

Department for Culture, Media and Sport

Tel [redacted]
Fax [redacted]

file communications bill etc

To Tessa Jowell
 Patricia Hewitt

cc Dr Kim Howells
 Andrew Ramsay
 Diana Kahn
 Bill Bush
 [redacted]
 Chris Dawes
 [redacted]

Douglas Alexander
 [redacted]
 Ed Richards

From [redacted]

Date 27 March 2002

Communications Bill : Universal free access to PSBs on satellite

Issue

1. Tessa Jowell had meetings with the PSBs, and with BskyB to discuss the best means to ensure universal access to public service channels on satellite. Do you wish, at the light of these meetings, to reconsider the policy?

Recommendations

2. That you choose between these options (all applicable from a date set by order, with the option of different dates for different measures) :

a - The Bill only contains "must offer" and "must distribute" provisions, or

b- The Bill contains "must offer" and "must distribute" provisions and

OFCOM is given a duty to take into account the specific situation of public service broadcasters when implementing the fair reasonable and non discriminatory rules (cost of access to the conditional access system, as well as cost of the solus card).

c- "Must offer", no "must distribute" provisions but

OFCOM is given a duty to take into account the specific situation of public service broadcasters when implementing the fair reasonable and non discriminatory rules.

d - Only the "must offer"

Department for Culture, Media and Sport

3. We recommend either C or B.

Timing

4. Immediate.

Background

5. The instructions are drafted as follows:

- a "Must offer" on the PSBs to be available, free-to-view at the point of reception to people receiving their television signals by satellite. PSBs with regional services must make available in every region at least the "right" regional service.
- A "must distribute" on the main packagers and retailers of satellite channels to provide the PSBs to all their subscribers at no additional cost ("free-to-view") and at a regulated cost (existing rules on FRND) for the broadcaster. OFCOM shall have the power to specify that some small satellite packagers are exempt from the provision.
- Regulation of access to CAS : OFCOM shall have a duty to check that the CAS is provided on a FRND basis
- "Solus cards" : the PSBs must provide on request, for free, a "solus card" to all those non-satellite subscribers who, in the view of OFCOM, do not have adequate access to PSBs owing to the limitations on terrestrial coverage. Ofcom shall regulate the cost of the solus card (FRND terms), and, in case of a dispute, determine how the cost of providing the solus cards to viewers shall be shared between PSBs.
- The Secretary of State may, by order subject to affirmative resolution in both Houses, modify any of these rules, if this appears appropriate and proportionate, to ensure universal availability of PSBs, free to viewers at the point of reception. She would have regard, inter alia, to the size of the population able to receive PSBs by satellite only, the extent to which viewers rely on a particular CAS system to access PSBs, the development of the market, the progress of the technology related to CAS, the extent to which there is an imbalance between the power of negotiation of satellite packagers and of PSBs ...
- All these provisions will commence at a date set by order (possibly different dates for each of the measures)

Department for Culture, Media and Sport

Outcome of the meeting with the public service broadcasters

6. Public service broadcasters claimed that the best solution would be to replicate the current cable must carry provisions on the satellite platform. That would mean imposing a "must distribute for free to subscribers" obligation on Sky, to offset the proposed must offer on PSBs.

7. They believe that Sky should be asked to bear the CA costs (estimated by Stuart Prebble at "tens of thousands" only), as they, in return would get the right to distribute valuable channels.

8. They claim that this is the most policy-focussed outcome, that it is fair, delivers the Government's required universality and there is precedent both in cable and other EU countries. It is also the minimum outcome that the market would provide if there were competing satellite platforms.

9. Their second best option, if it did not appear possible to give them free access to Sky conditional access, would be to have the simple "must distribute" obligation on satellite in the draft Bill (to offset the must offer rule) and to make clear that OFCOM would have, in regulating the price paid by PSB to Sky, to take into account the specific characters and obligations of these channels and spell out that PSBs should only be charged the direct incremental costs incurred by Sky.

10. The first solution is not arguable: there is no reason why Sky should have to bear these costs.

12. The second is a variant of the proposal you agreed, following my previous submission. It goes a little further, as it implies that OFCOM will have to apply the FRND regime in such a way that it discriminates in favour of the PSB, which are not in the same situation as other broadcasters. We believe that it will not be possible to go further than that, e.g. to have an order-making power for Secretary of State to determine the terms of access to the CAS or the solus cards, or to provide that, for PSBs, these terms must be based on marginal costs or long-term incremental costs. But we think it would be possible to provide that OFCOM's existing power to take into account the special place of PSBs would become a duty.

Sky's position

13. Tony Ball argued that the current regime was fair, that out of their 189 contracts,

Department for Culture, Media and Sport

they had only had one complaint, ITV's. If Ofcom were to consider that the prices paid by ITV were too high, as ITV has introduced a formal complaint, it would be able to intervene. There was nothing more to do, and the existing regime worked very well.

Discussion

14. You were clear that it does not appear appropriate nor legal to provide that public service broadcasters should not pay anything to get access to Sky's conditional access system and boxes:

15. However, it can be argued that insisting that public service broadcasters, subject to a "must offer" requirement, must bear the full costs of the commercial decision to subsidise the boxes is not appropriate either, and that the "must distribute" requirement is not an adequate counterbalance.

16. Therefore, OFCOM could be entitled to intervene to determine the terms of a more favourable treatment for public service broadcasters. However, it will not be possible to determine more precisely what the terms would be: we must leave the calculation to the regulator, as it does not seem possible to require OFCOM to use a specific cost basis such as long term incremental costs, or marginal costs.

17. We believe that if such a provision could be put in the Bill, this could be substituted for the rather heavy-handed "must distribute" regime.

18. However, if you do not want to require OFCOM to discriminate in favour of PSBs, the "distributors" regime remains an alternative. Though both measures are not exclusive, we recommend to choose only one of them.

Conclusion

19. Do you wish:

- to maintain instructions as currently drafted ("must offer" and "must distribute")

or -

- that, instead of the "must distribute" regime, provisions are made in the Bill to require OFCOM to take into account the specific situation of public service broadcasters when implementing the fair reasonable and non discriminatory rules (cost of access to the conditional access system, as well as cost of the solus card).

) Department for Culture, Media and Sport

