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MUST CARRY/MUST OFFER

1. [REDACTED] who is a DCMS member of the joint DTI/DCMS team working on the Communications Bill has prepared the attached submission on must carry/ must offer.
2. This issue is an intricate one and needs to be dealt with before policy for the Communications Bill can be finalised. Its importance lies in the Government's commitment to universal access to the public service broadcasting channels, both before and after digital switchover. When analogue television signals are switched off, the digital terrestrial signal (received through the TV aerial) will not reach all households. At that stage, therefore, it is vital that the public service broadcasting channels are available from the other platforms - satellite and cable.
3. There are long standing arrangements to ensure that cable operators must carry public service broadcasting channels with no charge to either operator (for rights) or broadcaster (for carriage). But there is no equivalent for satellite; since the satellite operators are extra-territorial it has not been possible to impose such obligations directly on them. The White Paper, therefore, proposes a requirement to be placed on public service broadcasters to offer their channels on the satellite platform but with no countervailing duty for the operator. This will be sufficient to deliver the policy objective of availability over satellite (as there is a competitive market in satellite capacity and Sky are already under a general regulatory requirement to offer its conditional access services to all comers on fair, reasonable and non-discriminatory terms).
4. The key question now is whether you should nevertheless go further by asking Parliamentary Counsel to draft a provision which would impose a new obligation on Sky as a packager and retailer of satellite channels to carry PSBs free as part of their basic subscription package, which the new EU electronic communications framework allows us to do. This would create a new category of licence and it should be possible to ask Counsel to set it up so that the provision could be commenced by Order at a later time than the rest of

the Bill, so that it would still be up to you to decide whether to bring the provision into force. (And there would even be opportunity for you to review whether you wish to include the provision at all in the draft Bill, in the light of the circumstances at the time.)

5. For DCMS officials the emphasis is towards safeguarding the public service broadcasters. For DTI officials, the emphasis is towards minimising unnecessary intervention in the market. The decision on the balance to strike is one for Ministers jointly.

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Communications Bill team

Communications Bill team

might also welcome it. Sky, though, would be likely to oppose it. It would, however, mean introducing a new category of broadcast licence for those who package and retail channels. It would be a change to the White Paper policy and therefore would need to be consulted on, but this can be as part of the general Bill consultation. Furthermore, we think we could ask Counsel to draft the provision so that it could be brought into effect by a Commencement Order later than the rest of the Bill, which would give you the flexibility to decide not to bring it into effect at all if it did not seem necessary at the time.

38 For DCMS officials, the emphasis is towards safeguarding the Public Service broadcasters. For DTI officials, the emphasis is towards minimising unnecessary intervention in the market. The judgement between these positions is essentially a political one.

Regional opt-outs on satellite

39 A secondary issue is the extent to which PSBs should be required to offer all their regional opt-outs on satellite, in the light of the stress placed in the CWP on the value of regional television (paras 4.4.1-4.4.4). The issue does not arise on other platforms because the delivery systems are more local, whereas the "footprint" and transponder capacity needed for a single regional service on satellite would be just as great as for a national service. Offering all terrestrial regional opt-outs on satellite too would have a high cost.

40 ITV is not a single national service (except the morning GMTV) but 15 regional licensees offering 27 sub-regional services. Each regional service has 2-3 hours a day of exclusively regional programming; the sub-regional services provide more localised news output. The transponder capacity necessary to offer all 27 services would be high and could cost £8-10M a year, or about £5M for the 15. The BBC, which has 14 English services (including 3 sub-regional variants) and one for each of the three Home Countries, offers just four satellite services: the Home Country ones and a "generic" single English service. The BBC plans in due course to extend its regional opt-outs, but this depends on the availability of transponder capacity and funding. The ITC Commission has agreed that ITV may provide only the 16 (HTV offering 2) main regional services on satellite.

41 We recommend that OFCOM be given the flexibility to allow innovative solutions to the problem of carrying regional services via satellite. OFCOM might, for instance, specify which services (ie not necessarily all) must be offered, and be given the power to specify some combination of services where appropriate.

SUBMISSION TO MINISTERS ON MUST CARRY/MUST OFFER

Issue

To settle the policies on Must Carry/Must Offer, in the light of Communications White Paper (CWP) responses and subsequent events, so that Instructions to Counsel for the Draft Bill can be finalised and European negotiations informed.

2 The issues revolve around securing access for Public Service Broadcasters (PSBs) to the main broadcast platforms - terrestrial, cable and satellite - and the financial terms for that access. The PSBs are: all BBC licence-fee funded services, the holders of Channel 3 licences (ie ITV), Channel 4 (or in Wales, S4C the Welsh Fourth Channel), Channel 5 and public Teletext.

3 The key issue for decision is whether to extend the Communications White Paper policy by requiring those who offer packages of sound or television broadcast content over satellite (capturing, today, only Sky) to carry the public service channels in their basic package, parallelling the position on cable. This might be unwelcome to Sky but welcome to PSBs, most immediately ITV.

Timing

4 As soon as possible so that we can settle the policy for the purposes of collective agreement and Instructions to Counsel for the draft Bill.

Background

5 This submission inevitably contains some jargon, so the Glossary from the CWP is attached at Annex A.

6 It is important to secure access for PSBs to all the main platforms which distribute content - currently terrestrial TV (through the TV aerial), satellite TV and cable TV - so that people have access to them whichever platform they choose and because, after the analogue terrestrial signal is switched off, the digital terrestrial signal will not reach everyone. So cable and particularly satellite will be essential to fulfil the commitment that everyone who can get the current analogue channels should get the same ones free after digital switchover (CWP para 3.3.1).

7 For terrestrial and cable, there are already provisions for securing access for PSBs, but there are less effective rules for satellite, where broadly speaking it is a matter for commercial negotiation, with restrictions on Sky from abusing its dominant position.

8 The White Paper said (section 3.4, copy at B) that the present arrangements for securing the transmission of public service (PS) channels on cable by imposing "must carry" obligations on the cable operators should continue, subject to satisfactory conclusion of negotiations on the new regulatory framework for electronic communications networks and services in Europe. It said that the channels currently subject to such "must carry" obligations (as at para 2 above) should continue to be carried free by the cable network operators, with broadcasters meeting only technical costs, and the PSBs continuing to be unable to charge the cable operators for rights to carry the channels. It also said that the Government should be able to add *new* PS channels to the "must carry" obligation, but that any such new obligations should be based on a reasonable charge by the cable companies.

9 The CWP also said that there should be a new, corresponding obligation placed on the PS channels to make themselves available on other main platforms, today most obviously satellite ("must offer").

Recommendations

10 A number of CWP responses challenged the policy, mainly in the light of sectional interest. We

think that the basic policy of continuing intervention to secure the carriage of PSBs on the main broadcast distribution platforms is sound, but need decisions on significant aspects, notably:

whether to extend the CWP policy by aiming for a regime in which the "must offer" obligation proposed for PSBs on satellite can be matched, if it proves necessary, by an obligation on those packaging and retailing the channels (ie Sky) to include the channels in their basic package on an obligatory "must carry" no charge basis. This is the key decision for Ministers: whether to extend intervention in the market in order to secure preferential treatment for PSBs' access to Sky's satellite services. This would be likely to be welcomed by PSBs and the ITC and opposed by Sky.

whether, as proposed in the CWP, to allow "reasonable compensation" for any obligation on cable and satellite platforms to carry any new free-to-air terrestrial public services which might in future be agreed. We recommend Yes.

whether to ensure that "must carry/offer" obligations extend to ancillary services such as subtitling and audio description. We recommend Yes.

whether to require the provision of the whole range of regional opt-outs on satellite or allow some flexibility. We recommend the latter.

11. We also recommend that the channels subject to "must carry/offer" are specified in secondary legislation subject to affirmative Order, a draft listing the current PSBs being published with the Bill to provide essential business certainty.

White Paper responses

12 Most notably, and predictably, the cable companies argued that their "Must Carry" obligations were too onerous; there should be platform neutrality; and the market should dictate terms. Reading between the lines (and confirmed informally by NTL at a recent meeting), our impression is that cable companies do not find the present obligations too onerous (and of course they knowingly took them on), but fear, first, increasing numbers of BBC PS channels (all within the scope of the current regime) and perhaps interactive applications, but especially new PS options which had less viewer appeal. They are concerned that excessive capacity will be absorbed by "Must Carry" channels and undermine their businesses.

13 ITV argued that the CWP's proposition that it be required to provide its service over satellite had undermined its negotiating position with Sky and that there must be a "Must Carry" obligation on satellite too.

14 The BBC noted that as a matter of policy it had made its channels available on all main platforms, but argued that the "must carry" policy might not be sufficient to ensure that PSBs would be offered all the facilities they needed to secure access to audiences, ie access to all relevant gateways in the set top box. They want a statutory obligation that the facilities would be available or for OFCOM to be empowered to introduce such an obligation where necessary to achieve universal access, as well as preferential pricing for PSBs (the latter a position supported in Brussels by ITV and C4).

15 C4 and C5 welcomed the proposals, though C5 had concerns about whether specific satellites would be designated, whether OFCOM would regulate prices, whether ancillary services such as subtitling would be included and whether broadcasters would need to pay for carriage and delivery of their channels on new platforms.

16 Teletext also welcomed the CWP policy, though it sought greater digital capacity for its service. A separate submission will deal with these and other Teletext issues.

Discussion

17 One of the CWP core objectives is to ensure the continued availability, free at the point of consumption, of public service broadcast channels. This is important both for reasons of social inclusion, with the public service channels available to all regardless of which platform someone chooses to adopt, and to ensure that the public service channels will be available after digital switchover, even if effective digital terrestrial television (DTT) coverage is not close to 100%.

18 There are currently three main platforms; terrestrial, cable and satellite, which need to be considered separately. The Bill will also need to provide for OFCOM, after consultation, to determine which should be the additional or alternative "main platforms" for the transmission of "licensable content services" to which "must carry" and "must offer" would apply, if major new platforms emerge.

A) Terrestrial

19 No issue. No CWP policy proposal and we see no need for changes in the way that carriage is secured terrestrially. Effectively, the PS broadcasters secure terrestrial carriage through the allocation by Government of the necessary spectrum. They pay the privatised transmission companies (Crown Castle for the BBC and the relevant arm of NTL for C3, C4/S4C and C5) for transmitting their analogue PS broadcast material at a rate set and maintained by Oftel (a RPI-minus formulation); since they are providing monopolistic services where competition is unlikely to emerge. Oftel can also step in, using sectoral powers, if they think that the transmission companies are gaining excess profit from their services to DTT operators. Payment is simply for a service: there is no material opportunity cost because transmitter operators cannot use for any other purpose frequencies allocated to PSBs. We propose to stick with this arrangement. If Ministers wished to create new terrestrial public service channels at some point, these would operate in the same way: allocation of spectrum and commercial negotiation of transmission with regulation by OFCOM if that failed.

B) Cable - current PSBs

20 "Must carry" provisions originated in relation to cable, to ensure that viewers were not denied free access to the PSBs just because they had chosen (or those responsible for their block of flats had chosen) to take a cable system in preference to terrestrial.

21. The White Paper policy was to maintain the current regime, under which digital cable operators may be made subject to "must carry" provisions for all television public services broadcast by the BBC as well as channels 3, 4, 5, and S4C in Wales. It ensures that these channels are simultaneously re-transmitted without interference or interruption and are available at no additional charge to any consumer. These are matched by obligations on the broadcasters to make their channels available without charge and to provide the technical input necessary to feed them into the cable network. These "must carry" rules apply only to cable operators who have been deemed, by the ITC, to qualify as a "digital local delivery service" under the Broadcasting Act. The ITC determine whether this is appropriate with "regard to the extent of the use and the proposed use of digital technology in the provision of the service". The ITC have not yet deemed any services to be "digital local delivery services". The purpose of this device is to provide some flexibility to enable the early roll-out of digital cable with minimal obligations, especially during the initial phase when capacity is consumed by simultaneous analogue carriage, and is worth retaining. In practice digital cable companies include the PS channels.

22 "Must carry" on analogue cable was dropped in the 1990 Act as unnecessary since cable operators wanted free access to attractive content: the only problems which occasionally arose were in relation to BBC Parliament.

23 We recommend sticking with the principles of the current policy, as proposed in the CWP, which provides a rough justice between cable companies who have to meet minimal costs of carriage and PS channels which combine niche channels such as BBC Parliament with the most popular channels which still command 60% of the audience and will be essential to the platform for the foreseeable future.

Cable - new PSB channels

24 The CWP also proposed that "must carry" might apply to new channels, but that if it did so there should be reasonable compensation. The thinking was that the extent of "free" must carry obligations should be limited by the universal terrestrial free to air availability of channels, since these were already available free to everyone and terrestrial was the platform with the most constraint on capacity. Other "must carry" services might arise which would not be broadcast terrestrially but would be interactive wire-based services (eg cable/satellite broadcast to the viewer and telephone line return path for the viewer to respond), such as an interactive health service. There would be no reason why wire-based services shouldn't pay for the service of carriage, since the systems would be the sole means of access rather than a potential barrier to access. This position would also have the benefit of limiting "must carry" obligations to the level established at the time of cable companies' digital licence applications, so would not raise issues of unfairness or the imposition of undue burdens.

25 This does beg the question, however, of whether "free" must carry should apply if a new public service terrestrial channel were established. This possibility may in practice be small, but the principle would alarm cable companies, especially as such channels would no doubt have a small audience at least initially and use capacity which might be put to more lucrative commercial use. It would be a new potential burden not envisaged when cable companies applied for the relevant licences. The two options are:

a) ring-fence the services which are carried "free" at the current level (which allows only new BBC public services to be added) - effectively a form of "grandfather rights" - in the expectation that in agreeing any new public service the cost of cable carriage could be factored in at the outset;

b) extend the definition of services qualifying for "free" "must carry" arrangements to all holders of public service broadcast licences providing services for general reception. This would be a logical position but Ministers would need to seek to reassure the cable companies and their investors that the new burdens would be very modest.

26 The CWP policy is that the Government should decide on additions to the "must carry" list: we propose that additions should be made by secondary legislation subject to affirmative order.

27 The CWP also proposes that, in taking such decisions, the Government would take account of capacity constraints and OFCOM's advice; would ensure that such obligations were proportionate to the purpose; and would leave the greater amount of capacity for normal commercial uses.

28 We recommend option (a) above, so that all new services designated as "must carry" should be carried by cable companies only with "reasonable compensation" whether or not they are carried on other platforms: the level of compensation would be subject to regulation by OFCOM.

29 Another issue is whether "must carry" obligations should extend to ancillary services, such as subtitling and audio-description. We recommend that the opportunity is taken to provide certainty that these services should be carried and at no additional charge to the broadcasters; no immediate additional burden arises for the cable companies since such services appear to be carried at present.

C) Satellite

30 Securing access to satellite is more problematical. The satellite operators (mainly SES-Astra) are based in Luxembourg and therefore outside other Member States' jurisdiction so it is not possible to seek to impose "must carry" obligations on them. However, there is no competitive reason why SES-Astra would refuse to lease the necessary capacity to PSBs. Moreover, there are also other providers and the market overall is largely competitive. PSBs could therefore be required, say, to "take all reasonable steps to procure capacity on and broadcast via any satellite system designated by OFCOM", thus meeting the "must offer" policy of the CWP. Payment would be at a competitive market rate.

31 However, to get their services to satellite viewers, PSBs also have to buy Conditional Access (CA) and Electronic Programme Guide (EPG) services (see Glossary). PSBs require conditional access services from the operator to prevent "rights overspill" outside the UK (copyright is traded on a national basis, but the satellite "footprint" extends beyond national boundaries) and (within the UK) to deliver the appropriate regional service. The CA services enable each PSB to encrypt their service so that they can be watched only by UK viewers.

32 Since the PSBs can buy satellite CA services only from Sky, there is some merit in ITV's argument that the "must offer" policy hinders their ability to negotiate with Sky to buy those services - they can't walk away from the negotiation. ITV and the other PSBs enjoy some protection in that the general regulatory framework for CA requires Sky to offer them Sky are currently required to provide CA on a "fair, reasonable and non-discriminatory" (FRND) basis. This obligation stems from the Advanced TV Standards Directive.

33 On this basis, OFTEL's current regime for CA rests on commercial negotiation between the parties on the price/terms for CA within the boundaries indicated by published OfTel guidelines, which amplify the FRND terms. OfTel's principle is that the CA provider is entitled to recover the reasonable costs of providing services (including the costs of subsidising set-top boxes without which there would be little market), rather than simply the additional cost it incurs by adding PSBs to its CA systems. Agreements may be on the basis of a 'per viewer' charge or a fixed price per annum charge on a long-term contract. OFTEL's current rules do not, however, provide a basis for "special treatment" for PSBs who take CA services, unless there are demonstrable savings.

34 One option would be to leave ITV, and the other PSBs, to negotiate with Sky within this FRND framework. The BBC, Channel 4 and Channel 5 already have CA agreements in place with Sky. These are believed to be multi-annual, fixed price contracts. There is no public information on whether they have renewal clauses in their contracts or how robust any such renewal provisions will be. Until now, it has been for PSBs to decide themselves whether to go onto Dsat and ITV has not yet done so. ITV have, though, now started negotiations but are not happy that Sky might charge them £22.8 million a year. Sky, nevertheless, apparently think that a deal will be struck between them and ITV later this year on a broad package of issues including CA terms. But even if this is right, the issue could be expected to surface again when the BBC, Channel 4 and Channel 5 seek to renew their contracts.

35 In the light of ITV's representations, and BBC concerns, we have examined the scope for PSBs being given preferential CA terms. We have concluded that the draft Access Directive, effectively agreed at a political level, would preclude any UNDUE discrimination but that there might be scope, within this framework, for the regulator (currently OfTel and in due course OFCOM) to determine that PSBs should be given some sort of preferential treatment. OfTel are due to launch a 3-month public consultation on the issue in July, but of course the outcome is uncertain.

36 A further option would be to place "must carry" obligations on Sky in their capacity as channel packager and retailer with no charge to or by the PSBs. This would have the advantage of being broadly parallel to the arrangements which exist for cable. The practical difference is that cable companies are both channel packagers and network operators and already have to be authorised to operate their network. Sky on the other hand do not operate a network and currently need no authorisation in their capacity as a packager and retailer of TV channels. They have two subsidiary companies: one acting as the channel packager, the other acting as operator of the conditional access "gateway". Preliminary legal advice, however, is that imposing "must carry" obligations in this form is legally feasible. Broadcasters would need to pay for access to Sky's systems for those satellite viewers who do not subscribe to Sky: there are currently estimated to be some hundreds of thousands of such households, compared with a total of some 5 million Sky subscribers.

37 Such an approach would benefit ITV, in relation to its current negotiations with Sky, and put it in a stronger position if, as some believe, they will be unable to retain their market-share post digital switchover. It would also benefit other PSBs when their contracts need to be renewed; they would otherwise risk a significant increase in charges at the renewal point. They might or might not wish to take advantage of such a deal - the BBC for example might be concerned at diluting the BBC brand by appearing as part of the Sky package - but it would at least provide them with some leverage in negotiating CA charges. This approach would therefore be popular with PSBs. Cable companies