based on the data provided by licensees and Ofcom’s analysis of the NWA. Given that the matters contained in this statement relate primarily to intra-ITV arrangements it was felt that Ofcom did not need to consult on this particular issue more widely.

2.4 This statement has been discussed with the ITV licensees prior to the statement being issued.

The general issue

2.5 Under the terms of the Network Programme Licence and the Tripartite Agreement, which have been force since 1992, the exclusivity arrangements are broadly similar for programmes commissioned from in-house producers and external third-party producers. Annex 1 sets out the relevant terms of the Network Programme Licence and the Tripartite Agreement in more detail.

2.6 The 2004 CoP created a new system for commissioning from independent producers. Under the terms of the 2004 CoP, when ITV Network commissions programmes for broadcast on ITV1, as a default it requires a 72 hour window between the time of the first transmission of the programme on ITV1 and its transmission in any overseas market. The window can be waived, subject to a commercial negotiation between ITV Network and the producer. This opens up the possibility that the licence fee paid by ITV Network may be reduced in return for a waiver of the 72 hour window.

2.7 The 2004 CoP also allows ITV Network to waive ITV1’s exclusive right to exploit the licence in the programme within the UK during the term of the licence period, subject to commercial negotiation between ITV Network and the producer. This waiver could be exercised to allow secondary exploitation of programmes within the ITV1

[1] http://www.ofcom.org.uk/consult/condocs/itv/statement/statement_itv_nwa.pdf
[2] http://www.ofcom.org.uk/consult/condocs/itv/main/itv.pdf

exclusive five year licence period. The 2004 CoP also establishes an expectation that the first transmission of the programme should occur on ITV1 but it might theoretically be possible for the waiver to be exercised on occasion to allow transmission on another UK channel in advance of the first transmission on ITV1.

2.8 The 2004 CoP is silent as to the position in situations where first transmission on ITV1 is delayed for long periods after acceptance of the programme.

2.9 The 2004 CoP, as currently drafted, applies only to independent producers, thereby creating a potential difference in treatment as between in-house and third-party producers. ITV Network and PACT have been in prolonged negotiations over the changes to the Tripartite Agreement necessary to give effect to the 2004 CoP and as such, it would appear that the issue of the potential differential treatment between in house and external producers has not yet been reflected in a revised version of the Tripartite Agreement. In its Final Statement on the NWA, Ofcom required the 2004 CoP to be extended to apply to all producers on an equal basis and changes made to accommodate this principle of equal treatment.

Specific issues raised by licensees

2.10 During the consultation, SMG raised a concern from its perspective as a producer, that in cases where the transmission of a programme on ITV1 is delayed significantly after its delivery, this delay might prevent transmission of the programme in international territories. SMG suggested that if a programme has not been scheduled for broadcast within a 6 month period of its delivery to the ITV Network, then ITV Network's holdback should lapse and the first transmission of the programme could then take place outside the UK. In effect it would give ITV Network a 6-month window for the worldwide premiere of a programme.

2.11 SMG has also raised the issue of how the principle of an exclusive first transmission on ITV1 is to be interpreted, and in particular, whether ITV Network's ability within the terms of the 2004 CoP to waive ITV1's exclusivity within the UK during the licence period should ever be exercised in order to allow a 'showcase premiere' on another channel, for example ITV2, 3 or 4, ahead of the first transmission on ITV1. SMG argues that if a programme has been fully or partially funded from the Network Programme Budget its first transmission in the UK should invariably occur on ITV1. SMG also raised issues about the way in which monitoring of the granting of any waivers would be carried out.

2.12 UTV expressed concern about the way in which ITV Network was choosing to allow programmes commissioned for ITV1 to be shown on commercial services in the Republic of Ireland simultaneously with the first transmission on ITV1. Given that television services from the Republic of Ireland are broadcast into Northern Ireland, UTV argued that in allowing simultaneous transmission, ITV Network was compromising the integrity of ITV1 as a network service and that it was also having a detrimental impact on UTV in that viewers in Northern Ireland were choosing to watch ITV1 programming on services provided from the Republic rather than on UTV.

2.13 UTV has asked for a change in the terms of the 2004 CoP in a way which would protect ITV licensees. Rather than ITV Network having an ability to negotiate a waiver of the 72 hour window between first transmission of a programme on ITV1 and its transmission in international territories, UTV has proposed giving all licensees a right of veto of the waiver of the window and hence the transmission of programmes on a simultaneous basis into their region.

2.14 UTV also raised an issue about the impact of the broadcasting of television services from the Republic of Ireland on the process of achieving digital switchover in Northern Ireland. The Republic of Ireland does not currently have a digital terrestrial service and so has no plans for switching over its existing analogue services to digital. UTV argued that the fact that programming from ITV1 would be available on analogue services broadcast from the Republic of Ireland would act as a disincentive on households in Northern Ireland to switch to digital. In the context of the digital switchover process, Ofcom considers that the impact of the continued reception of ITV1 programmes within the schedule of analogue services broadcast from the Republic of Ireland is just one of a range of issues that need to be considered as part of the process of achieving digital switchover in Northern Ireland and is by no means the most significant or the most immediate issue. On that basis Ofcom does not propose to consider the issue further in this context.

Section 3

Principles of the Networking Arrangements

Principles of the Networking Arrangements

3.1 In Ofcom's view, the operation of the NWA is based on a number of key principles and these principles help to establish a framework for considering the issues outlined in the previous section.

3.2 The first principle is that of equality of treatment as between in-house and external producers. Equality of treatment was identified as an important principle by the Monopolies and Mergers Commission ("MMC") in its 1992 Report on the NWA. This principle was then reflected in the Network Programme Licence and the Tripartite Agreement which established the basic contractual framework for commissions by ITV Network.

3.3 The 2004 Code of Practice, which was adopted pursuant to a requirement introduced under the Communications Act 2003, enabled ITV to create a new regime for commissions from independent producers. Ofcom considers that internal and external producers should, as far as possible, be treated on an equivalent basis in their dealings with ITV Network. In keeping with this general principle of equality of treatment, Ofcom's Final Statement on the NWA therefore provided that the 2004 CoP should apply to in-house and external producers.

3.4 The 1992 MMC Report also established the principle that the operation of ITV Network should be led by the needs of the ITV1 schedule. This principle was incorporated into the 1992 Statement of Principles and subsequently re-confirmed in the recent review of the NWA.

3.5 The default position under the 2004 CoP is that secondary exploitation of a programme within the UK during the term of ITV's exclusive licence is not allowed and that there should be a 72 hour window between the first transmission of a programme on ITV1 and its subsequent transmission outside the UK except with the permission of ITV Network. However, the 2004 CoP also gives ITV Network the flexibility to waive these requirements as part of a commercial negotiation if it so chooses.

3.6 Ofcom considers that this position is consistent with the principle that the operation of ITV Network should be led by the needs of the ITV1 schedule. On the one hand, allowing for a gap between the first and subsequent transmissions of programmes commissioned by ITV1 protects the integrity of ITV1 broadcasts in the UK, and thereby the ability of ITV1 to compete effectively with other channels in the UK. At the same time, the ability of ITV Network to waive its exclusivity within the UK and the 72 hour international window subject to commercial negotiation reflects the need for flexibility in the operation of the NWA and allows producers greater freedom to exploit their programming. The need for flexibility in negotiating broadcasting rights was also stressed by the MMC in its 1992 Report on the NWA. In Ofcom's view, subject to the principle of equal treatment set out above, it is important that this flexibility is not curtailed.

3.7 A consideration of the issues raised by SMG and UTV needs to take place within the framework established by these principles.

Section 4

Ofcom Decision

General Principles

4.1 Based on the principles set out in the previous section, Ofcom considers that whatever decision is taken on the exclusivity of first run transmissions on ITV1 should reflect the general principle of equality of treatment between in-house and external producers. The terms of trade applicable to in-house productions (reflected in the Network Programme Licence) should therefore be no more or less restrictive than the terms of trade applicable to external productions (reflected in the Tripartite Agreement), although there should be flexibility for producers (whether in-house or external) to negotiate different arrangements on a case-by-case basis.

4.2 Subject to this general principle of equal treatment, Ofcom believes that the ITV licensees should be free to decide whatever arrangements they consider to be most appropriate in relation to international programme sales (with the exception of programme sales into the Republic of Ireland). This will allow the ITV licensees to address the issues raised by SMG relating to delayed transmissions in whatever way the licensees deem to be most appropriate for the licensees themselves and all producers.

4.3 Concerning programme sales within the UK (including for transmission on ITV2, ITV3 and prospectively ITV4) and the Republic of Ireland, the issues raised are slightly more complicated, given the increased potential for such programme sales to impact on the integrity of broadcasts on ITV1. All the licensees agree on the importance of protecting the integrity of ITV1 broadcasts in the UK in order to protect their advertising revenue.

Ofcom's views on these issues are set out below.

Exclusivity of first transmission on ITV1

4.4 The 2004 CoP is clear that it relates to the commissioning of programming by ITV Network for broadcast on ITV1:

> "The purpose of this Code of Practice ("Code") is to provide guidance on the practices which will be adopted in relation to access to and the selection and commissioning of programmes by ITV, together with the outline guidance on the terms on which those programmes will be licensed by ITV for broadcast on ITV1 as mutually acceptable as between ITV and the producer and in the spirit of the Code" [Paragraph B]

4.5 Furthermore, the 2004 CoP also acknowledges that additional rights for ITV secondary channels would be subject to a separate negotiation. In the context of setting out what factors would be relevant for ITV Network to take into account in terms of setting its indicative tariff ranges, the 2004 CoP refers to arrangements for the use by ITV of the programme on ITV secondary channels but goes onto confirm that:

> " …it being acknowledged that in such event any additional rights on such ITV secondary channels will be separately negotiated and agreed and are not made conditional to the commissioning of the primary rights on ITV1;" [Paragraph 3.1.9]

4.6 In its Final Statement on the NWA, Ofcom required ITV Network to have in place arrangements which set out terms on which programmes funded by ITV Network are exploited on other ITV plc operated channels. For the most part this only affects programmes produced by ITV plc (although Ofcom recognises that programmes produced by other producers, including SMG, may also be affected). The existing terms are such that if exploitation does occur on other ITV plc operated channels within the initial licence period then it would be on a secondary sales basis and with a price based on a percentage of the original price paid by ITV1.

4.7 There is a difference of opinion between the ITV licensees in relation to the principle of whether programmes commissioned by ITV Network and funded from the network programme budget should have their first transmission on ITV1. The Other Licensees (i.e. all the licensees other than ITV plc) have argued for the principle that such programmes must always have their first showing on ITV1. ITV plc has argued that there are likely to be circumstances where ITV Network programme controllers need to take into account and help to implement the ITV multi-channel strategy, and that programming should be able to move between channels which are ITV branded or cross-promoted from ITV1. ITV plc has argued in favour of this principle that the BBC and Channel 4 have this flexibility and that to deny it to ITV would be unfairly prejudicial.

4.8 The key difference between the position of ITV and that of the other broadcasters cited is that the BBC and Channel 4 wholly own all their family of channels, while the Other Licensees have an 8 percent stake in ITV1 and fund approximately 8 percent of ITV1's programme budget but have no ownership stake in the other ITV family of channels.

4.9 The ITV licensees are in discussion to establish an agreed basis for the allocation of programme costs between ITV1 and the ITV family of channels. In Ofcom's view there is a substantial difference between the value of a repeat transmission of a programme on a different channel within the initial licence period and the value of the first run transmission on that channel i.e. the UK (and probably world) television premiere. Clearly different principles would need to be arrived at for the basis of programme cost allocation under these two scenarios. Nevertheless, the basic concept behind ITV1 is that of a channel showing first run originated programming commissioned specifically for ITV1 and the Tripartite Agreement and Network Programme Licence terms have been drawn up on that basis.

4.10 Ofcom therefore considers it appropriate that the terms of the Code of Practice make it clear that as a general rule, programming commissioned under the terms of the Network Programme Licence or Tripartite Agreement and funded from the Network Programme Budget is intended to be for first run exclusive transmission on ITV1. This is a general principle, which would not prevent ITV Network from agreeing different arrangements in some circumstances where this is of benefit to ITV1. Indeed, this is consistent with the general principle that the operation of ITV Network should be led by the needs of ITV1.

4.11 Ofcom recognises that the interests of the licensees may differ on whether to allow a change to the general arrangements. In arriving at such a decision to vary these terms of the programme licence, ITV Network and its programme controllers should be guided by the following principles:

- ITV Network will exercise the core functions in the interests of all the Regional Licensees and independently of the production interests of any of the Regional Licensees; and
- Where there is a conflict between the interests of the Regional Licensees, ITV will act as even-handedly as possible and taking into account the interests of the network as a whole.

4.12 If ITV1's exclusivity is waived, either in advance of the first ITV1 transmission, or during the exclusive UK licence period, Ofcom would expect such waivers to be available in principle to all producers, both in house and external, and on equivalent terms. SMG raised a concern about how to ensure that waivers were being operated by ITV Network on an even-handed basis. If waivers are not being exercised on an equivalent basis, producers would be in a position to complain that ITV Network was not complying with the 2004 CoP and could follow the dispute resolution procedure set out in the CoP.

4.13 To the extent that such waivers may be anticipated at the time of commissioning, Ofcom would expect this to be factored into the amount paid by ITV Network to the producer. Where such a waiver is sought after the programme has been commissioned then Ofcom would expect there to be a commercial negotiation between the producer and ITV Network. In the particular case of a waiver of ITV1's exclusivity, to allow transmission on another channel in advance of the first transmission on ITV1, Ofcom would expect ITV Network to be suitably compensated in that the waiver would attract a payment which reflected the commercial value of the first run premiere of the programme in question.

4.14 Where a programme has not been scheduled for broadcast within a 6 month period of its delivery to ITV Network, SMG had proposed that a producer selling into international markets should be able to exploit the programme overseas automatically. ITV Network has indicated that it is prepared to consider SMG's proposals and so this is a matter which might reasonably be dealt with in the more detailed Terms of Trade that will flow from the application of the 2004 CoP and which are currently being finalised between ITV Network and Pact.

Exploitation of Programme Rights in the Republic of Ireland

4.15 Annex 2 sets out background data on the extent of the overlap between the Northern Irish and the Republic of Ireland broadcasting markets.

4.16 Given the significant degree of access to UK services such as UTV in the RoI, and their high reach and viewing shares, it is likely that a current UK programme which is sold into the Irish market will be worth far more if it is transmitted simultaneously with the UK transmission than if there is a gap of some days between the UK and Irish transmissions. Indeed, Granada International (ITV plc's international distributor) has argued that if ITV plc produced programmes were not sold to TV3 on a simulcast basis they would have no, or a negligible, value in the Irish market. In other international markets it is unlikely that the value of the international rights would be impacted so significantly by the relative timing of the UK and international transmissions.

4.17 Since the existence of a requirement for a 72 hour window between first transmission in the UK and transmission in the RoI could be detrimental to the international sales value of a programme in the particular territory of the RoI, it would appear that as the 2004 CoP is extended to apply in principle to both in-house and external producers, the same general exclusivity and window terms should be applied to both in house and external producers, i.e. the 72 hour window requirement should either be waived for both groups, or applied to both groups, and any conditions around waiver should also be equally applied to both groups.

4.18 Since the application of similar terms of trade relating to ‘windowing’ to both in house and external producers is a change to the existing arrangements, in this situation where the interests of ITV plc and those of UTV are clearly in conflict, Ofcom has considered what the impact of such a change would be on all the groups concerned, both producers and broadcasters. A more detailed analysis of the issues is set out in Annex 3.

4.19 Based on analysis of the data provided by ITV plc and UTV set out in Annexes 2 and 3, Ofcom considers that the immediate impact on UTV of allowing ITV Network to retain the flexibility to waive the 72-hour window for transmission of programming commissioned by ITV Network in the RoI is likely to be small. Ofcom therefore considers that ITV Network should retain the ability to exercise a waiver of the 72 hour rule in the Irish market, provided that, in principle, it is applied equally to all producers. This is also consistent with the principle of flexibility, outlined above, in that it does not constrain the ability of producers to exploit their programming rights

4.20 However, if a waiver of the 72 hour window is given, then UTV no longer enjoys exclusivity in its own territory and there is the need to consider whether some form of remedy might be appropriate to compensate for this.

4.21 In the special case where a programme has no prospect of being transmitted on ITV1 or where it has been decided to premier the programme on another ITV channel, then there should be scope for producers – in-house and external – to approach ITV Network for apply for a waiver to enable programme sales into the RoI.

Appropriate Remedy for exercise of waiver for sales to the Irish market

4.22 In principle there are two alternative approaches to remedy the breach to UTV’s exclusivity caused by allowing waiver of the 72 hour window. One approach would be to allow UTV to veto the waiver, as it has proposed. The alternative approach would be to compensate UTV for the breach.

4.23 If UTV were allowed to veto waiver of the 72 hour window, there seems little doubt that, given the advantage that this would deliver to its viewing share in the RoI and to its All Ireland revenue, it would exercise its veto in every case. This would cause significant damage to ITV plc’s international programme sales into the Irish market.

4.24 It is also the case that the ability to exercise a veto is without precedent within the NWA and related agreements, outside issues relating to changes in the cost sharing arrangements between licensees. Elsewhere throughout the Memorandum and Articles of ITV Network and the NWA there has been a general principle that decisions are to be arrived at by voting with a variety of thresholds for approval, all of which fall well short of allowing the smaller licensees a veto. If the principle of a veto was allowed in this case, licensees would undoubtedly argue for its application in other circumstances. A general ability to veto measures that are perceived to be unfavourable to a particular licensee would potentially give all the licensees, irrespective of their size, an ability to block change and would damage ITV’s ability to adapt to changing business circumstances.

4.25 The issue of how to deal with the conflicting interests of licensees has already been dealt with in Ofcom's Final Statement on the NWA. As set out above, Ofcom has proposed wording to be incorporated into the Statement of Principles stating that:

> "ITV Network will exercise the core functions in the interests of all the Regional Licensees and independently of the production interests of any of the Regional Licensees.
>
> Where there is a conflict between the interests of the Regional Licensees, ITV will act as even-handedly as possible and taking into account the interests of the network as a whole."

4.26 Ofcom therefore considers that UTV should not have the ability to veto exercise of the waiver, but rather a more appropriate remedy would be for ITV Network to compensate UTV for any proven damage caused to its UK licence and revenues by waiver of the 72 hour window.

Quantification of Compensation

4.27 Ofcom considers that the level of compensation paid to UTV for waiver of its exclusivity should relate to the damage caused to UTV in the Northern Irish market, and should exclude any consideration of any damage caused to UTV's potential viewing share in the RoI by the broadcast of those same programmes simultaneously in the Irish market. This is because neither ITV1 nor UTV have purchased rights to broadcast ITV1 programmes in the RoI. Those rights remain with the producer.

4.28 An estimate of the maximum loss of viewing to UTV from simultaneous transmission of ITV1 programmes on TV3 in NI can be arrived at in terms of TV3's viewing share in NI for the ITV1 programmes simultaneously scheduled. This is a maximum value, since if TV3 was not available in NI, or showed different programmes, the viewing share that it currently takes might be taken by any of the other channels available to NI viewers. Indeed it is possible that if TV3 was showing programmes other than those already available on ITV1 it might even take a larger viewing share than it currently does. The maximum impact on UTV of the ITV1 programmes simultaneously scheduled on TV3 might be measured approximately in terms of the commercial impacts delivered by those programmes, since if they were not available the TV3 viewers might watch UTV instead.

4.29 However, UTV also benefits from the commercial impacts delivered by the availability of UTV to viewers in the RoI. These are commercial impacts delivered by rights to programmes that nether ITV Network nor UTV has paid for. As set out in Annex 2, UTV has clearly been able to monetise these impacts.

4.30 Ofcom therefore considers that the appropriate measure of compensation due to UTV is to calculate the value of the commercial impacts delivered in NI on TV3 by ITV1 programmes scheduled simultaneously with UTV and to net off that figure the value of the commercial impacts delivered by those same simultaneously scheduled programmes in the RoI to UTV.

4.31 The relative sizes of the Irish and NI markets, and the relative viewing shares of UTV in the RoI and TV3 in NI mean that in the near term the value of compensation payable to UTV would be zero. However, it would be open to UTV to approach ITV Network for payment of compensation at any time should the value of commercial impacts delivered in NI to TV3 approach the value delivered to UTV in the RoI. At that time, Ofcom would expect UTV to provide ITV Network with an appropriate quantification of the damage caused, and ITV Network could decide, either to pay compensation or to refuse to give a waiver of the 72 hour window. It is also the case that Ofcom's analysis assumes that commercial impacts in NI and the RoI are of broadly equal value to an advertiser. In the event that there are robust arguments as to why this is not the case, then the parties could ask Ofcom to consider the relative weighting of commercial impacts.

Annex 1

The ITV Networking Arrangements provisions relating to exclusivity

Existing Terms of the NWA and Related Agreements

A1.1 The template for the contractual relationship between independent producers and ITV Network is governed largely by ITV Network's Tripartite Agreement whereas the template for the contractual relationship between an in-house producer and ITV Network is governed by the Network Programme Licence. These contracting relationships stem from the 1992 MMC Report.

The 1992 MMC Report

A1.2 The 1992 Report considered issues relating to both the equality of treatment as between independent producers and licensee producers and also the acquisition of rights by ITV Network. In its report, the MMC made a series of recommendations that were designed to secure equal access for independent producers to the ITV Network and also to limit the rights which ITV Network could secure. For instance, the MMC made clear that ITV Network was prohibited from acquiring rights other than the UK broadcasting rights and non-UK simultaneous transmission rights needed for the programme to be shown on the ITV network. All other UK rights and all overseas rights were to be reserved for the producer on the condition that there was no exploitation of any other UK rights prior to first transmission on ITV. This would imply that there was a clear expectation that a producer would be free to exploit overseas rights ahead of first transmission in the UK.

ITV Network Statement of Principles

A1.3 The MMC's recommendations were translated into ITV Network's Statement of Principles.

A1.4 In the case of the principles setting out the structure of the contractual relationships between independent producers, licensee producers and ITV Network, the MMC Report proposed a specific form of words and that wording was then incorporated directly into the ITV Network Statement of Principles.

A1.5 In relation to the granting of the contracting structure, the ITV Network Statement of Principles states that:

> 6.3.1 A Network Programme Licence or other contract will be drawn up to cover the provision to the Centre of all programmes for the Network – whether from licensees or independent production companies. The contract will describe the UK broadcast rights to be acquired by the Centre. All contract terms will be negotiated in good faith. The Centre will have the power to make stage payments.
>
> 6.3.2 The principles governing the terms of the contracts will be led by the needs of the ITV schedule and will encourage free and fair competition and avoid restrictions or distortions of competition. The terms of any such contract as to the licence period, any extension thereof, further programme rights, format rights or power to seek

reacquisition of rights must not be more onerous than the terms contained in the Network Programme Licence and the ITVA General Terms and Conditions applicable to an ITVA Network Programme Licence, as modified under Schedule 4 of the Broadcasting Act 1990…..".

A1.6 In referring to the fact that terms of contracts with independent producers should be not be more onerous that the terms contained in the Network Programme Licence, the Statement of Principles appears to envisage equal contractual terms for an independent producer as compared to an in-house producer.

Network Programme Licence

A1.7 In terms of the detail of the Network Programme Licence ("NPL"), the recitals make reference to the fact that:

> "The Network Programme Licence Agreement and these General Conditions may be varied and adapted by ITV for use as a tripartite contract between ITV, a Contracting Producers and a Regional Licensee when ITV wish to commission a programmes for the Channel 3 Network direct from a Producer other than a Regional Licensee.

A1.8 Section 6 of the NPL sets out the basic conditions in relation to the rights which ITV Network receive in return for funding the programme and by implication which rights remain with the producer.

A1.9 The basic thrust of the NPL is that ITV Network controls the exploitation of the broadcast rights in the UK for the duration of the licence but that the producer is free to exploit the overseas broadcast rights at any time with the exception of the Republic of Ireland where there is a restriction that the TV rights should not be exercised before the first ITV transmission.

Tripartite Agreement

A1.10 There are some slight differences in wording as between the Tripartite Agreement and the NPL but in all material respect the wording of the current Tripartite Agreement in relation to the exploitation of TV rights basically mirrors the wording of the NPL i.e. there is a restriction that exploitation of rights in the RoI should not take place ahead of first transmission on ITV.

The 2004 Code of Practice

A1.11 The 2004 CoP applied to independent producers and sought to impose a specific time restriction in relation to the exploitation of rights in the RoI and other international markets. As set out above, under the terms of the 2004 CoP, ITV sought to require a 72 hour window between the time of the first transmission of a programme commissioned by ITV Network on ITV1 and its transmission in any overseas market.

A1.12 The changes in the terms of the 2004 CoP as compared with the previous NPL and Tripartite Agreement are that, under clause 5.4, ITV Network must approve any exploitation of the programme:

- within the UK, during the licence period; and

- in overseas markets, prior to the UK transmission.

A1.13 Additionally, under clause 5.4.3, ITV Network must approve any exploitation in overseas markets, including the RoI, within 72 hours after the UK transmission.

Annex 2

Data on broadcast markets in Northern Ireland and the Republic of Ireland

Sale of ITV plc produced programmes into the Irish Market

A2.1 For a number of years, ITV plc has had a practice of selling its programmes, and in particular drama serials, to Irish broadcasters who transmit them simultaneously with the ITV1 first transmission. In 2001 ITV plc acquired a 45% shareholding in the Irish commercial broadcaster TV3. Since then ITV plc has sold its programmes in the RoI exclusively to TV3. The volume of such sales has increased significantly over the period since acquisition of the TV3 shareholding, both as a result of growth in ITV plc's production business through acquisition and through the relationship between the two broadcasters. Around half of the programmes sold to TV3 are transmitted simultaneously on TV3 and ITV1 and they represent an important part of the TV3 peaktime schedule.

A2.2 UTV has expressed its concern over this practice for some time within the ITV system, both before ITV plc's acquisition of the TV3 shareholding and since. UTV argues that the practice of allowing simultaneous transmission of ITV plc produced programmes in RoI is in breach of its exclusive rights to the programme concerned in NI because of the broadcasting of Irish television services into NI. UTV has taken the opportunity of the Ofcom review of the NWA and the extension of, and proposed changes to, the 2004 CoP to propose changes to the 2004 CoP which go beyond an extension of the existing terms of the 2004 CoP to in house ITV producers and would give the affected licensee a right of veto of any waiver of the 72 hour window between first transmission of a programme in the UK market and its transmission in international markets.

Reception and viewing issues in Ireland

A2.3 The UTV licence area shares a land border with the RoI, giving UTV uniquely among the ITV licensees issues of terrestrial retransmission across the Irish border.

A2.4 TV3, as a national commercial Irish broadcaster, is available (like the rest of the Irish terrestrial channels) via cross border terrestrial broadcasting from the Clermont Carn (Irish) transmitter to Northern Irish viewers, with a coverage of just under 50% of the 621,000 NI homes, a total of around 300,000 homes. RTE estimates that around 70% of NI homes can receive their signal, and that TV3's coverage is similar. We understand that TV3 is only available via broadcast over-the-air in NI and that the channel has not been licensed to any cable operators for retransmission in the NI market.

A2.5 On a similar basis, the UTV terrestrial signal broadcasts into RoI, giving it access to approximately 13% of RoI's 1.4 million homes. Under the terms of the Irish Cable Holders Rights Agreement (to which ITVNL, BBC, C4, Irish Cable Operators, and Irish collection agencies are signatories), the UTV signal received in the RoI can be retransmitted on all Irish cable systems. UTV has signed agreements with all the RoI cable operators to carry its channel. Via a combination of terrestrial broadcasts and cable retransmission the UTV signal is therefore available in 62% of RoI homes, a total of just under 850,000 homes.

A2.6 In May 2005, the reach of the two channels in the two territories was as follows: in NI UTV has a 98.6% reach and TV3 a 22.2% reach; and in RoI, TV3 has a 94% reach and UTV a 67.7% reach.

Viewing shares reflect these differences in coverage and reach. In NI TV3 took a viewing share of 1.2% in 2004, versus UTV's 25.8%. While in RoI in 2004, UTV took a viewing share of 6.7% versus TV3's 14%. Since 2000, TV3's viewing share has been relatively constant in NI while UTV's NI viewing share has reduced in line with the general weakening of ITV1's viewing share across the UK. In RoI since 2000, UTV's viewing share has been weakening while TV3's viewing share has been growing. This information is set out in Tables A1 and A2 below.

Table A1Viewing Shares in Northern Ireland (2002-2004)

	TV3	UTV
2002	**1.5%**	**27.3%**
2003	**1.2%**	**25.8%**
2004	**1.2%**	**25.8%**

Source: ITV submission

Table A2 Viewing shares in the Republic of Ireland (2000-2004)

	TV3	UTV
2000	**9.3%**	**10.1%**
2001	**12.9%**	**9.7%**
2002	**12.7%**	**8.4%**
2003	**13.4%**	**7.7%**
2004	**14.0%**	**6.7%**

Source: ITV Submission

Scheduling and airtime sales issues in Ireland

A2.7 ITV plc programming forms a significant part of the TV3 schedule. In the May 2005 peaktime schedule, TV3 showed a total of 48.5 hours of ITV1 material of which 85% was scheduled simultaneously with ITV1. The volume of simultaneous transmissions varies from month to month but at its core are sales of the soaps Coronation Street and Emmerdale which together represent a steady level of 11 episodes or 5.5 hours per week (just under 24 hours per month).

A2.8 TV3's viewing share in NI has been reasonably steady over the past 4 years, despite the increasing volume of simultaneously scheduled ITV1 material in its peaktime schedule.

A2.9 In the airtime sales market in Ireland, it is possible to buy airtime on one of 3 bases. Airtime can either be bought in the NI market only, or in the RoI market only, or airtime which is available to an audience right across the island of Ireland can be bought on an All Ireland basis. It is understood that TV3 sells all of its airtime on a RoI basis and does not sell airtime in NI. It does not monetise the impacts delivered in NI as these are not significant in volume relative to the ratings it delivers in the RoI.

A2.10 From the advertiser's perspective, when advertisers who are targeting viewers on an All Ireland basis - e.g. Unilever or Proctor & Gamble - purchase ratings they recognise that they are buying ratings in both NI and RoI even though they do not explicitly purchase the ratings in the other territory. So when an advertiser purchases 100 ratings on UTV in NI they realise that they will also (currently) get 25 ratings in RoI. And when an advertiser purchases 100 ratings on TV3 in RoI they recognise that they will also (currently) get 8 ratings in NI. These extra ratings increase the cost per thousand ratings that advertisers are prepared to pay.

A2.11 A2.11 In the mid 1990's, UTV decided to take advantage of its viewing share in the RoI by starting actively to sell some of its airtime on an All Ireland basis from Dublin. Since the early 1990's, UTV airtime has always been sold by an ITV airtime sales house, now by ITV plc, but UTV also retains its own regional airtime sales force and has its own sales office in Dublin. UTV has a reach of around 97% of homes in NI, (600,000 homes) and approximately 67% homes, (900,000 homes in RoI). Because of the relative sizes of the two markets, despite the lower share of viewing it achieves in RoI than NI, UTV earns a significant portion of its advertising revenue from the RoI market. As evidence of this, while UTV's viewing share in NI has performed in line with the pattern of overall fall in ITV1's overall viewing share within the UK, UTV's share of ITV1's total advertising revenue has grown from 1.55% in 1990 to 1.97% in 1994 and 2.71% in 2004. This share growth has come from selling its impacts on an All Ireland basis and the resultant increase in the cost per thousand paid.

A2.12 A2.12 The increase in UTV's share of ITV's total advertising revenue has occurred despite the fact that UTV and ITV have seen similar decreases in their share of commercial impacts since 2001. This increase in the UTV share of ITV1's total revenue has also occurred despite the broadcast of the TV3 signal into NI and the increasing volume of programming on TV3 which is available to the NI viewer scheduled simultaneously with ITV1.

Annex 3

Analysis of the operation of the 2004 Code of Practice to programme sales to the Republic of Ireland

Implication of the application of the 72 hour window to all producers

A3.1 Ofcom has considered the implications of a change in the current arrangements, through imposition of a 72 hour window requirement on all producers, for all the groups affected by them.

A3.2 If a 72 hour window were imposed on all programme sales to RoI, Ofcom considers that there would be no significant beneficial impact on UTV's advertising revenue in NI – there is no evidence that TV3 is currently causing significant damage to UTV's viewing share and hence advertising revenue in the NI market. For example, the Monday night episodes of soaps are currently simultaneously transmitted on UTV and TV3. UTV takes a 61.5% viewing share with Emmerdale at 19.00, while TV3's viewing share for the same programme is 0.9%. UTV takes a 67.5% share with Coronation Street at 19.30, while TV3's share delivered by the same programme is 1.4%. This data is set out in more detail in Tables A3 and A4 below together with annual data for 2001-04. The recent growth in UTV's advertising revenue is also evidence of the lack of damage.

Table A3: Average Share for Emmerdale in Northern Ireland (2001-2005)

	UTV - % share	TV3 - % Share
2001	**57.5**	**0.6**
2002	**58.2**	**0.8**
2003	**55.5**	**0.5**
2004	**57.8**	**0.6**
2005 to date	**61.5**	**0.9**

Notes: Based on 19:00-19:29 on a Monday
Source: ITV Submission

Table A4: Average Share for Coronation Street in Northern Ireland (2001-2005)

	UTV - % share	TV3 - % Share
2001	**67.6**	**1.0**
2002	**66.4**	**1.0**
2003	**63.8**	**0.9**
2004	**65.0**	**0.9**
2005 to date	**67.5**	**1.4**

Notes: Based on 19:30-19:59 on a Monday
Source: ITV Submission

A3.3 ITV plc has argued that there would be a significant detriment to the value of ITV plc international programme sales to TV3 if they could not be transmitted simultaneously with the UK broadcast. Sales of Emmerdale and Coronation Street represent a high proportion of ITV plc's total programme sales to TV3. While the value of such sales may not diminish to the negligible level that ITV plc has suggested, given the nature of the soap audience and UTV's extensive reach and existing viewing share within RoI, Ofcom accepts the principle that there could be a reduction in value.

A3.4 In the case of external producers, Ofcom is aware that ITV Network has been prepared to allow the simultaneous transmission of programming produced for ITV1 in the RoI by external producers. For instance, in May 2005, Footballers' Wives was shown simultaneously on both ITV and TV3 at 9pm on a Thursday. However, Ofcom is not clear whether this represents a general policy that has been adopted by ITV Network Centre or whether it represented a one-off arrangement or a commission that predates the 2004 CoP. If the 72 hour window was in future applied to external producers the value of their programme sales to RoI would fall compared with the current Terms of Trade.

A3.5 In contrast, it is likely that UTV would benefit very significantly if it had a 72 hour window of exclusivity of ITV1 programming in the RoI market, and conversely that TV3's revenues would be significantly damaged through the loss or rescheduling of a large part of its peaktime schedule. However, since this is a market outside the UK, since UTV (and ITV1) hold no Irish rights in the programming, and since TV3 is not an Ofcom licensee, this is not a factor which Ofcom has deemed it appropriate to take into account in reaching its decision.

A3.6 Thus it would appear that the sole beneficiary of the application of a 72-hour window to all producers would be UTV and that the value of programme sales to the RoI both by ITV plc's in-house production business and by external producers could be adversely affected.

Implication of the waiver of the 72 hour window for all producers

A3.7 Ofcom has also considered the impact of waiving the requirement for a 72 hour window for all producers.

A3.8 In NI, Ofcom considers that such a waiver would have not necessarily have a significant impact on UTV's viewing share since there is in practice already a waiver in place for the 60% of ITV1 commissioned programming that is produced by ITV plc. However, if other external producers were also able to sell their programmes to TV3 for simultaneous transmission in the Irish market, it is possible that the overall volume of ITV1 programmes scheduled on TV3 might rise. Equally, it is also possible that externally produced ITV programmes might displace some of the ITV plc programmes already sold to TV3. On balance Ofcom considers that the impact on UTV's viewing share would be small, but that there might be some detriment. Whether any reduction in viewing share would result in a reduction in the revenue that UTV earns from the NI market would depend on whether TV3 changes its existing approach of selling all its airtime only on a RoI basis.

A3.9 There would be no direct impact on ITV plc programme sales to RoI as they are already able to benefit from the value of simultaneous transmission. Externally produced programmes might substitute for some existing ITV plc sales to TV3. However, such programmes would be very unlikely to substitute for Emmerdale and Coronation Street which represent around the great bulk of the value in ITV plc's sales to TV3 in terms of both revenue and hours.

A3.10 Such a change would bring some benefit to independent producers, maintaining the position that appears to have existed under the previous Tripartite Agreement and potentially increasing the value of their sales into the Irish market due to the benefit of simultaneous transmission and allowing some incremental sales or substitution for ITV plc programme sales.

A3.11 There may be some damage to UTV's viewing share in RoI and hence the value of its all Ireland airtime sales if the volume of simultaneously transmitted material increases – but because these are matters pertaining to the RoI, Ofcom does not consider that it is appropriate to take these into account in reaching its decision.

A3.12 Given the impact on UTV's viewing share in NI is likely to be small, Ofcom considers that ITV Network should retain the ability to exercise a waiver of the 72 hour rule in the Irish market, provided that it is applied equally to all producers. This is also consistent with the principle of flexibility, outlined above, in that it does not constrain the ability of producers to exploit their programming rights

A3.13 However, if a waiver of the 72 hour window is given, the principle of exclusivity of transmission on ITV 1 in its territory would have been breached for UTV – there is therefore a need to consider the appropriate remedy for the breach.