

The future regulation of access control services

A consultation issued by the Director General of Telecommunications

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Summary

S1 A new package of EU Directives regarding electronic communications networks and services was implemented in the UK on 25 July 2003. The government's method for implementation of four of those Directives was the Communications Act 2003 which received Royal Assent on 17th July 2003 (the "Act"). This consultation document considers how the Act should be applied in relation to access control services.

S2 Certain technical broadcasting services, known as access control services, are used to offer interactive services through the digital television set-top box. Interactive services allow viewers to interact with the television, for example choosing a special camera angle at a football match or calling up information relating to a particular TV programme. They also allow viewers to contact suppliers via a modem in the set-top box, enabling viewers to shop, gamble, or send votes. Oftel proposes that the provider of access control services on the digital satellite (DSAT) platform should be obliged to provide such services on fair, reasonable and non-discriminatory terms. The provider of access control services on the DSAT platform is Sky Subscriber Services Limited.

S3 Oftel has published guidelines on how it currently interprets a requirement to supply access control services and conditional access services on fair, reasonable and non-discriminatory terms (*Terms of supply of conditional access: Oftel guidelines*, October 2002). If regulation is imposed under the new regime in the way that is proposed in this consultation document, then the Director proposes that those guidelines will continue to have effect to the extent that they are relevant, until such time as new guidelines are issued.

Chapter 1

Introduction

New Directives

A new regulatory regime

1.1 A new regulatory framework for electronic communications networks and services entered into force in the UK on 25 July 2003. The basis for the new regulatory framework is five new EU Communications Directives as follows:

- the Framework Directive (Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services);
- the Access Directive (Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities);
- the Authorisation Directive (Directive 2002/20/EC on the authorisation of electronic communications networks and services);
- the Universal Service Directive (Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services) and;
- the Privacy Directive (Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector).

1.2 The new regulatory framework is designed to create harmonised regulation across Europe and is aimed at reducing entry barriers and fostering prospects for effective competition to the benefit of consumers.

1.3 The Framework Directive provides the overall structure for the new regulatory regime and sets out fundamental rules and objectives which read across all the new directives. As its name suggests, it is the directive that establishes the new framework. Article 8 of the Framework Directive sets out three key policy objectives which have been taken into account in this document, namely promotion of competition, development of the internal market and the promotion of the interests of the citizens of the European Union. The Authorisation Directive establishes a new system whereby any person will be generally authorised to provide communications services and/or networks without prior approval. The general authorisation replaces the former licensing regime. The Universal Service Directive defines a basic set of services that must be provided to end-users. The Access and Interconnection Directive sets out the terms on which providers may access each others' networks and services with a view to providing publicly available electronic communications services. These four Directives were implemented in the UK on 25 July 2003 through the Communications Act 2003 (the "Act"). The fifth Directive on Privacy establishes users' rights with regard to the

privacy of their communications. This Directive was adopted slightly later than the other four Directives and will be implemented later this year.

1.4 The Act provides for functions, powers and duties to be carried out by Ofcom which include, inter alia, functions, powers and duties flowing from the four EC Communications Directives referred to above. Certain existing functions are also transferred to Ofcom. However, Ofcom is not expected to assume full functions under the Act until later this year. Accordingly, transitional arrangements are in place as described below.

1.5 The Communications Act 2003 (Commencement No. 1) Order 2003 has been made under sections 411 and 408 of the Act. This order commences certain provisions of the Act for the purpose of enabling the networks and services functions under those provisions to be carried out by the Director until such time as those functions are transferred back to Ofcom later in the year. Accordingly, references in those provisions of the Act to Ofcom are, for the present time, to be read as references to the Director. For these reasons, the Director is empowered to set the proposed conditions under the Act.

The end of the individual licensing regime

1.6 Changes to the regulatory framework flow from the requirements of the new Directives. The principal change to the previous arrangements in the UK has been the ending of the licensing regime under the old Telecommunications Act 1984. This has now been replaced by a new authorisation regime. Under the requirements of the Authorisation Directive the obligations in licences have been replaced by a set of general and specific obligations.

1.7 The general conditions apply to all persons providing certain types of electronic communications networks and services. Additionally, individual operators may be subject to specific conditions, such as access-related conditions or those imposed as a result of a finding of SMP, as defined in Article 14(2) of the Framework Directive, or as a result of being designated to be a universal service provider. Oftel is already carrying out a number of consultations in relation to such conditions.

Existing access control conditions

1.8 Access control services are currently regulated through the continuation notice dated 23 July 2003 which was given to the class of persons defined in that notice for the purposes of the provision of access control services. The continuation notice can be found at the following link: http://www.oftel.gov.uk/publications/eu_directives/cont_notices/acs_class.pdf. The notice was given under paragraph 9 of Schedule 18 to the Act (to take effect on 25 July 2003) and had the effect of continuing certain provisions of the Class Licence for the provision of Access Control Services of 31 August 1999. This access control regulation (which, as noted above, has been continued) only applies to certain operators who are regarded as possessing

market power. A determination published in June 2000 (*Decision as to the status of Sky Subscribers Services Limited as a regulated supplier in the market for Access Control Services for digital interactive television services*) found Sky Subscribers Services Limited (SSSL) to be dominant in the relevant economic market for access control services. Since the publication of the determination, SSSL has been obliged, amongst other things, to provide access control services for digital interactive television services on fair, reasonable and non-discriminatory terms.

1.9 The Director is under an obligation contained within paragraph 9(11) of Schedule 18 to the Act to decide, as soon as reasonably practicable after continuing licence provisions, whether to replace these continued provisions. Hence, the Director has undertaken to issue this consultation document in order to seek views on proposals in respect of a new regulatory regime for access control services.

1.10 Once the Director has decided whether to replace the continued provisions, either with the conditions proposed in Annex A or otherwise, he is required to discontinue the continued provisions. On completion of this consultation the Director would give a discontinuation notice to the class of person as set out in the draft discontinuation notice at Annex B to this consultation document.

Services to be considered as part of this consultation

1.11 This consultation document deals with wholesale technical services used in the provision of retail digital interactive television services. The technical services it considers are known as access control services, which are used to offer interactive services through the digital television set-top box. Interactive services allow viewers to interact with the television, for example choosing the camera angle at a football match, or to call up further information regarding a particular television programme. They also allow viewers to contact suppliers via a modem in the set-top box, enabling viewers to shop, gamble, or send votes.

1.12 On 24 July 2003, Oftel published a document entitled *The Regulation of Conditional Access*. This document can be found at the following link: http://www.oftel.gov.uk/publications/eu_directives/2003/condac0703.pdf. The purpose of the Conditional Access document was to serve a formal notification pursuant to Section 48(1) of the Act in order to set access-related conditions for the provision by Sky Subscribers Services Limited of conditional access services. A separate consultation document deals with broadcasting transmission (which can be found at the following link: http://www.oftel.gov.uk/publications/eu_directives/2003/broad0903.pdf), and Ofcom will shortly be consulting upon the regulation of Electronic Programme Guides (EPGs).

1.13 Chapters 2 and 3 below describe the technical services in more detail and provides more detailed definitions, drawn where possible from the new Directives and from the Act themselves. It also considers what regulation, if

any should be imposed on the provision of access control services. This is done in the form of a regulatory option appraisal (see *Oftel's Regulatory option appraisal guidelines: assessing the impact of policy proposals*, June 2002 at the following link: http://www.oftel.gov.uk/publications/about_oftel/2002/roa0602.htm).

Market power and the relevant provisions of the Directives and the Act

1.14 The new Directives include the requirement that National Regulatory Authorities (NRAs) such as Oftel should carry out reviews of competition in communications markets, to ensure that regulation remains proportionate in the light of changing market conditions. Oftel already carries out market reviews as part of its long term strategy, focusing on effective competition as the best means to deliver a good deal for consumers.

1.15 However and exceptionally, the regulation of the markets for access control and electronic programme guides is not to be subject to a finding of market power, but falls under the ambit of Article 5 of the Access Directive (which is implemented by Sections 73 to 75 of the Act). Neither the Act, nor Article 5, requires reference to the level of market power in order to set conditions. Instead, Article 5 requires NRAs, amongst other things, to encourage and where appropriate ensure adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users. This is reflected in Section 73 of the Act. Moreover, Article 5 specifically states that NRAs may impose obligations without prejudice to measures that may be taken regarding undertakings with significant market power (SMP) in accordance with Article 8. As such, the ability to impose access-related conditions under the Act is not dependent upon a finding of SMP.

1.16 Article 5(1)(b) provides that NRAs shall be able to impose, to the extent that it is necessary to ensure accessibility for end-users to digital radio and television broadcasting services specified by the Member State, obligations on operators to provide access to Application Programme Interfaces (APIs) and EPGs on fair, reasonable, and non-discriminatory terms. Article 5(1)(b) is implemented in the UK by Sections 73(2) and 74(2) of the Act. Section 45 of the Act allows the Director to set different types of conditions, including access-related conditions. Section 45(5) provides that an access-related condition is one that is authorised by Section 73 whereas Section 74(2) states that the conditions that may be set under Section 73(2) includes those conditions set out in Section 74(2). The Director proposes to rely on both sections 73(2) and 74(2) when setting access conditions in relation to access control services.

Structure of this document

1.17 Chapter 2 discusses the background to the proposed new regulation of access control services and sets out the regulatory option appraisal undertaken by Oftel.

1.18 Chapter 3 provides a detailed analysis of the Director's proposals for the new access control conditions. Chapter 3 also sets out a list of questions for stakeholders.

1.19 Chapter 4 sets out details of the consultation process and provides details on how to make representations on the proposals contained within this consultation paper.

The notification and the conditions

1.20 Annex A contains the formal notification of the proposals made by the Director for consultation. Under the Act, the Director is required to issue a formal notification of his proposals to set new conditions under the new regime. Accordingly, the Director has followed this approach in this document. The notification at Annex A is made in accordance with section 48(2) of the Act.

1.21 The Director expects, following this consultation, to issue a further notification setting conditions in accordance with section 48(1) of the Act.

1.22 A copy of the notification has been sent to the Secretary of State in accordance with section 50(1)(a) of the Act, and to the European Commission and the regulatory authorities of every other member state in accordance with section 50(3) of the Act.

Chapter 2

Proposals for regulation of access control services: background

Introduction

2.1 The launch of digital television in the UK has allowed expansion not only in the number of channels offered to viewers, but also in the type of services offered. In particular, the increase in the bandwidth and functionality allowed by digital transmission allows viewers to interact with the television, eg choose the camera angle at a football match. Viewers are also able to view information services or play games, and can also contact suppliers via a modem in the set-top box, and thereby shop, gamble and vote using their television remote control.

2.2 In order to offer these interactive television services to viewers, broadcasters and third parties use certain technical services that are usually provided by the operator of the digital television platform. The technical services considered as part of this chapter are not supplied directly to end-users (ie the viewers of television services). Instead, they are supplied to persons (for instance, broadcasters, retailers, television games services, or companies which author digital interactive television services for other parties) which wish to supply interactive television services to end-users.

2.3 The European Commission defined a market for digital interactive television services separately from content services. This definition was contained within Commission Decision of 15 September 1999 relating to a proceeding under Article 81 of the EC Treaty (Case IV/36.539 *Š British Interactive Broadcasting/Open*). The market includes home banking, home shopping, holiday and travel services, down-loading of games, learning on-line, entertainment and leisure, sports, motor world, walled garden™ Internet sites provided by a third party and e-mail and public services.

2.4 Following the European Commission's definition and decision, the UK developed regulation for supply of these services under the terms of the Class Licence for the supply of Access Control Services (the "Access Control Class Licence").

Existing regulation

2.5 Under the terms of the Access Control Class Licence, Oftel published a determination in June 2000 (*Decision as to the status of Sky Subscribers Services Limited as a regulated supplier in the market for Access Control Services for digital interactive television services*) which deemed Sky Subscribers Services Limited (SSSL) to be a regulated supplier of access control services used for digital interactive television services. SSSL is the supplier of access control services on the digital satellite platform. The effect of this determination was that SSSL was required, under the terms of the

Access Control Licence, to supply access control services for digital interactive television services on fair, reasonable and non-discriminatory terms.

2.6 As explained above, the licensing regime came to an end on 25 July 2003 but the Director could not at that time propose replacement conditions. Thus, on 23 July 2003, the Director (in accordance with Paragraph 9 of Schedule 18 to the Communications Act) gave notice that for the purposes of the provision of Access Control Services certain conditions set out in the Access Control Class Licence would continue to have effect from 25th July 2003 as modified and to the extent set out in Schedule 1 to that continuation notice. The following conditions were continued:

- Condition 10: Obligation to supply access control services on fair and reasonable terms
- Condition 11: Relating to intellectual property
- Condition 12: Requirement to keep separate financial accounts
- Condition 14: Prohibition on undue preference and undue discrimination
- Condition 15: Publication of charges, terms and conditions

As noted at paragraph 1.9 above, the Director is under an obligation contained with paragraph 9(11) of Schedule 18 to the Act to decide, as soon as reasonably practicable after continuing licence provisions, whether to replace these continued provisions. This document and the proposed new conditions are intended to fulfil this obligation. Once that decision is made, the Director is required to discontinue the continued licence provisions and the draft discontinuation notice set out in Annex B is intended to fulfil this obligation.

2.7 The June 2000 determination, which deemed SSSL to be a regulated supplier of access control services used for digital interactive television services, was originally made soon after digital television was launched in the UK. Since then there have been significant developments that have affected, and will continue to affect, the relevant market, including:

- the growth of all digital platforms, including digital terrestrial television and digital cable services;
- the provision of interactive services over these platforms;
- expansion in the numbers and kinds of services being offered;
- wider changes including expanding internet usage and the launch of broadband internet access.

2.8 Perhaps most significantly, the providers of interactive services have acquired more information on which services are likely to be most appealing to the public. Although some services, eg interactive shopping, have proven to be less successful than originally anticipated, others, eg games, have proven to be much more so. These changes continue to affect the market, eg shopping services have become more directly integrated with broadcast television channels.

The services

2.9 A wide range of digital interactive services is currently available to digital TV viewers. This range includes, but is not limited to, the following:

- Video games
- Selection of different video feeds (for example between different tennis or football matches on a single TV channel)
- Home banking
- Home shopping
- Information services
- Message services
- Betting/gaming
- Charitable donations

2.10 There are a number of different types of technical services that may be required in order for broadcasters or other third parties to be able to provide such digital interactive television services to television viewers. These include:

- Signal Processing Services, such as encryption or scrambling of digital services so as to confine their use to authorised end-users;
- Authentication Services, such as services which identify an end-user or a set-top box in order to permit or deny access of that end-user or set-top box to a digital interactive television service;
- Access Device Management Services, such as the actuation, control or operation, or the remote actuation, control of operation of Access Devices;
- Selection Services, such as the processing by an Access Device or the preparation and transmission to an Access Device of Signals which allow a viewer to initiate access to, or select from a number of, digital interactive television services; and
- Subscriber Management Services, such as the preparation of smart cards or the online updating of a viewer or listener's entitlement to make use of a particular subscription service.

The Access Device means any device in electronic or tangible form, including but not limited to, the application programme interface or the modem, which permits a viewer to be able to access and use digital interactive television services.

Aims of regulation

2.11 The Director's aim in regulating the provision of access control services is to satisfy the duties set out in Section 4 of the Act (which gives effect to Article 8 of the Framework Directive). In particular, the Director is concerned that any proposed regulation should have the effect of promoting competition and innovation in the provision of digital interactive television services to end-users.

2.12 Sections 73(2) and 74(2) of the Act set out the specific objectives to which the Director must have regard when imposing a regulatory regime in respect of access control services. The objectives set out in Section 73(2), which apply to all access-related conditions, are to secure (a) efficiency on the part of communication providers and persons making associated facilities available; (b) sustainable competition between them; and (c) the greatest possible benefit for the end-users of public electronic communications services. The objectives set out in Section 74(2), which relate specifically to conditions dealing with access to the application programme interface, are to secure (a) that persons are able to have access to such programme services provided in digital form as Ofcom may determine; and (b) that the facility for using those interfaces or guides is provided on terms which are fair and reasonable and do not involve, or tend to give rise to, any undue discrimination against any person or description of persons.

2.13 In practice, the Director is especially aware that the aim of regulation should be that conditions imposed are the minimum necessary to secure their desired objectives. The following paragraphs comprise a regulatory option appraisal, and consider whether, and how, it is necessary to impose regulatory obligations which allow broadcasters access to the relevant services on regulated terms.

Regulatory option appraisal

No regulation

2.14 The Director has considered the impact of imposing no regulatory regime on access control services. If there were no regulation imposed on the provision of access control services, the Director is of the view that there would be no guarantee that broadcasters or other third parties would be able to supply digital interactive television services to viewers. Where contracts had already been signed between a broadcaster or other third party and the provider of the access control services, the absence of regulation would not necessarily cause difficulties. Moreover, in circumstances where existing or new services were already popular, the ancillary access control services may continue to be supplied in the absence of any regulation. However, the absence of any ex ante regulation could mean that some broadcasters or third parties who were not already being carried on the platform would be unable to obtain the services needed to offer interactivity to end users. It could also cause problems to arise if existing contracts for the provision of access control services came to an end and the provider refused to enter into a new contract with that contracting party for the same services.

2.15 This could lead to a situation in which a broadcaster might be able to provide its television channels on the digital television platform but would not be able to provide digital interactive television services to the viewer. A broadcaster who is obtaining conditional access services as a result of regulation of conditional access services (conditional access regulation applies regardless of the level of market power) may also wish to obtain similar technical services that allow it to supply its interactive programming to

viewers. Unless broadcasters are able to obtain access control services, a situation may be created in which the broadcaster is able to use the regulated conditional access services to supply its non-interactive programming to viewers but would not be able to provide interactivity in its television programmes. At a time when interactive programmes are becoming increasingly common, this would not allow viewers to obtain the "maximum benefit" of all broadcasters' services. With no regulatory regime in place, it could also be possible for the provider of access control services to make such services available to its own channels but not to other broadcasters or third parties. This could have an effect on intra-platform competition since some channels and services would have additional, and valuable, functionality while others would not. The Director therefore considers that it would be unsatisfactory to impose no regulatory regime on the provision of access control services.

Imposing regulation on SMP operators only

2.16 The current obligation imposed on SSSL to supply access control services on fair, reasonable and non-discriminatory terms is based on a finding by the Director that SSSL has significant market power in the market for the supply of access control services for digital interactive TV. Ofcom has considered whether it is necessary to review this SMP finding for SSSL and consider the market power of other platform operators in deciding whether to impose obligations on SSSL and such platform operators under the new regime. However, the Act does not require reference to the level of market power in order to set conditions. Section 73(2) of the Act provides that access-related conditions may include conditions relating to the provision of such network access and service interoperability *as appears to Ofcom appropriate* for the purpose of ensuring (a) efficiency on the part of communications providers and persons making associated facilities available; (b) sustainable competition between them; and (c) the greatest possible benefit for the end-users of public electronic communications services. The Access Directive also provides that regulation of access control services may be justified regardless of the level of market power: Article 5 of the Access Directive allows the imposition of obligations on operators without SMP provided that national regulatory authorities (NRAs) act in a way that "promotes efficiency, sustainable competition and gives the maximum benefit to end-users". Specifically, the Access Directive allows that regulation can be applied in order to ensure accessibility for end-users to digital television (and radio) broadcasting services. The Director considers that interactive digital TV services form an integral part of the overall package of digital television broadcasting services. Thus, the correct test as to the appropriateness of regulation is whether or not content providers have a right to obtain carriage for their content on the platform. Under the European framework, the question of whether or not the platform operator has SMP is not strictly relevant to this test, although in practice the tests may well lead to similar results.

2.17 The Director takes the view that it is appropriate to apply conditions to access control services provided by platform providers, or their associates,

which correspond to those applied under the regulation of conditional access. This would allow broadcasters to have access to access control services in the same way that broadcasters have fair, reasonable and non-discriminatory access to conditional access services.

Range of access control services

2.18 As stated above, Section 74(2) of the Act states that conditions may be imposed on a person providing facilities for the use of application programme interfaces as Ofcom considers necessary for securing (a) that persons are able to have access to such programme services provided in digital form as Ofcom may determine; and (b) that the facility for using those interfaces or guides is provided on terms which are fair and reasonable and do not involve, or tend to give rise to, any undue discrimination against any person or description of persons. In the Act, the application programme interface (API) is defined as "a facility for allowing software to make use ... of facilities contained in any other software". This definition relates to software which (a) allows a person to have access to programme services; (b) allows a person to make use of an electronic communications network by means of which a programme service is broadcast or otherwise transmitted; (c) allows a person to become the end-user of a description of public electronic communications service. The Director considers that the limited nature of the Act's definition of the API could potentially constrain the range of digital interactive television services which might be supplied to viewers by broadcasters. In particular, by limiting the scope of regulation solely to the definition of the API contained within the Act, this would mean that access on reasonable terms to the modem contained within set-top boxes could not be guaranteed. The modem contained within the set-top box is used, for example, if a broadcaster is offering a form of interactive voting relating to a TV programme to its viewers. The use of such a voting function is an increasingly popular aspect of digital interactive television services. Another function that requires the use of the modem contained with the set top box is the making of online donations to charity.

2.19 The Director has given detailed consideration to the question of how to define the wider concept of access control services for the purposes of imposing regulation in light of the limited definition of the API contained within the Act. The Director is of the opinion that, in order to give full effect to the requirements of Article 5(1)(b) of the Access Directive, it is necessary to impose regulation on a range of access control services such as to include access to the modem contained within set-top boxes.

2.20 In light of the above, the Director is minded to impose regulation based on the definition of access control services which is set out in the attached conditions at Annex A to this consultation document. This definition includes the technical services which may make use of, for example, both the API as well as the modem contained within the set top box. The Director proposes to impose such regulation under the powers conferred to him by two sections of the Act. Section 74(2) provides, as stated above, that the Director has the power to set conditions "imposing obligations on a person providing facilities

for the use of application programme interfaces ... on terms which are fair and reasonable and do not involve, or tend to give rise to, any undue discrimination against any person or description of persons". Section 73(2) of the Act provides, also as stated above, that "access-related conditions may include conditions relating to the provision of such network access and service interoperability as ... appropriate for the purpose of securing (a) efficiency on the part of communications providers and persons making associated facilities available; (b) sustainable competition between them; and (c) the greatest possible benefit for the end-users of public electronic communications services".

2.21 The Director therefore considers that the greatest efficiency, most sustainable competition, and greatest possible benefit to end-users will only be achieved if broadcasters and third parties are able to have access to the full range of access control services required in order to provide interactive services to viewers. This range of services should include, for example, those access control services that make use of the modem, and other functions contained within the set-top box, as well as the API. The Director is of the view that digital interactive television services that make use of the modem in the set-top box are of considerable benefit to television viewers. For instance, as noted above, the modem in the set-top box is now commonly used to register votes in television programmes. Further, the modem is also utilised in home banking transactions via the television screen, charitable donations and any transactions that involve any aspect of purchasing goods or services. These services are expected to grow in availability and popularity, and the Director therefore takes the view that all broadcasters and other third parties that wish to do so should be able to provide such services so as to offer the greatest possible benefit to the viewers. In order that this should be the case, the Director considers that all reasonably required access control services, in particular those which relate to the use of the modem (and therefore facilitate the provision of such interactive services to the end-user by broadcasters and other third parties), ought to fall under the regulatory regime.

The extent of regulation to be imposed

2.22 Oftel has considered whether, in the interests of proportionality, regulatory obligations should be applied only to the provision of access control services to a particular category of broadcaster, for example to Public Service Broadcasters. However, Oftel considers that in order for end-users to receive the maximum benefit possible it is necessary for regulation to be applied such that it extends to the provision of access control services to all broadcasters, rather than to just one category of broadcaster. Otherwise, a situation could arise in which only a limited range of interactive services would be made available to viewers via a limited range of broadcasters. This would not satisfy the aim of achieving the greatest possible benefit to end-users. Such a situation could also result in potential adverse effects on competition – some broadcasters might be able to offer a more attractive degree of functionality in their channels than other broadcasters (who may nonetheless wish to provide the same services). This would not be in keeping with the objectives set out in Section 4 of the Act. The Director therefore considers that it would not be

appropriate to limit protection of regulated services to certain types of broadcasters.

2.23 The Director further considers that the additional burden to the provider of making services available to all broadcasters and third parties on a regulated basis would not be materially greater than required to provide to one category of broadcaster. This is because the incremental cost incurred by the provider in order to make access control services available to additional broadcasters or third parties is likely to be relatively small compared to the stand-alone cost of providing access control services to just a single broadcaster. Moreover, the platform provider would, of course, be able to charge an appropriate price for the services provided such a price was fair, reasonable and non-discriminatory.

Operators on which conditions will be applied

2.24 Currently, access conditions are applied to SSSL, the provider of technical services for interactive services on BSkyB's digital satellite platform. The Director has considered whether these access conditions should also apply to other digital television platforms.

2.25 The Director takes the view that, at present, it is not appropriate and there is little practical benefit in regulating the provision of access control services on platforms (such as cable) where transmission capacity is not readily available to broadcasters on a commercial basis. However, if digital cable platform does become "open" at some point in the future, the Director would then reconsider whether and/or how best to regulate the access control services provided on the platform.

2.26 On the digital terrestrial platform, no operator is offering access control services to other broadcasters for the provision of digital interactive television services to viewers. If an operator begins to offer access control services for the provision of digital interactive television services on the digital terrestrial platform, the Director will, as with the cable platform, reconsider whether and/or how best to regulate access to the interactive functionality provided on that platform.

2.27 The Director has conducted investigations into the interactive television services that are currently being offered by the BBC on Kingston's KIT interactive television platform. Currently, the BBCi Hull service is being offered to TV viewers on a non-commercial, trial basis and the trial itself is scheduled to end in April 2004. The Director takes the view that it would be inappropriate at this juncture to impose regulation on the KIT platform. This is because the BBCi trial is scheduled to end in April 2004 and it is currently unclear whether the service will be offered on a permanent basis. Further, it remains unclear whether Kingston will decide to make access control services available on its IP network to broadcasters or other third parties on a commercial basis. Should a scenario arise in which Kingston do begin to make such services available to broadcasters on a commercial basis then the Director may decide to conduct further investigations into the appropriateness

or otherwise of imposing access related conditions. In the meantime, the Director will continue to monitor market developments on the KIT platform.

2.28 The Director emphasises that he intends to adopt a platform-neutral approach to the imposition of access conditions. Thus, although the Director would be required to consult on the application of specific access conditions on the digital cable and digital terrestrial platforms, he would, in such circumstances, nonetheless expect to propose to introduce a suitably proportionate approach which is similar to that imposed on the digital satellite platform.

2.29 In the light of the analysis in paragraph 2.22 above, the Director therefore proposes to apply ex ante regulation at present only to SSSL.

Initial Conclusions

2.30 Oftel proposes to impose, inter alia, an obligation (which, for the moment will be applied only to SSSL) requiring it to provide fair, reasonable and non-discriminatory access to the technical services required in order to provide interactive services to viewers. As with the regulation of conditional access, the Director proposes to follow the approach described in his document: *Imposing access obligations under the new EU Directives*, September 2002. As with the regulation of conditional access services, the Director considers that this document provides a useful basis from which to develop a consistent approach to access issues in relation to access control services.

Chapter 3

Proposals to set new Access Control conditions

Application of the conditions

3.1 Section 46(6) of the Act provides that “particular persons” may be made subject to access-related conditions. The Director therefore proposes, for the reasons noted in Chapter 2 above and paragraph 3.2 below, to apply the conditions contained at Annex A to this consultation document to Sky Subscribers Services Limited, including any of its subsidiaries or holding companies, or any subsidiary of such holding companies.

3.2 The Director considers it appropriate to prevent a person to whom a condition is applied which is part of a group of companies, exploiting the principle of corporate separation. That is to say, a person to whom the conditions are intended to apply should not use another member of its group to carry out activities or to fail to comply with a condition, which would otherwise render that person in breach of its obligations. Accordingly, the Director considers it appropriate that the draft obligations detailed at Annex A to this consultation document shall apply to: Sky Subscribers Services Limited, whose registered company number is 02340150, including any of its subsidiaries or holding companies, or any subsidiary of such holding companies, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989. The current operator of technical services for the provision of interactive television services to viewers on the digital satellite platform is SSSL. SSSL is a wholly owned subsidiary of British Sky Broadcasting Group Limited, which is itself a wholly owned subsidiary of BSkyB Group Plc.

3.3 The Director is of the view that it is appropriate, reasonable and proportionate to define the Provider in this way. It is right that, in principle, the regulated entity should include all of the economic entities that are under the control of the person who is subject to the access-related condition. However, the Director does not intend to use this definition as a means of increasing the Provider’s obligations in an inappropriate manner. Rather, the Director will look to see which persons are operating on the relevant market and whether it is necessary to enforce the access-related obligations in relation to that person by virtue of the fact that it is controlled by the Provider. This definition is intended simply as a mechanism to prevent the Provider from avoiding its regulatory obligations.

The criteria to be satisfied under the Act

3.4 The Director has considered all of the Community requirements detailed in Section 4 of the Communications Act and considers that the proposed conditions (set out in Annex A to this Consultation Document) satisfy such requirements where appropriate. In particular, the Director

considers that, by imposing the proposed conditions, the requirement to promote competition will be satisfied. This is because if the terms upon which access control services are offered are regulated in the proposed manner, all broadcasters, which wish to provide digital interactive television services to their viewers, will be able to do so. More generally, the Director also considers that by imposing the proposed conditions the third Community requirement to promote the interests of all persons who are citizens of the European Union will also be satisfied.

3.5 Each condition that the Director proposes to impose on the Provider must also pass the tests set out generally for all access-related conditions in section 47(2) of the Act, namely that each condition must be:

- objectively justifiable in relation to the networks, services or facilities to which it relates;
- not such as to discriminate unduly against particular persons or a particular description of persons;
- proportionate to what the condition is intended to achieve; and
- in relation to what it is intended to achieve, transparent.

3.6 The Director considers that the proposed conditions contained within Annex A satisfy all of these tests set out in Section 47(2) of the Act.

- They are objectively justifiable, in that they relate to the need to ensure that competition develops to the benefit of consumers. Specifically, they will ensure that end users (in this case, television viewers) are provided with optimum choice through a wide availability of digital interactive television services. This is because the proposed conditions will ensure that *all* broadcasters who wish to provide digital interactive television services to viewers will be able to obtain the necessary access control services to do so on terms that are regulated.
 - They do not discriminate against Sky Subscribers Services Limited, including any of its subsidiaries or holding companies, or any subsidiary of such holding companies. The Director considers that this is the case because SSSL has been found to be the only operator that currently provides access control services for digital interactive television services on a digital television platform that is operated on an open-access basis. By open-access, this means that transmission capacity is freely available on the DSAT platform, and the platform host makes conditional access services available to broadcasters. However, the Director emphasises that it will continue to monitor other digital television platforms, and will consult on the necessity and scope of any regulation in relation to such platforms if transmission capacity becomes available on those platforms on an open-access basis.
 - The Director considers that they are also proportionate. The conditions ensure that the regulated provider of access control services retains the flexibility to come to a wide range of pricing and supply arrangements for access control services, which is important in a varied and still developing industry. They are also formulated in such a way that they do not impose an unreasonable burden on such supplier. Such supplier will be entitled to set charges designed to recover reasonably and efficiently incurred incremental and common costs of
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supply, including in particular a reasonable rate of return on capital employed. Moreover, the Director has taken this opportunity to dispense with a number of conditions contained within the old Access Control Class Licence which were neither appropriate nor effective under the new regulatory framework.

- The proposed conditions are set out in a transparent form in Annex A of this document, so that the Director considers that they meet the requirement of transparency set out in the Act. The conditions aim to maximise accessibility for end-users to interactive television services and they do so in a clear and comprehensible manner.

3.7 The Director's overall intention is that the new conditions contained at Annex A should achieve broadly the same effect as the regulation of access control services under the previously existing Access Control class licence, some of the provisions of which have been continued. As noted above, those existing conditions which the Director considers to be redundant, for example because they duplicate other conditions, have been removed – resulting in a substantial reduction in the number of conditions. It is hoped that this intention to impose the minimum amount of regulation necessary will lead to greater brevity and provide increased clarity for all stakeholders. Other conditions have been retained. In some cases, existing conditions have been reformulated in order to fit in more naturally with the construction of the Act or to be more closely analogous with the formulation of conditions in other markets. Where the purpose of conditions in different markets is, in essence, the same, it aids the understanding of market players and promotes legal certainty if the formulation of the conditions is as similar as possible.

3.8 Section 73(2) of the Act states that access-related conditions may be set by Ofcom for the purpose of securing efficiency, sustainable competition and the maximum benefit to end-users. In this particular case, the Director considers that the proposed conditions contained at Annex A to this document are appropriate for such purposes because:

- Broadcasters which are operating on an open-access digital television platform and who are obtaining conditional access services will also be able to obtain the access control services needed to provide digital interactive television services. Ensuring that these access control services are provided on regulated terms will help promote efficiency in the provision of services by broadcasters to television viewers.
 - As stated above, effective competition between providers of digital interactive television services will be maintained since there will be no limitation on which broadcasters can or cannot provide such services to their viewers. All broadcasters who wish to provide digital interactive television services will be able to do so on regulated terms.
 - In turn, the Director considers that this means consumers will be able to receive a wider selection of interactive services. This increased availability will ensure that the benefits to end-users will therefore be maximised.
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Condition 1 - Requirement to provide Access Control Services

3.9 Condition 1 proposes an obligation to provide, on fair and reasonable terms, such access control services where a person reasonably requests such services in writing. This condition is proposed under sections 73(2) and 74(2)(a) and 74(2)(b). The Director considers that this condition is necessary to ensure that, if a person requests an access control service to which there is no significant technological impediment, for which there would be a reasonable level of demand and which could be supplied at a price which would cover the costs of developing and making the service available, such a request will not be refused. A refusal in these circumstances would be considered to be a breach of the obligation to supply access control services on fair and reasonable terms. As with conditional access, in interpreting Condition 1 (and in particular in assessing whether a particular request is “reasonable”), the Director proposes to follow the approach described in his document: *Imposing access obligations under the new EU Directives*, September 2002. Although, as noted above at paragraph 2.24, this document is not expressly applicable to access control services, the Director nonetheless considers that it provides a useful basis from which to develop a consistent approach to access issues in relation to access control.

3.10 Under Condition 1, in accordance with section 45(10)(a), the Director also has the power to make directions. This power could be used to deal with issues relating to specific forms of access or the particular terms and conditions on which access is provided – for example to clarify whether a particular service being requested is in fact a reasonable request.

Condition 2 - Obligation To Keep Separate Financial Accounts

3.11 Condition 2 is proposed under sections 73(2) and 74(2)(b) and proposes an obligation on the provider (SSSL) to keep separate financial accounts regarding its activities as an access control service provider. The Director considers that this condition is both necessary and appropriate in order to give effective practical application to the overarching principles of fairness, reasonableness and non-discrimination that are set out in the other conditions. Specifically, the Director is of the opinion that without this requirement to keep separate financial accounts he will be unable to undertake thorough investigations into allegations relating to whether the provider has made access control services available on fair, reasonable and non-discriminatory terms. The Director emphasises that the detail provided in the condition will offer clarity and an unambiguous breakdown of the Provider’s responsibilities.

3.12 Condition 2 differs from the continued condition 12 in so far as it removes the provision which states that the Provider should not have to maintain separate financial accounts for access control services if that Provider already maintains separate financial accounts in respect of conditional access services. The Director considers that this change is clearly justified on the basis that, without having access to separate financial

accounts in respect of access control, the Director would be unable to perform clear, informed and precise investigations into whether there may or may not have been a breach of the other conditions in relation to the provision of access control services. The proposed condition 2 envisages that the Provider shall be required to prepare Accounting Documents for the purpose of condition 2 and produce and deliver them to the Director as soon as reasonably practicable but not later than 31 June 2004.

3.13 The Director's intention is that the Provider would then be required to comply with Conditions 2.6 to 2.19 from that same date. The Director's practical intention is that this deadline shall allow the Provider sufficient time in which to organise its accounting practices so as to be able to comply with the condition. From 31 June 2004, the condition envisages that the Provider will be required to comply with the condition and the provisions of any directions issued by the Director from time to time in relation to the format and disclosure of the Accounting Documents. There is reference in proposed condition 2.6 to the provider being required to prepare a financial statement in relation to "any period". For the purposes of this condition, the Director envisages that "any period" would be a reasonable period, and likely to be no less than one month.

3.14 Condition 2 deals with the appointment of a Regulatory Auditor, and provides for that auditor to owe a duty of care to the Director. The Director recognises that discussion of the duty of care owed to Regulators is currently taking place within various accountancy bodies and that the position adopted by that auditor may change if further guidance on this issue is issued by the accountancy profession. However, notwithstanding this ongoing discussion, the Director considers that it is a vital and indispensable requirement of his role that he is able to rely on the veracity and accuracy of regulatory accounts prepared by the appointed Regulatory Auditor. The reason that this is so important is due to the fact that the Director, as economic regulator of access control services, is the primary user of those regulatory accounts. As a matter of public policy, it is not appropriate for the Director to enter into a contractual relationship with the Regulatory Auditor in order to ensure that he can rely on the regulatory accounts. Therefore, the Director proposes that the Regulatory Auditor should owe him a duty of care under the provisions of the Contracts (Rights of Third Parties) Act 1999. This proposal is consistent with the view of other UK regulators. Furthermore, it is also consistent with provisions contained within the accounting conditions that Ofcom intends to impose upon other operators in the telecommunications industry.

Condition 3 - Requirement not to unduly discriminate

3.15 Condition 3 is proposed under sections 73(2) and 74(2)(b)(ii) and proposes an obligation on the provider not to discriminate unduly in the provision of access control services. The Director considers that this condition is appropriate and necessary in order to ensure that the Provider should not differentiate in favour of certain broadcasters or third parties to the detriment of others in such a way so as to have a material adverse effect on competition. This is because the Director considers that it is important to

ensure that access control services are not provided to broadcasters or third parties on less favourable terms than those on which SSSL provides services to BSkyB.

3.16 The Director has already outlined how Oftel might treat undue discrimination in its statement *Imposing access obligations under the new EU Directives*, September 2002. As noted in 2.24 above, this document is not expressly applicable to access control. However, as before, the Director nonetheless considers that it provides a useful basis from which to develop a consistent approach to undue discrimination in relation to access control.

Condition 4 - Publication of Charges, Terms And Conditions

3.17 Condition 4 is proposed under sections 73(2) and 74(2)(b) and proposes an obligation on the provider in relating to the publication of charges, terms and conditions. Where an access control service is provided after the proposed condition comes into force, a copy of the notice containing the charges and terms and conditions should be sent to the Director within 28 days of condition coming into force or of the access control services being first provided. In the event that any charges, terms or conditions are amended, a notice of such amendments must be provided to the Director not less than 90 days prior to their introduction. This is a notice period imposed on many markets for services regulated by Oftel and is, in particular, appropriate where users have no choice of supplier as in this case. In the Director's view, these notice periods represent the appropriate balance: the Director considers that the publication of charges provides transparency and helps to ensure stability in markets and, without such a notice period, incentives to invest might be undermined and opportunities for market entry may therefore be less likely.

3.18 Publication of charges, terms and conditions also assists both the NRA and broadcasters in judging the state of the market and enables broadcasters to make a judgement as to whether the terms they are offered are likely to be fair, reasonable and non-discriminatory. It is thus a necessary complement to that requirement. The wording of the obligations in this condition – except for those concerned with the 90 day notice period – broadly reflects that which is set out in the continued condition 14.

Questions for stakeholders

3.19 Do you agree with the Director's proposal to implement access-related conditions in relation to access control services in the manner as set out in the conditions attached at Annex A to this consultation document?

3.20 Specifically, do you agree that it is necessary to impose regulation on all access control services, including services that require access to the modem contained within the set-top box, instead of limiting regulation solely to access to the application programme interface?

3.21 Do you agree that all of the conditions proposed satisfy the tests set out in Section 47(2) of the Act, namely that they are objectively justifiable, do not unduly discriminate against particular persons, are proportionate to what they are intended to achieve, and are transparent?

3.22 Do you have any comments on the Director's proposal to discontinue the continued access control licence conditions as proposed in Annex B?

3.22 Are there any other issues that you think the Director ought to take into account when it implements the new conditions?

Chapter 4

Consultation

4.1 The purpose of this consultation is to seek views on the Director's proposals for regulation of Access Control services in the UK. The Director will consider all relevant comments before making the final Notification.

4.2 In addition to comments respondents may wish to make on the Director's proposals, the Director would like respondents' views on the specific questions raised at the end of Chapter 3.

4.3 The Director is publishing the draft conditions for Access Control services together with this explanatory document so that interested parties may have a reasonable opportunity to make representations. Having considered any such representations, the Director will make any changes he thinks appropriate and then publish a final version of the new conditions.

4.4 In accordance with Sections 48(2) and (3) of the Communications Act, and the standard consultation period which will be adopted by the Office of Communications, a consultation period of **10 weeks** has been permitted for representations.

4.5 Representations must arrive at the Office of Communications (Ofcom), by no later than close of business on **23 January 2003**. Representations received after this time will not be taken into account, and no extensions of the deadline will be permitted.

4.6 Where possible, comments should be made in writing and [sent by e-mail](mailto:margaret.doherty@oftel.gov.uk) to margaret.doherty@oftel.gov.uk or margaret.doherty@ofcom.org.uk. However, copies may also be posted or faxed to the address below. If any stakeholders are unable to respond in one of these ways, they should discuss alternatives with:

Margaret Doherty
Office of Communications
Riverside House
2A Southwark Bridge Road
London SE1 9HA

tel: 020 7634 8828
fax: 020 7634 8731

Further copies of this document

4.7 This document can be viewed, initially, on Oftel's website, www.oftel.gov.uk. It will subsequently also be available on Ofcom's website. Paper copies and more accessible formats such as large print, Braille, disc and audio cassette can be made available on request. Please contact Oftel's

Research and Information Unit by telephoning 020 7634 8761 or by sending an e-mail to infocent@oftel.gov.uk.

Publication of representations made by stakeholders

4.8 On this occasion, the Director is not inviting stakeholders to comment on the representations made by others. However, in the interests of transparency, all representations will be published, except where respondents indicate that a response, or part of it, is confidential. Respondents are therefore asked to separate out any confidential material into a confidential annex that is clearly identified as containing confidential material. Oftel will take steps to protect the confidentiality of all such material from the moment that it is received at Oftel's offices. In the interests of transparency, respondents should avoid applying confidential markings wherever possible.

4.9 Non-confidential representations can be viewed on Ofcom's website. They can also be viewed at Ofcom's Research and Information Unit. Appointments must be made in advance by telephoning 020 7634 8761 or by [sending an e-mail](#) to infocent@oftel.gov.uk.

Annexes

Annex A

**Notification of proposals under Section 48(2) of the Communications Act
2003**

**NOTIFICATION OF PROPOSALS UNDER SECTION 48(2) OF THE
COMMUNICATIONS ACT 2003**

**Proposal for setting access-related conditions under section 45(5) of the
Communications Act 2003 as authorised by sections 73(2) and 74(2) of
the Communications Act 2003**

1. The Director General of Telecommunications ('the Director') in accordance with section 48(2) of the Communications Act 2003 ('the Act') hereby makes the following proposals for setting access-related conditions to apply to the Provider as defined in the Schedule to this Notification who provides Access Control Services as set out in the Schedule to this Notification. (The Director is able to exercise powers under the Act pursuant to section 408 of the Act and Article 3(1) of the Communications Act 2003 (Commencement No. 1) Order 2003).
 2. The Director is proposing to set access-related conditions under section 45(5) of the Act 2003, as authorised by sections 73(2) and 74(2) of the Act.
 3. The effect of the Conditions would be to impose provisions on the Provider as defined in the Schedule to this Notification who provides Access Control Services as permitted by sections 73(2) and 74(2) of the Act.
 4. Further details of the effect of, and the Director's reasons for making, the proposals to set the Conditions are set out in the consultation document accompanying this Notification.
 5. In considering whether to make the proposals set out in this Notification, the Director has complied with all relevant requirements set out in sections 45 to 50 and sections 73 and 74 of the Act.
 6. In making the proposals referred to in paragraph 1 of this Notification the Director has considered and acted in accordance with the six Community requirements in section 4 of the Act.
 7. Representations may be made to the Director about any of the proposals set out in this Notification and the accompanying explanatory memorandum by no later than close of business on 15 December 2003.
 8. Copies of this Notification and the accompanying consultation document have been sent to the Secretary of State in accordance with section 50(1)(a), the European Commission and the regulatory authorities of every other member state in accordance with section 50(3) of the Act.
 9. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act.
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**JIM NIBLETT
DIRECTOR OF BROADBAND AND INTERNATIONAL AFFAIRS**

**A person duly authorised by the Director General of
Telecommunications pursuant to paragraph 8 of Schedule 1 to the
Telecommunications Act 1984**

14 November 2003

SCHEDULE

PROPOSED CONDITIONS APPLICABLE TO PROVIDERS OF ACCESS CONTROL SERVICES

Part 1: Definitions and Interpretation Relating to the Conditions in this Schedule

Definitions

In this Schedule, except in so far as the context otherwise requires:

“Access Control Services” means services, facilities or arrangements, other than Publicly Available Telephone Services or Conditional Access Services, by means of which the supply to end-users of a Digital Interactive Television Service is controlled and which are provided to any Third Party, including the Provider, and without prejudice to the generality of the foregoing includes:

(i) Signal Processing Services, that is to say any encryption, scrambling or other processing of Signals associated with or incorporated in a Digital Interactive Television Service of any description prior to a transmission to an Access Device;

(ii) Authentication Services, that is to say either or both of:

(a) services which identify an end-user or an Access Device in order to permit or deny access of that end-user or Access Device to a Digital Interactive Television Service; or

(b) services which identify a Digital Interactive Television Service in order to permit it to operate with an Access Device;

(iii) Access Device Management Services, that is to say the actuation, control or operation, or the remote actuation, control or operation of Access Devices;

(iv) Selection Services, that is to say the processing by an Access Device or the preparation and transmission to an Access Device of Signals which allow an end-user to initiate access to a Digital Interactive Television Service or to select from a number of Digital Interactive Television Services;

(v) Subscriber Management Services, that is to say either or both of:

(a) the preparation of and the preparation and supply, adaptation of, or adaptation and supply to end-users of Essential Components; or

(b) the preparation and transmission to Access Devices of Signals giving effect to end-users' decisions to subscribe to a Digital Interactive Television Service;

“Access Device” means any device in electronic or tangible form (including, but not limited to, the Application Programme Interface or the modem) which processes Signals so as to permit an end-user access to a Digital Interactive Television Service or to permit a Digital Interactive Television Service access to an end-user;

“Accounting Documents” means together the Regulatory Accounting Principles, the Attribution Methods, the Transfer Charge System Methodology, the Accounting Policies, the Detailed Attribution Methods and the Detailed Valuation Methodologies;

“Accounting Policies” means the manner in which the requirements of the Companies Act 1985 as amended by the Companies Act 1989, the accounting standards and the accounting policies whenever not superseded by the Regulatory Accounting Principles, that would be

applied in the preparation of each of the Financial Statements, as produced and delivered to the Director by 31 June 2004 and as amended from time to time in accordance with Condition 2 as the case may be;

"Accounting Separation Activities" means services, facilities or arrangements used directly or indirectly in the course of providing Access Control Services, that are individually identified by the Provider and agreed between the Provider and the Director and/or as directed by the Director from time to time;

"Accounting Separation Attribution" means, in relation to Access Control Services, the totality of all apparatus, data, procedures and activities which the Provider uses or holds for use to determine the costs, revenues, assets and liabilities to be attributed to Access Control Services and activities related to Access Control Services, either based upon data recorded by an Accounting Separation Measuring System or otherwise;

"Accounting Separation Measuring System" means the totality of all apparatus, systems, data, procedures and activities which the Provider uses or holds for use to determine the extent to which costs, revenues, assets and liabilities are to be attributed to Access Control Services and activities related to Access Control Services;

"Accounting Separation System" means the Accounting Separation Attribution and Accounting Separation Measuring System taken together;

"Act" means the Communications Act 2003;

"Attribution Methods" means the practices used to attribute revenue, costs, assets and liabilities to Access Control Services, or activities related to Access Control Services, as produced and delivered to the Director by 31 June 2004 and as amended from time to time in accordance with Condition 2 as the case may be;

“Auditing Standards” means United Kingdom auditing standards and guidelines issued from time to time by the Auditing Practices Board or its predecessor body the Auditing Standards Body, or by its successor(s);

“Auditor” means any auditor which could be appointed as the Provider’s auditor in accordance with the requirements of the Companies Act 1985 as amended by the Companies Act 1989;

"Conditional Access Services" means services, facilities or arrangements by means of which access to Protected Programme Services may be controlled so that only those viewers who are authorised to receive such services do so and includes -

(i) Encryption Services that is to say -

(a) any encryption or scrambling of signals for Protected Programme Services; and

(b) the conveyance by the Electronic Communications Network of encryption or scrambling information;

(ii) Subscriber Authorisation Services that is to say -

(a) the actuation or control or the remote actuation or control of decoders; or

(b) the initial transmission of messages connected with (ii)(A) above;

(iii) Subscriber Management Services, that is to say -

(a) the preparation or preparation and supply to viewers of Essential Components; or

(b) the preparation from viewers orders of instructions for authorisation signals for transmission to decoders,

or both;

“Detailed Attribution Methods” means the document with that title (along with the Detailed Valuation Methodology') containing details of the systems and processes for deriving or calculating the costs, revenues, assets and liabilities which are used by the Provider to prepare the Financial Statements;

“Detailed Valuation Methodology” means the document with that title (along with the Detailed Attribution Methods) containing details of the systems and processes for deriving or calculating the costs, revenues, assets and liabilities;

“Digital Interactive Television Services” means interactive television services available on a digital television platform, whether supplied by the Provider or any other Third Party, but not including:

(i) any of the services specified in Section 72(2)(a) to (f), of the Broadcasting Act 1990 other than licensable programme services specified in Section 46(1) of that Act which are conveyed for reception at different times in response to requests made by different users of the service;

(ii) Protected Programme Services; or

(iii) Publicly Available Telephone Services;

“Director” means the Director General of Telecommunications as appointed under section 1 of the Telecommunications Act 1984;

"Essential Component" means the smart card or other technological component in electronic or tangible form which is necessary for the

reception of authorisation signals and thus to enable customers to view Protected Programme Services in or upon which is mapped the customer's viewing entitlements for insertion or incorporation into or other interoperation with the decoder;

“Financial Statement” means any Financial Statement that is required under Condition 2.10;

“Process” means the series or inter-related activities or actions to obtain, record or hold data or information or to carry out any operation or set of operations on the data or information, including:

(i) organisation, storage, adaptation, or alteration of the data or information;

(ii) retrieval, consultation, computation or use of the data or information;

(iii) disclosure of the data or information by transmission, dissemination, or otherwise making available; or

(iv) alignment, combination, blocking, erasing or destruction of the data or information;

“Provider” means Sky Subscribers Services Limited, whose registered company number is 02340150 and any Sky Subscriber Services Limited subsidiary or holding company, or any subsidiary of that holding company, all as defined by Section 736 of the Companies Act 1985 as amended by the Companies Act 1989;

“Regulatory Accounting Principles” means the high level general principles and rules to be followed in meeting the reporting requirements of Condition 2 as produced and delivered to the Director by 31 June 2004 and as amended from time to time in accordance with Condition 2 as the case may be;

“Regulatory Auditor” means the Auditor for the time being appointed by the Provider in accordance with Condition 2 as the case may be;

"Relevant Intellectual Property Right" means any right, which is wholly or partly controlled by the Provider, in Industrial or Intellectual Property or is subject to an agreement, an arrangement or concerted practice to which the Provider is a party;

“Standard Audit Opinion” means an audit opinion in accordance with Condition 2.15 as the case may be;

“Third Party” means a person;

“Transfer Charge System Methodology” means methodologies used in deriving and accounting for transfer charges from and to the Provider’s activities as a provider of Access Control Services as produced and delivered to the Director by 31 June 2004.

1. Except insofar as the context otherwise requires, words or expressions shall have the meaning assigned to them otherwise any word or expression shall have the same meaning as it has in the Act. If it has no meaning there, it shall have the meaning ascribed under paragraph 1 of Part 1 of the Notification setting general conditions published by the Director on 22 July 2003 under section 48(1) of the Act.
 2. The Interpretation Act 1978 shall apply as if each of the conditions were an Act of Parliament.
 3. For the purpose of interpreting the Conditions set out in Part 2 the headings and titles shall be disregarded.
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Part 2: The Conditions**Condition 1 - Requirement to provide Access Control Services**

- 1.1 Where a Third Party reasonably requests in writing Access Control Services in relation to the provision of Digital Interactive Television Services, the Provider shall provide those Access Control Services. The Provider shall also provide such Access Control Services in relation to the Provision of Digital Interactive Television Services as the Director may from time to time direct.
 - 1.2 The provision of Access Control Services in accordance with paragraph 1 shall occur as soon as reasonably practicable and shall be provided on fair and reasonable terms, conditions and charges and on such terms, conditions and charges as the Director may from time to time direct.
 - 1.3 The Provider shall comply with any direction the Director may make from time to time under this Condition.
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Condition 2 - Obligation To Keep Separate Financial Accounts

- 2.1 Except in so far as the Director may consent otherwise in writing, the Provider shall keep separate financial accounts regarding its activities as a provider of Access Control Services in the manner set out below.
- 2.2 The Director may from time to time make such directions as he considers appropriate with respect to the Provider's obligations to maintain a separation for accounting purposes under this Condition.
- 2.3 The Provider shall comply with any direction the Director may make from time to time under this Condition.
- 2.4 The Provider shall prepare Accounting Documents for the purpose of this Condition and produce and deliver them to the Director as soon as reasonably practicable but not later than 31 June 2003.
- 2.5 The Provider shall comply with Conditions 2.6 to 2.19 from 31 June 2003 as appropriate.
- 2.6 The Provider shall ensure that its accounting and reporting arrangements (including Accounting Separation Systems) are sufficient to enable the Provider, at all times, to be capable of preparing in relation to any period a financial statement in accordance with the Accounting Documents. These accounting and reporting arrangements shall be, in the opinion of the Director, suitable to demonstrate at any time and in relation to any period that its charges for Access Control Services are transparent, non discriminatory, fair and reasonable.
- 2.7 The Provider shall maintain a separation for accounting purposes of Accounting Separation Activities from other activities, so as to:
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- (a) identify all elements of revenue, cost, assets and liabilities, with the basis of their calculation and the Detailed Attribution Methods used, related to the Accounting Separation Activities including an itemised breakdown of fixed assets; and
 - (b) ensure that Accounting Separation Activities are identified and are recorded at an appropriate amount in accordance with the Accounting Documents.
 - 2.8 The Provider shall maintain accounting records in a form which, on a historic cost basis and on a current cost basis:
 - (a) enables each of the Accounting Separation Activities to be separately identified and the revenues, costs, assets and liabilities of the Accounting Separation Activities to be separately attributable; and
 - (b) which shows and explains the transactions of each of the Accounting Separation Activities.
 - 2.9 The accounting records referred to in paragraph 2.8 shall be kept in a form which enables the Provider to prepare Financial Statements both on a historic cost basis and on a current cost basis.
 - 2.10 The accounting records referred to in paragraph 2.8 and all associated documentation shall be:
 - (a) maintained in accordance with the Accounting Documents;
 - (b) maintained in order to ensure compliance with this Condition;
 - (c) sufficient to enable the Financial Statements to have expressed upon them a Standard Audit Opinion; and
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- (d) sufficient to ensure that charges for Access Control Services can be shown to be fair and reasonable and not to be unduly discriminatory.

2.11 The Provider shall,

- (a) prepare in accordance with the Accounting Documents, which shall be identified in the Financial Statements by reference to their date, the Financial Statements identified in any direction the Director may make from time to time;
 - (b) secure, in accordance with paragraph 2.15 (or, if the Director so consents, paragraph 2.16) the expression of an audit opinion upon the Financial Statements as identified in any direction the Director may make from time to time;
 - (c) deliver to the Director the Financial Statements and any corresponding audit opinion identified for delivery in any direction the Director may make from time to time;
 - (d) publish the Financial Statements and any corresponding audit opinion identified for publication in any direction the Director may make from time to time;
 - (e) ensure that any Financial Statements and any corresponding audit opinion are fit for such purpose, or purposes, if any, as notified by the Director in writing; and
 - (f) deliver to the Director a report detailing any changes in the Accounting Documents, any Process and any other methodology which caused any figure presented on any one of the Financial Statements to change by more than 5% from the figure that would have been presented had such a change not been made. Any such
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report shall include details sufficient to render transparent such changes in accordance with any direction the Director may make from time to time.

- 2.12 The Provider shall publish and deliver to the Director copies of Financial Statements and any corresponding audit opinion each and all of which shall be in the form in which they are ultimately to be published, as directed by the Director. The Provider shall publish with the Financial Statements a written statement made by the Director and provided to the Provider commenting on the data in, the notes to or the presentation of any or all of the Financial Statements and/or the Accounting Documents.
- 2.13 The Provider shall make such amendments to the form and content of the Financial Statements as are necessary to give effect fully to the requirements of this Condition. The Provider shall provide to the Director particulars of any such amendment, the reasons for it and its effect, when it delivers the Financial Statements to the Director.
- 2.14 Where the Director has reasonable grounds to believe that any or all of the Financial Statements and/or Accounting Documents are deficient and/or where the Provider has been found to be in breach of one of its Conditions, the Provider shall, where directed by the Director:
- (a) amend the Accounting Documents in order to remedy the deficiencies identified by the Director;
 - (b) restate the Financial Statements identified by the Director as requiring restatement in accordance with the Accounting Documents which have, where necessary, been amended pursuant to paragraph 2.14(a);
 - (c) secure in accordance with paragraph 2.15 (or where the Director so consents, 2.16) the expression of an audit opinion on the restated Accounting Separation Financial Statements;
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- (d) deliver to the Director the restated Financial Statements and corresponding audit opinion.
- 2.15 The Provider shall secure in respect of each Financial Statement an expression of an audit opinion by the Regulatory Auditor, which shall conform to Auditing Standards and to the requirements as directed by the Director from time to time for this Standard Audit Opinion.
- 2.16 To the extent the Director is satisfied that the requirement to secure an audit opinion on a specific Financial Statement is not proportionate, the Provider shall secure an audit opinion by the Regulatory Auditor which shall conform to Auditing Standards and to the requirements as directed by the Director from time to time for this lesser audit opinion.
- 2.17 The Provider shall use its best endeavours to obtain from the Regulatory Auditor any further explanation and clarification of the reports required under Condition 2.15 and/or 2.16 and any other information in respect of the matters which are the subject of those reports as the Director shall reasonably require.
- 2.18 The Regulatory Auditor that the Provider from time to time appoints shall at all times be satisfactory to the Director having regard to such reasonable matters as the Director considers appropriate. The Provider shall notify the Director in writing of the Auditor appointed to secure compliance with this Condition before the Auditor carries out any work for that purpose. The Provider shall notify the Director of any proposed change of Regulatory Auditor 28 days before effect is given to that change.
- 2.19 The Provider's letter of engagement appointing the Regulatory Auditor shall:
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- (a) include an express obligation on the Regulatory Auditor that, in forming and/or expressing any audit opinion pursuant to this Condition, the Regulatory Auditor shall owe a duty of care to the Director (but not directly or indirectly to any other third party) subject only to such qualifications or limitations as are set out by the Regulatory Auditor to the Director in writing and acknowledged by him in writing prior to the expression of any audit opinion pursuant to this Condition; and

- (b) shall give effect to such duty of care by expressly acknowledging the Director's interest pursuant to the Contracts (Rights of Third Parties) Act 1999 and dis-applying any provision, term or condition of the Provider's letter of engagement that could otherwise exclude his interest.

2.20 The Provider shall secure that sufficient checks, controls and reconciliations are performed between figures contained in the Financial Statements and the accounting records to enable the Financial Statements to be audited and an audit opinion expressed upon them in accordance with paragraphs 2.15 (or where the Director so consents, 2.16).

Condition 3 - Requirement not to unduly discriminate

3.1 The Provider shall not unduly discriminate against particular persons or against a particular description of persons, in relation to matters connected with the provision of Access Control Services.

3.2 In this Condition, the Provider shall be unduly discriminating where the discrimination has a material adverse effect on competition and has no objective justification.

Condition 4 - Publication of Charges, Terms And Conditions

4.1 The Provider shall except in so far as the Director may otherwise consent in writing:

(a) publish in the manner and at all times specified in paragraph 4.2 a notice specifying, or specifying the method that is to be adopted for determining, the charges and other terms and condition on which it offers to provide Access Control Services, or package of such services.

and

(b) where it offers to provide Access Control Services, or package of such services , do those things at the charges and on the other terms and conditions so published.

4.2 Publication of the notice shall be effected in the following way:

(a) where the Provider is providing Access Control Services on the date that this Condition comes into force, by sending a copy thereof to the Director not later than one month after the date this Condition comes into force; or

(b) where the Provider provides Access Control Services after the date that this Condition comes into force, by sending a copy thereof to the Director not than later than 28 days after the Provider first provides Access Control Services; and

(c) thereafter, 90 days before the date on which any proposal to amend any charge, term or conditions or the method of determining the same is to become effective

and, in any and all of these circumstances, by:

(d) placing a copy of the said notice on any relevant website operated or controlled by the Provider; and

(e) sending a copy thereof to any person who may request such a copy at that person's written request (or such parts which have been requested).

Annex B

Proposed form of Discontinuation Notice

**NOTICE TO A CLASS OF PERSON DEFINED AS THE LICENSEE FOR
THE PURPOSES OF THE PROVISION OF ACCESS CONTROL SERVICES
UNDER PARAGRAPH 9 OF SCHEDULE 18 TO THE COMMUNICATIONS
ACT 2003**

**Notice that certain continued provisions set out in the continuation
notice given to a class of person defined as the licensee for the
purposes of the provision of Access Control Services on 23 July 2003
will cease to have effect from [.....]**

1. The Director General of Telecommunications ('the Director'), in accordance with Paragraph 9(9) of Schedule 18 to the Communications Act 2003 ('the Act') hereby gives notice to a class of person defined as the licensee for the purposes of the provision of Access Control Services ('the Licensee') that all of the continued provisions contained in Schedule 1 to the continuation notice given to the Licensee on 23 July 2003, which had effect from 25 July 2003, ('the Continuation Notice'), will cease to have effect from [.....] ('the Discontinued Provisions').

2. In giving this notice, the Director has, in accordance with Paragraph 9 (11) of Schedule 18 to the Act, taken all steps necessary for enabling him to decide whether or not to set a condition under Chapter 1 of Part 2 of the Act for the purpose of replacing the continued provisions and whether or not to exercise his power to set a condition under that Chapter for that purpose.

3. All directions, determinations, consents and other provisions which were continued under the Continuation Notice by virtue of Paragraph 9(8) of Schedule 18 to the Act will also cease to have effect from [.....] to the extent that they were given or made for the purposes of the Discontinued Provisions.

5. The Director consulted on his proposals to discontinue the Discontinued Provisions on [.....] in the consultation document entitled 'The future regulation of access control services' and requested comments by [.....]. The Director has taken into account the comments he received during that consultation.

6. In this notice, except as otherwise provided or unless the context otherwise requires, words or expressions shall have the meaning assigned to them and otherwise any word or expression shall have the same meaning as it has in the Act. For the purposes of interpreting this notice, headings and titles shall be disregarded.

JIM NIBLETT
DIRECTOR OF BROADBAND AND INTERNATIONAL AFFAIRS

[Date]
