EXPLANATORY MEMORANDUM TO

THE BROADCASTING (LOCAL DIGITAL TELEVISION PROGRAMME SERVICES AND INDEPENDENT PRODUCTIONS) (AMENDMENT) ORDER 2012

2012 No. [XXXX]

1. Introduction

1.1 This explanatory memorandum has been prepared by the Department for Culture, Media and Sport and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 To support the emerging local TV market in the United Kingdom, the instrument will remove the burden of a 10% commissioning quota obligation that would ordinarily apply to newly licensed local TV services; and encourage independent producers to participate in the bidding process for local TV licences. Such producers will be incentivised to do so by the amendment of the definition of "independent producer", which at present prevents independent producers from holding local TV broadcast licences if they wish to retain "independent" status. Specifically, this Order will

i) Exempt local digital television programme services (as defined in The Local Digital Television Programme Services Order 2012[1]) from the independent productions quota which would otherwise apply to them by virtue of section 309 of the Communications Act 2003[2] ("the 2003 Act");

ii) Permit an independent producer, as defined in the Broadcasting (Independent Productions) Order 1991 ("the 1991 Order")[3], to hold up to 100% ownership in a broadcaster providing a local digital television programme service (as defined in The Local Digital Television Services Order 2012), provided that the provision of relevant regulated television services is not the main activity of the producer; and

iii) Enable the Office of Communications ("Ofcom") to impose, on any holder of a local TV broadcasting licence who is also a producer, a licence condition requiring that licence holder to provide Ofcom with such information as is necessary for the purpose of determining whether that licence holder is an independent producer within the meaning of the 1991 Order.

[1] S.I. 2012/292
[2] 2003 c.21
[3] S.I. 1991/1408.

Matters of special interest to the Joint Committee on Statutory Instruments

3.1 The 1991 Order was made under section 16(5) of the Broadcasting Act 1990, which was repealed (subject to the transitional provisions specified at paragraph 34 of Schedule 18 to the Act) by section 406 of, and Schedule 19 to, the 2003 Act. The effect of the transitional provisions at paragraph 34 of Schedule 18 to the Act is that the 1991 Order continues in force as though it were an order made under sections 272(2) and 309(2) of, and paragraphs 1(2) and 7(2) of Schedule 12 to, the 2003 Act. Therefore the powers enabling amendment of the 1991 Order are sections 272(2) and 309(2) of, and paragraphs 1(2) and 7(2) of Schedule 12 to, the 2003 Act.

4. Legislative Context

4.1 This Order is part of a new local TV framework for the United Kingdom, and is the fourth Order to be made in that regard. Accordingly, it should be considered alongside the three previous Orders in that framework:

- The Local Digital Television Programme Services Order 2012: this Order established the new local TV licensing regime and amended the existing multiplex licensing regime for the purposes of local TV;
- The Code of Practice for Electronic Programme Guides (Addition of Programme Services) Order 2011: this Order ensured appropriate prominence for local TV services on Electronic Programme Guides (EPGs); and
- The Wireless Telegraphy Act 2006 (Directions to OFCOM) Order 2012: this Order ensured that sufficient spectrum be kept available for broadcast of local TV services.

4.2 This Order is being made under sections 244, 277 and 309 of, and paragraphs 1(2) and 7(2) of Schedule 12 to, the Act. The Order will make amendments to the 1991Order (which, among other things, defines what is meant by an "independent producer") and to the Local Digital Television Programme Services Order 2012.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 The Secretary of State for Culture, Olympics, Media and Sport has made the following statement regarding Human Rights:

"In my view the provisions of the Broadcasting (Local Digital Television Programme Services and Independent Productions) (Amendment) Order 2012 are compatible with the Convention rights."

7. Policy background

7.1 The Department for Culture, Media and Sport ("DCMS") has taken steps to enable new local television services to emerge across the UK from 2012 onwards. In February 2012, two Orders were made: the first, made under section 244 of the 2003 Act, gave powers to Ofcom to implement a targeted local TV licensing regime; the second, made under section 5 of the Wireless Telegraphy Act 2006, made available suitable spectrum. A third order, made in December 2011 under section 310 of the Act, ensured that local TV services would be given appropriate prominence on EPGs.

7.2 Ofcom research shows that nine out of ten adults regularly consume some form of local news; 79% of people rate local news stories as important; and 75% of people feel more attached to their city/town/village than those who feel more attached to their region (56%).

7.3 Local TV exists in many other countries but has consistently failed to establish itself in the UK. Because it has historically faced a number of barriers preventing it from succeeding, Government is seeking to support the emergence of local TV in the UK on a sustainable basis by removing burdens and restrictions and encouraging greater participation in the local TV bidding process.

7.4 This instrument will result in the following changes:

i) Removal, in relation to local TV broadcasters only, of the obligation to source 10% of qualifying programme content from independent producers. Government believes that the 10% quota could present a significant barrier to the success of local TV services, which are likely to be small scale operations with small programme budgets. The Government's intention is to keep the regulatory burdens on local TV to a minimum. The removal of this obligation for local TV broadcasters only is consistent with the European Audiovisual Media Services Directive 2010[4], which also imposes a general 10% quota but permits Member States to disapply that quota in relation to "television broadcasts that are intended for local audiences and do not form part of a national network".

ii) Amendment of the definition of "independent producer" in the 1991 Order to lift, in relation to local TV only, the ownership ceiling which at present limits the stake an independent producer may hold in any television broadcaster. The definition is being changed to allow independent producers to hold local television digital programme services licences without losing independent status (and therefore to continue to benefit from the commissioning quota). The removal of

[4] Directive 2010/13/EU of the European Parliament and of the Council on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive).

this barrier will allow independent producers to bid for and hold local TV broadcast licences in partnership or outright giving independent producers the same opportunity to bid for local TV licences as other potential providers. The Government wants to maximise the number of bidders, and allow as many interested parties as possible to bid for a local TV licence.

7.5 The 2003 Act places an obligation on every digital television programme service licence regardless of whether the service broadcasts nationally, regionally or locally (sub-regional) to ensure that 10% of the total amount of time allocated to the broadcasting of qualifying programmes (within the meaning of section 309 of the Act and article 2 of the 1991 Order) is provided by independent producers. This requirement has helped ensure the growth of the independent production sector in the UK over recent years. However section 309 was designed with national and regional television production in mind not localised services. Local television was not in existence when the 1991 Order and the Act were passed. Given that a new local TV market will shortly emerge, facilitated by the Orders listed in paragraph 4.1 above, DCMS considers that it would not be appropriate for the quota and ownership cap regulations to be applied in this context. In addition, while the Audiovisual Media Services Directive also requires a minimum 10% of qualifying programmes to be independently produced, the Directive provides Member States with the ability to carve out local TV services from this obligation. This means that under European law local broadcasters do not have to comply with the European quota obligation; additionally, it means that local TV services are considered a special case under the European independent production rules.

7.6 The 1991 Order defines, at article 3(4), what is meant by an independent producer. Producers must meet the terms of that definition in order to qualify as "independent" such that their production content will count towards the 10% quota. One of the limbs of the definition, at article 3(4)(b), stipulates that a producer cannot be "independent" if it holds more than a 25% shareholding in a broadcaster. This order removes the 25% shareholding cap but only for shareholdings in local television broadcasters. Removing the cap in this way enables independent producers to choose to bid for and hold a local TV broadcast licence without losing their independent status at the national and regional level.

7.7 Even though this order is confined to lifting the rules in respect of local TV services, it is important to maintain the distinction between a broadcaster and a producer. If we do not retain this distinction with sufficient clarity, we risk losing our ability to comply with the European obligation to ensure that national broadcasters source 10% of their content from "producers who are independent from broadcasters". To ensure that independent producers are still "independent from broadcasters", even where they are permitted to own a total stake in a local television broadcaster, this instrument provides that the ownership ceiling is only lifted where the main activity of the producer in question is not the provision of relevant regulated television services, as defined by section 13(1A) of the Broadcasting Act 1990.

8. Consultation outcome

8.1 DCMS consulted on these proposals in the consultation *The role of independent producers and independent production quotas in local TV*, which ran from 9 February 2012 until 8 March 2012. In total, DCMS received 12 responses. A brief summary of responses was published on 10 April 2012[5].

8.2 Of those who responded, three were in favour of increasing the ceiling of ownership to 100%, two were content to see an increase if independent producer ownership was still capped to a minority stake, four did not comment, and three were against a change (although the response from one respondent incorporated views from a number of independent production companies, some of whom were in favour of a change). On the quota, three respondents supported removal, one suggested a quota increase, five did not comment and three were opposed to a change.

9. Guidance

9.1 This Order does not require Ofcom to produce guidance on the proposed changes. Ofcom and other interested parties have been consulted on the proposals and no further guidance is planned.

10. Impact

10.1 There will be no impact on charities or voluntary bodies arising from implementation of this legislation.

10.2 An Impact Assessment is attached to this Memorandum which states that there are no direct costs imposed by the removal of these burdens. There may be an opportunity cost for independent producers as the sector will not automatically benefit from a guaranteed 10% commissioning revenue stream. However, removal of the quota will not prevent local TV providers from sourcing content from independent producers; it will simply remove the obligation that this percentage of commissions must be sourced from those producers.

11. Regulating small business

11.1 The Order does not impose any requirements on any size of business, including small firms employing up to 20 people.

11.2 The effect of this Order and the related Orders that create the new local TV framework is that it creates new opportunities for small businesses in a new sector. Small businesses which are independent producers could benefit from the increased ownership ceiling, allowing them to have more of a stake in local TV broadcasts.

[5] http://www.culture.gov.uk/consultations/8840.aspx

12. Monitoring & review

12.1 The Government will conduct a review in conjunction with Ofcom of the measures a year after they have come into force, and may undertake further reviews as necessary.

13. Contact

13.1 Dominic Lake at the Department for Culture, Media and Sport (Tel: 020 7211 6957 or email dominic.lake@culture.gsi.gov.uk) can answer any queries regarding the instrument.