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MEMORANDUM

FROM BRITISH SKY BROADCASTING

TO THE JOINT COMMITTEE ON

THE DRAFT COMMUNICATIONS BILL

JUNE 2002

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A. KEY POINTS

OFCOM

1. Sky supports the Government's proposals to rely on competition law whenever possible in preference to sector specific regulation, and to place OFCOM under a duty to be a light touch regulator.
2. It is essential that OFCOM apply competition law in a transparent and accountable way and that, subject to due process, all decisions are reached within commercially acceptable timescales.

Spectrum

3. The Government needs to publish its response to the Independent Review of Radio Spectrum Management (the Cave Review) quickly so that the industry has sufficient time to comment on its proposals.
4. The provisional proposals allow for the implementation in full of the recommendations of the Cave Review. They do not address a clearly identified problem and are unworkable.

Must Carry/Must Offer

5. Digital satellite is an open platform, in contrast to cable. Broadcasters can obtain capacity from a relevant satellite operator (SES or Eutelsat) and retail or otherwise provide their own channels independently of Sky's pay TV packages. This is achieved through access being made available to the EPG and, where appropriate, through the provision of conditional access services (encryption, entitlement and regionalisation). Sky is required to provide EPG and conditional access services on a fair, reasonable and non-discriminatory basis.
6. The Director General of Telecommunications recently concluded: 'Public service broadcasters should pay a commercially negotiated rate for conditional access services ... This is the basis on which they would expect to pay for any other service which they need to purchase, including regulated services... Regardless of [any future 'must offer'] requirement, conditional access providers will not be able to charge above levels that are fair, reasonable or non-discriminatory.'

Media Ownership

7. Cross media ownership rules should be abolished in their entirety. Competition law (including merger control rules) - coupled with impartiality requirements - is sufficient to ensure plurality and diversity in the media.

Public Service Broadcasting (PSB)

8. Government policy must be based on a clear analysis and understanding of the role, purpose and scope of PSB in the wider communications landscape. Such an analysis has yet to take place and cannot wait until digital switchover.
9. OFCOM should be given overall responsibility for the approval of any proposed new BBC services and for the scrutiny of the new BBC channels that have already been approved. Approvals and reviews should be considered within the context of a more rigorously defined public service role and remit, and with a specific obligation to ensure that such services do not duplicate - or foreclose entry by - commercial services.

B. BACKGROUND ON SKY

10. Thirteen years ago BSkyB pioneered direct to home (DTH) satellite broadcasting in the UK and Ireland. At significant risk and expense, the company initially launched four new channels including Europe's first indigenous 24-hour news channel, Sky News, thereby increasing competition in television services and creating a new broadcasting platform.
11. Other broadcasters soon followed BSkyB's lead by leasing transponders and accessing the base of DTH set top boxes. By the mid-1990s, more than 40 channels were available to UK and Irish viewers on the analogue satellite platform.
12. In 1998 BSkyB launched its digital service in the UK and Ireland. Three years later it migrated fully from analogue to digital technology and switched off its analogue signals.
13. To date, the company has invested more than £2 billion in digital television. As at 31 March 2002, more than 5.88 million satellite homes in the UK and Ireland subscribed to Sky Digital. Digital satellite

viewers can choose from more than 300 channels from many different broadcasters, including BBC, ITV, Channel 4, Discovery Networks Europe, National Geographic, History Channel and Artsworld. There are scores of free to air television channels - and a wide range of radio services - on the digital satellite platform.

14. Digital satellite is an open platform, in contrast to cable. Broadcasters can obtain capacity from a relevant satellite operator (SES or Eutelsat) and retail or otherwise provide their own channels independently of Sky's pay TV packages. This is achieved through access being made available to the EPG and, where appropriate, through the provision of conditional access services (encryption, entitlement and regionalisation). The relevant B Sky B companies are required to provide these services on a fair, reasonable and non-discriminatory basis. Sky has entered over 180 agreements with third parties for these regulated services.
15. Sky has pioneered the development of interactive television in the UK. Viewers can use email, shop on screen, play games and place bets. Sky Sports Active enables viewers to change camera angles, access match statistics and watch match highlights. Sky News Active gives viewers an alternative news service comprising a choice of news feeds and summaries.
16. Sky's DTH broadcasting services are licensed and regulated by the Independent Television Commission ("ITC") pursuant to the UK Broadcasting Act 1990 as amended and supplemented by the Broadcasting Act 1996.
17. Sky is also regulated by the Office of Telecommunications ("Ofcom") pursuant to two class licences under the UK Telecommunications Act 1984 in relation to conditional access and access control services for digital transmissions.
18. In addition, Sky is subject to the EU competition law regime and to individual national regimes in the countries in which it operates.

C. ISSUES

OFCOM

19. Given that the Government proposes to move away from sector specific regulation, Sky supports the fact that OFCOM will have concurrent powers with the OFT to exercise the competition powers of the Competition Act 1998 in relation to the communications sector.
20. It will be important, however, that OFCOM exercises its competition powers in a transparent and accountable way, adhering to the principles of the Better Regulation Task Force (as set out in section 3(2)(a) of the draft Bill). Sky is concerned that these principles have not been given sufficient prominence in this draft of the Bill: OFCOM is not under a duty to apply these principles, rather it only needs to "have regard" to them, as they have been introduced into the draft Bill in section 3(2)(a), as opposed to under the duties in section 3(1).
21. While interested parties must be given sufficient opportunity to defend themselves against any allegations of infringement of competition law or regulation, decisions should be reached within a commercially acceptable timescale.
22. This has not always been the case to date. For example:
 - It is nearly two and a half years since the OFT first announced that it would review its regulation of Sky's position in wholesale pay TV, but it still has not reached any final conclusions; and
 - In September 2000, Sky and NTL signed a distribution agreement, subject to approval of the DGFT, which was notified to the OFT in October 2000 for a decision under Chapter I of the Competition Act 1998. 17 months later, in February 2002, the OFT informed Sky and NTL that it was closing the file on its investigation, without reaching a decision on the agreement. This meant that the agreement could not be implemented.
23. Delays and outcomes of this kind are enormously disruptive and undermine businesses' ability to operate. The Competition Act 1998 already contains powers in paragraphs 7 of Schedules 5 and 6 for companies to seek directions from the courts to ensure that the DGFT reaches decisions without "undue delay". Yet these provisions have not been brought into force.

24. Sky notes the provisions of section 3(5) of the draft Bill concerning the resolution of any conflict between OFCOM's duties. Sky believes that OFCOM should provide reasoned decisions in such cases, in accordance with the accountability and transparency principles currently brought into the draft Bill under section 3(2)(a).

SPECTRUM

25. Sky understands that the proposals relating to spectrum management, including those for Recognised Spectrum Access (RSAs), are provisional and the broadest necessary to implement in full the recommendations of the Independent Review of Radio Spectrum Management (the Cave Review). Consequently the proposals are likely to be amended in the light of Government's response to the consultation on the Cave Review and responses to a proposed Radiocommunications Agency's consultation on how RSAs might be applied to satellite services in practice. Sky notes that the Government's response to the Cave Review and the additional Radiocommunications Agency consultation have not yet been published.

26. In Sky's view, the proposal to develop a licensing system (RSAs) for broadcasting to the UK via satellite which would allow for the introduction of charges where such satellite broadcasting shares spectrum with, and constrains the deployment of, UK-based terrestrial services is not aimed at clearly identified problems and is disproportionate. Sky is not aware of any evidence of terrestrial fixed links not being exploited because of potential interference with satellite downlinks: a significant number of terrestrial fixed links have been deployed across the UK.

27. The draft Bill includes proposals for RSAs, e.g. auctioning, which, on the face of it, are unworkable. However, in the absence of the Radiocommunications Agency's additional consultation, further comment would be premature.

MUST CARRY/MUST OFFER

28. The Government proposes - but has yet to make available - additional draft clauses in the Bill empowering OFCOM to impose certain obligations, if they

appear necessary to achieve the universal availability, free at the point of reception, of public service channels on satellite after switchover.

29. Such provisions are unnecessary. Digital satellite is an open platform, in contrast to cable. Broadcasters - including the public service channels - can obtain capacity from a relevant satellite operator (SES or Eutelsat) and retail or otherwise provide their own channels independently of Sky's pay TV packages. This is achieved through access being made available to the EPG and, where requested, through the provision of conditional access services (encryption, entitlement and regionalisation). Sky is required to offer EPG and conditional access services on a fair, reasonable and non-discriminatory basis.

30. Public service broadcasters have argued that:

- Existing obligations guaranteeing them fair, reasonable and non-discriminatory access to conditional access services (CA) services are inadequate; and
- Proposals for a "must offer" obligation on public service broadcasters should be matched with a "must carry" provision on both cable and satellite operators in order to balance up the weight at the negotiating table.

31. However, these arguments have already been addressed by Oftel, the UK's conditional access regulator. Following a detailed public consultation on *The Pricing of Conditional Access Services and Related Issues*, the Director General of Telecommunications recently concluded that:

'Oftel does not accept the validity of arguments...that public service broadcasters might be permitted, or required, to receive conditional access services at below the long-run incremental cost or even free of charge. Public service broadcasters should expect to make a reasonable contribution to the costs of provision of conditional access services which are common to all purchasers of those services as they would expect to do for all other services they purchase.' (para S.11)

'public service broadcasters are not 'subsidising' non public service broadcasters by paying for

conditional access but are purchasing a service from a platform provider as they would any other service in order to broadcast." (A.25 in Annex)

32. Proposals for a "must offer" obligation on public service broadcasters - to ensure that they are provided to consumers on relevant digital platforms - do not alter this. As the Director General noted:

"The BBC stated that the 'must offer' requirement would restrict public service broadcasters' bargaining power, and this asymmetry needs to be recognised. Oftel's view is that any such obligation does not add or subtract from the requirement already on conditional access service providers to provide fair, reasonable and non-discriminatory terms, but that it should be a factor to be taken into account in negotiations." (A.31 in Annex)

"Regardless of [any future 'must offer'] requirement, conditional access providers will not be able to charge above levels that are fair, reasonable or non-discriminatory. All purchasers of conditional access, including public service broadcasters, are able to ask Oftel to enforce this requirement if they regard it as being breached. It would also be possible to make a complaint under the Competition Act 1998." (para 4.19)

33. Nor is there any rationale for extending existing cable "must carry" requirements to conditional access services. Firstly, the equivalent of the cable network is the satellite, which is operated under the auspices of the government of Luxembourg and which is owned by SES. Secondly, the "must carry" obligations were imposed on cable because of specific characteristics of cable platforms:

- Cable operators have closed platforms, unlike digital satellite. Thus, cable operators can refuse to carry non-"must carry" channels, whereas all channels, whether "must carry" or not, have guaranteed access to conditional access services on satellite;
- Cable operators retail 'must carry' public service channels as part of their basic packages. Even the lowest cable access tier with BBC, ITV, Channel 4 and Channel 5 requires a monthly fee, whereas these services are not part of any Sky subscription

package, and are offered entirely free to air on satellite.

- Cable operators were initially granted exclusive rights to provide services in their franchise areas and were subject to capacity constraints in their analogue systems. The must carry obligations were imposed on cable operators for their special privileges.

34. However, cable operators no longer hold exclusive rights to their franchise areas and are not capacity restrained when offering digital systems, making it very unlikely that they would not carry the public service channels. It therefore may be appropriate for policy makers to consider a liberalisation of the traditional must carry rules. It is notable, for example, that cable operators' carriage of ITV1 in digital results in millions of pounds of 'digital dividend' for the commercial companies that own ITV, but with no contribution to the billions of pounds of expenditure made by cable operators in digital cable networks.

MEDIA OWNERSHIP

35. In the past, the choices of television services available to viewers were strictly limited by the scarcity of spectrum and by Government policy. Today, however, the introduction of new delivery technologies and the launch of digital television mean that there is sufficient capacity to support the entry of a large number of competing voices and sources of opinion, including thematic channels and services targeted at previously underserved audiences - e.g. services dedicated to news, documentaries, the arts, ethnic groups and parliamentary coverage.

36. The widespread deployment of digital technology has resulted in, and will continue to produce, an increasingly diverse and pluralistic media with reduced need for Government or regulatory intervention to protect these objectives.

37. The Government has set out several measures to deregulate media ownership in the draft Communications Bill - such as the removal of restrictions on foreign ownership. However, other changes are less far reaching. The 1996 Broadcasting Act prevents newspaper proprietors with a share of newspaper circulation

greater than 20%, or TV companies in which such a newspaper proprietor has more than a 20% interest from owning more than 20% of a terrestrial television licence. The Bill will amend that rule by allowing significant newspaper groups, or broadcasters in which such newspaper groups have more than a 20% interest, to own Channel 5, but not ITV.

38. In Sky's view, the existing cross-media ownership rules should be abolished in their entirety since they are outdated, arbitrary and discriminatory. Issues of ownership and mergers are already subject to competition law and ex ante sector specific rules are unnecessary.
39. The UK competition regime is quite capable of addressing the issue of plurality. Competition policy is designed to protect the consumer and diffuse market power where this may have adverse consequences for the welfare of the consumer. In addition, under the reformed merger regime, reductions in plurality which lead to a substantial lessening of competition, can be prevented.
40. It is crucial to bear in mind also that content regulation supports plurality as well as diversity. In particular, all licensees are - and will continue to be - subject to stringent impartiality requirements, to be expanded upon in OFCOM's standards code, to ensure that programmes are free from bias.¹

PUBLIC SERVICE BROADCASTING (PSB)

41. In its report on *The Communications White Paper*, the Culture, Media and Sport Committee identified 'three general principles which should guide the future provision of public service broadcasting':²
- While the position of the "privileged broadcasters" - the BBC, ITV, Channel 4 and Channel 5 - means that they will continue to produce considerable public service content, it does not follow that the output of these broadcasters can be equated with "public service broadcasting";

¹ See clause 213 of the draft Bill and paragraph 363 on page 72 of the Explanatory Notes to the draft Bill.

² Culture, Media and Sport Committee Second Report, *The Communications White Paper*, March 2001, Volume 1, pages xxx-xxxi.

- The privileged position of these broadcasters brings with it very considerable costs, both in terms of the direct and indirect charges upon the public and in terms of the impact on the development of a competitive and dynamic market. These costs should be transparently identified and continuously assessed against other means of achieving the public service content desired; and
- The focus in future should be on ensuring the provision of public service content from whatever source is most appropriate, rather than on protecting the privileges of certain broadcasters for their own sake.

42. The Select Committee also concluded:

*'In the future, judgements about public service value will become separated from privileged access. With the end of spectrum scarcity, new forms of public service content will emerge...A more imaginative approach to the concept of public service broadcasting based on the three principles we have identified, together with the opportunities of technological change, provides a chance to tap that vein.'*³

43. However, the Communications White Paper affirmed the Government's commitment to maintaining the role of PSB in the digital age - and concluded that it may have 'an even more important role than it has now' - without conducting any critical analysis of that role.

44. A clear analysis and understanding of the role, purpose and scope of public service broadcasting in the wider communications landscape is still needed, and cannot wait until digital switchover and the consultation on PSB that the White Paper proposed for that time.⁴

Regulating the BBC

45. In its most recent inquiry on *Communications*, the Culture, Media and Sport Committee noted that:

³ Culture, Media and Sport Committee Second Report, *The Communications White Paper*, March 2001, Volume 1, page xxxi.

⁴ In section 8.4.4 of the *Communications White Paper*.

*'The balance of evidence submitted to us, including from the current regulators, was in favour of the BBC being regulated entirely by OFCOM. This was argued on the grounds that it made little sense for a significant part of the broadcasting market to be outside the purview of the broadcasting regulator.'*⁵

46. In line with the overwhelming majority of industry and consumer representations, Sky believes that the regulation of the BBC should be included within OFCOM's remit: it is a large player in the communications sector and its unique privileges make it a strong and effective competitor to commercial companies.

47. OFCOM should also be given overall responsibility for the approval of any proposed new BBC services and for the scrutiny of the new BBC channels that have already been approved. Approvals and reviews should be considered within the context of a more rigorously defined public service role and remit, and with a specific obligation to ensure that such services do not duplicate - or foreclose entry by similar - commercial services.

48. In respect of approved services, should any new BBC services fail to meet the original approvals criteria or commitments proposed, the continued existence of that service should come into question. This is particularly the case where a new BBC service is not highly valued by consumers and is having a detrimental effect on commercial operators. Without such accountability, the approval of a new BBC service will amount to a 'carte blanche' for the BBC to pursue its ambitions in any relevant genre and any 'review' of such services will amount to nothing more than a meaningless administrative exercise.

BSkyB
June 2002

⁵ Culture, Media and Sport Committee Fourth Report of Session 2001-02, Communications, May 2002, page 19.

