BPD 3 02/135 pt 3 plec. PLS (if necessary)

To:

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(paper copies)

From:

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28 June 2002

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COMMUNICATIONS BILL – APPEARANCE BEFORE PLS 8 JULY

Issue

1. You are due to appear before PLS committee on 8 July. A first draft of the briefing is attached.

Timing and recommendation

2. You should consider the attached brief and feed back if you want any additional lines by 3 July. We will then submit a final version of this brief for 5 July.

briefpackcover

Background

3. At present, the brief covers the main areas that have been of interest to the committee. You can both expect questions on section 1 (OFCOM) and section 4 (cross media ownership and other related provisions), which you will need to agree a means of handling. Other sections then broadly correspond to Departmental responsibilities.

4. The brief as drafted concentrates more on the "how" of government policy than the "why". We will add more material on the latter on a targeted basis once we hear from the committee clerks (by 3 July) on what the likely lines of questioning will be.

5. If there are particular items where you would like more material, background or to cover additional subjects, please let me know by 3 July (there is already a meeting arranged with Tessa for this purpose, and Patricia may want something similar).

[redacted]

1 OFCOM

1.1 OFCOM's Powers and Duties - are they right?

- Many witnesses have argued that one or other of OFCOM's duties should take priority over the others. We do not believe that this is practicable given the scope of OFCOM's responsibilities. To place, for example, promotion of competition at the head of OFCOM's responsibilities might lead to inappropriate decisions being taken in respect of content issues. It is better to ask OFCOM, if they feel that their various duties pull in different directions in any specific case, to weigh up the relevance of each duty and strike an appropriate balance.

- A number of the telecoms companies argued that OFCOM should have a responsibility to promote investment in the sector. OFCOM is a regulatory body and its role is to implement the Government's regulatory policy as set down in the legislation. It is for Government, not the regulator, to consider the long term investment climate and we believe that the regime set out in the Bill is appropriate to support Government's actions to that end.

- **(If raised)** Agree that the Directive explicitly mentions investment, and this is duly reflected in Cl. 5 of the Bill, which is explicitly to be interpreted in the light of the Directive.

- Some witnesses have suggested that OFCOM should be obliged to focus on the long term rather than short term effects of their decisions. It is difficult to see how this could be done in the legislation, even if it were

desirable. We would expect OFCOM to take a balanced view on both the long and short term position in any decision that it takes.

- **(If raised)** Would not agree that requiring OFCOM to have regard to the interest of customers in respect of prices implies a focus on their short-term interests. Even on the specific issue of prices, customers have an interest in seeing that prices remain low in the longer term. On very many issues, OFCOM will have to remain mindful of both short-term and long-term concerns, and strike an appropriate balance.

Detail

The Bill sets out clear duties for OFCOM which cover the full range of powers that OFCOM will have to apply in carrying out all its functions.
These broadly implement the priories set out in the White Paper:

- to protect the interests of consumers in terms of choice, price, quality of service and value for money, in particular through promoting open and competitive markets;
- to maintain high quality content, a wide range of programming and plurality of public expression; and
- Protect the interests of citizens by maintaining acceptable standards in content, balancing freedom of speech against the need to protect against potentially harmful material and ensure appropriate protection of fairness and privacy.

It will be for the Board to look at individual issues and, should there be any conflict between its objectives in a particular case – it will be for the Board to reach a proper balance between them.

OFCOM will also have to take a number of issues into account - the vulnerability of children and others who may be in need of special protection, the needs of the elderly and the needs of people with disabilities.

Equally, people in different parts of the UK and those living in rural and urban areas have different interests and OFCOM must also take these into account when carrying out all its work.

1.2 Does OFCOM need an Economic Board?

- OFCOM brings together responsibility for economic regulation of the whole of the communications sector and regulation of broadcast content. These very different remits require different skills and experience.

- The OFCOM Board will have the full mix of skills and experience needed to cover the whole of its remit, but we said in the White Paper that we would establish bodies to reflect the public interest in the content of communications services. The Content Board is set up by the draft Bill to meet this commitment.

- The Content Board will have the principal function of ensuring that the "public interest" in the nature and quality of television and radio programmes is sufficiently represented within OFCOM's overall structure. In particular, the Content Board will provide a clear mechanism for ensuring, through its diverse lay membership, that the interests of different sections of society and different parts of the UK are reflected in OFCOM's consideration of content issues.

- We have also decided to establish a Consumer Panel to provide a voice for the interested of the ordinary user of electronic communications networks and to ensure that consumer interests in regulatory issues are effectively identified and brought to the attention of OFCOM. The primary focus of the Consumer Panel, which will operate with a high degree of operational independence from OFCOM will be on service delivery.

- Some witnesses have argued that there is a need for an 'Economic Regulation Board' to balance the Content Board. We do not see this as necessary and it would run counter to the principle that we should not impose unnecessary inflexibilities on OFCOM as to how it manages its responsibilities. Too many sub-boards would risk a slow down of decision-making.

- The Content Board, which is an integral part of OFCOM, is set up to ensure that there is an effective mechanism for handling content issues, based on a lay membership able to represent the wide range of cultural and social interests which arise with many content issues, both positive and negative. These are not necessarily matters that can appropriately be resolved solely by full time officials. The Content Board will operate on the basis of delegated authority from the main Board, and within any wider strategic framework set by OFCOM.

- The Consumer Panel, on the other hand, will operate with a high degree of independence from OFCOM, precisely so that it can speak up for the interests of the ordinary domestic and small business user; that independence requires specific provision. OFCOM will be able to establish any economic regulation committees or other advisory arrangements that it requires. But we do not see any sufficient reason for any statutory requirement for additional structures on top of these.

1.3 Light Touch Regulation - General

- It is important to make it clear that when we talk about light touch regulation what we mean is ensuring that the regulation in place is sufficient to secure the Government's public policy objectives, whilst ensuring that no unnecessary burdens are placed or kept on business.

- In other words, regulation will be rolled back where it is clearly unnecessary or counter-productive, but the regulator's prime objective is to ensure that the public policy objectives set for it in its general duties are met. Therefore regulation will be appropriate and in some cases could involve reasonably "heavy" regulation by OFCOM – but only where justified.

- This approach is reflected throughout the Bill, both in terms of the general provisions on light touch regulation, and the specific regulatory proposals. For example, clause 5, requires OFCOM to keep their functions under review with a view to ensuring that they do not impose or maintain unnecessary burdens. The key word there is unnecessary. Where regulation is necessary to secure the objectives set out in the Bill OFCOM must ensure that that regulation is in place.

- In line with the Better Regulation Task Force's recent report on economic regulators we are requiring OFCOM to be a model of regulatory best practice. This includes publishing and meeting promptness standards - speed of decision making has been a concern expressed by a number of your witnesses – and will include a requirement to undertake, consult on and publish, impact assessments of all significant decisions. In addition to

this, there is a requirement on OFCOM to follow the five principles of regulatory good practice (transparency, accountability, proportionality, consistency and targeting). These requirements, taken together with the requirements for transparency and Parliamentary accountability already in place in OFCOM Act should ensure that OFCOM is truly a model regulator.

- Many witnesses have suggested that what is needed in the telecoms sector is not 'light touch' regulation but 'appropriate and proportionate' regulation. In our proposals 'light touch' does mean appropriate and proportionate – where heavy regulation is required in order to secure policy objectives OFCOM will be empowered to apply it.

1.4 Light Touch Regulation - Content

- It has been questioned whether light touch regulation is appropriate in the broadcasting sector. It is important that the creativity and dynamism of our broadcasting industry is not crushed by unnecessary regulation. However it is important to ensure that high quality public service broadcasting continues to be delivered to the viewing and listening public. The provisions for self-regulation of the tier 3 public service broadcasting remit strikes the right balance here.

- Clearly there is a balance to be struck. The promotion of competitive markets and the protection of consumers must be central to OFCOM's work. But OFCOM will also be responsible for cultural as well as economic issues. There are, therefore, other equally important areas relating to content and fairness and privacy for which OFCOM will have important regulatory functions.

- The Government believes that the current system of independent regulation established by Parliament remains the best approach to achieving a proper balance of both freedom of expression and the need to provide protection against certain types of broadcasting material.

- As proposed in the White paper, OFCOM will regulate content standards of television and radio by way of a statutory code or codes, underpinned by specific provisions in the Bill.

- Content regulation is still needed, beyond the general law, for the most pervasive broadcast media, which comes into almost everyone's home and where there's a large measure of trust among viewers and listeners.

- The Bill requires the establishment of a high level set of principles and objectives for the regulation of content, these ensure that universal minimum standards are maintained, but also that these standards are flexible so as to be able to reflect changes in social attitudes and audience expectation.

- OFCOM will also work with industry to ensure effective co and self-regulatory approaches to protection for other services, such as the internet.

- Not proposing that OFCOM should have a role in regulating the Internet, but should support initiatives, such as the Internet Watch Foundation, that underpin effective self-regulation.

- OFCOM is to have audience research responsibilities on content of both radio and television similar to those enjoyed by the current regulators and also in relation to new functions, for example media literacy.

Q&A

Is content regulation a thing of the past?

No. It is important to maintain standards in the most pervasive broadcast media which come into everyone's homes and where there is a large measure of trust among viewers and listeners. People need to have a reasonable idea about what to expect on different channels and in different media.

Research indicates very high level of understanding about differences between pre-Watershed and post-Watershed, different channels and different systems. That may change over time, and the regulatory approach needs to be able to adapt. But it works well now.

Will OFCOM decide the timing of television programmes? For example the news?

OFCOM will ensure the availability of news and current affairs in peak time, but not the detailed scheduling beyond that. OFCOM must not micro-manage but give more responsibility to broadcasters to meet public needs.

Will OFCOM be able to stop programmes like Brass Eye?

Broadcasters should take primary responsibility for their output OFCOM will have similar sanctions to those of the current regulators. OFCOM will regulate the content standards of television and radio by way of a statutory code or codes, underpinned by specific provisions in the Bill. OFCOM will not have the power to "preview" programmes and neither would we want it to.

We believe that the system of independent regulation established by Parliament remains the best approach to achieving a proper balance of both freedom of expression and the need to provide protection against certain types of broadcasting material. The provisions in the Bill ensure that OFCOM has the tools to do this job effectively, and gives it the ability to be quick and flexible enough to deal with the kind of issues that arise in any individual case.

Why are you removing the concept of taste and decency?

We're modernising the law. "Taste and decency" smack of the 1950's and indeed appeared in the 1954 Television Act. In fact, the regulators' codes already assess, based on research, what is "tasteful and decent" largely on the basis of research into what viewers and listeners find generally acceptable and that is the new test.

1.5 Self-regulation for Advertising?

- OFCOM will have principal responsibility for regulating broadcast advertising and will be able to apply consistent overarching content standards to all forms of broadcasting.

- We need to be confident that advertising does not affect the integrity of programmes through product placement, inappropriate sponsorship or blurring of boundaries between advertisements and editorial content. Therefore, we expect standards to be applied to broadcast advertisements that are consistent with the standards for other forms of content.

- Within this context, there may nevertheless be the opportunity for a greater degree of industry co-regulation, based on the development of industry practices that conform to and contribute to the advertising standards that are laid down by OFCOM.

- Complete self-regulation of the advertising Industry is not envisaged partly because there are various European Directives in existence that place

limitations on the extent to which OFCOM can formally delegate its powers. But this need not impede the further development of Industry co-regulation.

- The advertising industry has put some proposals before the Committee, detailing certain "core principles" for achieving greater advertising self-regulation. We shall need to consider whether, if these are acceptable to broadcasters, they form a proper basis for maintaining public protection and whether amendment of the draft Bill would be needed to accommodate them.

1.6 How competition powers will work

- OFCOM will be given concurrent powers with the Director General of Fair Trading to exercise the powers of the Competition Act in relation to the communications sector. The framework for concurrent application of these powers by sectoral regulators is now well established, and already applies to the telecoms sector. We are confident it will work equally well for the communications sector.

- We expect that competition issues arising in the communications sector will usually be dealt with by OFCOM. But the OFT and OFCOM will always consult on any new issue or complaint, and decide which of them is best placed to act.

- Subject to the outcome of Parliament's consideration of the Enterprise Bill, OFCOM will also have concurrent powers to make market references to the

Competition Commission, where there are concerns about the working of the market but no evidence that there is any breach of competition law.

- This will improve the existing competition framework in a number of ways:

  (1) OFCOM will have stronger powers. It will be able to levy fines for breaches of the sectoral competition rules, as well as for breaches of general competition law.
  (2) It will be able to tackle competition issues right across the sector. It will be able to take a fully integrated view of those issues which cross the boundaries between broadcasting and telecommunications.
  (3) It will also be able to draw on the insight and detailed knowledge of the ITC in the broadcasting sector, and use that to inform investigations into competition concerns, which could if appropriate lead to action using the powers and sanctions of the Competition Act.

Q&A

Why not just say it will be OFCOM for the comms sector and resolve all this uncertainty?

It is impossible to draw a bright line between the communications sector and the rest of the economy. Even if a complaint is about the behaviour of a company generally regarded as a communications company, the market effects complained of may extend outside the sector. In some such cases, the OFT may be better placed that OFCOM to deal with the issue.

Why is the BBC partly exempted?

The BBC is not exempt. All of its commercial activities fall within the scope of the Competition Act. And its other activities are still subject to the requirements of the Act – even as a public sector broadcaster, it must still comply with the Act except to the extent that to do so would obstruct the performance of the special functions. If it is possible for it to arrange its affairs so as to carry out these functions without any breach of the requirements of the Act, it must do so.

But it's all too slow -the current investigation into Sky has taken years!

Applying competition law in a new market sector, against a background of fast-evolving technologies, is not simple. It requires careful investigation of the evidence, and it requires the regulator to seek out a large amount of information. And of course the company being investigated must have proper opportunities to contribute their view on the issues and make their case. It is not ultimately in anyone's interests to try to cut corners on these processes.

But OFCOM, with its ability to take an overall view of developments in these converging industries, will be well placed to build up expertise so that it can deal with new cases as expeditiously as is consistent with thorough and proper investigation of the issues.

1.7 Competition and the BBC

- The impact of the BBC's activities on competition fall within the ambit of the Competition Act and Fair Trading Acts, like any other broadcaster. Responsibility for considering complaints on these issues, and enforcing the law if necessary, lies with the OFT at present and will be transferred to OFCOM under the Bill.

- Under the Bill OFCOM will have powers to levy fines for breaches of the sectoral competition rules, as well as for breaches of general competition law, and will be able to tackle competition issues right across the sector. OFCOM will exercise its powers in relation to the BBC on the same basis as in the case of other communications matters.

- Because of its special position as a publicly funded body, the BBC's commercial activities are and will continue to be governed by its own fair trading policy and procedures, which go beyond the statutory requirements. These are monitored by the Board of Governors and are set out in the BBC's published Commercial Policy Guidelines.

- The fair trading policy and procedures have been upheld by independent scrutiny:

- independent external audit by Ernst & Young validated the procedures and controls and was published in the BBC 2000/2001 Annual Report;

- Professor Richard Whish's independent review of the fair trading policy,

published in May 2001, concluded that the BBC's Fair Trading Commitment and Commercial Policy Guidelines are appropriate to ensure that the BBC does not distort competition in commercial markets;

- accreditation by the British Standards Institute for the BBC's management of its fair□trading procedures, in May 2001.

- Not appropriate for me to comment on any particular cases or complaints. [If pressed: ITN have written to urge that the fair trading procedures should in future be subject to OFCOM policing. Am studying their letter and will reply as soon as possible.]

1.8 Content Board

- OFCOM will have a duty to establish and maintain the Content Board. It is the only part of OFCOM's internal structure that we think it right to specify in statute and it must have a major role.

- This board will have the principal function of ensuring that the public interest in the nature and quality of television and radio programmes is sufficiently represented within OFCOM's overall structure.

- The draft Bill provides for the Content Board to have decision-making functions delegated to it by OFCOM and also advisory functions.

- Should like to clarify that the Content Board is fully part of OFCOM. OFCOM must be able to take responsibility for its decisions, including against any legal challenge. It is not a separate regulator. Realistically, the relationship is likely top need to be formalized in some way.

- The remit of the Content Board was discussed at the recent BSC seminar, which some members of the Committee attended, so they will know that there are different views about its extent. These are for OFCOM not for the Bill.

- Areas where the Content Board's advice to OFCOM may be particularly valuable include issues such as the definition of both negative minimum content standards and accuracy and impartiality standards - this could include the approval of codes, policy on complaints and OFCOM's programme of research on content issues.

- The Content Board might also be expected to advise on the quality of public service broadcasting output and licensees' compliance with their high-level remits.

- The Content Board will be expected to play a role in ensuring that the particular interests of nations and regions are taken into account in all OFCOM's work in licensing and setting standards for television and radio programme services: hence the provision requiring members able to represent the interests of Scotland, Wales, Northern Ireland and the English regions.

Q&A

Should the Content Board report to Parliament?

As it is to be part of OFCOM, it would not be appropriate to require that. But the Content Board will be chaired by a member of the OFCOM Board, so it is quite possible that the Chair of the OFCOM Board would want to be accompanied by the chair of the Content Board in, for example, any appearance before a Select Committee.

Why not set down in the legislation the functions that OFCOM should delegate to the Content Board?

OFCOM will have to ensure that the Content Board has 'at least a significant influence' on decisions relating to content. It is important that we are not overly prescriptive in the legislation. We must give OFCOM the flexibility to take decisions on its internal mechanisms for itself.

What decision-making functions will the content board have?

OFCOM will delegate to the Board those decision-making functions that they want it to perform, and specify the areas in which they require the Board's advice, but we expect the Board to play a major role.

Areas where the Content Board's advice to OFCOM may be particularly valuable include issues such as the definition of both negative minimum content standards and accuracy and impartiality standards - this could include the approval of codes, policy on complaints and OFCOM's programme of research on content issues.

The Content Board would also be expected to advise on the quality of public service broadcasting out put and licensees' compliance with their high-level remits.

How are the nations and regions to be properly represented on this board?

The Content Board's membership will include designated members from Scotland, Wales, Northern Ireland and England, and it will be expected to play a role in ensuring that the particular interests of nations and English regions are taken into account in all of OFCOM's work in licensing and setting standards for television and radio programme services.

Why not have them on the main board?

Important to keep the main Board small so that it can retain a clear strategic focus.

1.9 The Consumer Panel

- Not a completely separate body from OFCOM. This would mean creating a new Quango – another layer of bureaucracy that would confuse consumers and significantly add to costs without adding much value. The Panel will have a very high degree of operational independence from OFCOM and a high public profile of its own.

- Should cover content as well as services. To operate effectively the Panel will need a clear focus based on consumer principles such as choice, information and value for money. Many content issues raise much wider questions eg of culture and social harm. OFCOM will require lay input here too, not just in framing its policies but in its day-to-day work on content standards. This is reflected in our parallel proposal for a Content Board operating as an integral part of OFCOM.

- Gives precedence to consumers over other interests (eg those of business). OFCOM needs a clear and well-informed perspective from all of its stakeholders if it is to do its job well. Large companies have the capacity to provide this themselves, while consumer interests are diverse and poorly resourced. But the Panel will have a remit to represent the interests of small businesses up to 50 employees – many of whom are customers of electronic communications services in much the same way as residential consumers.

- National and regional (and other special interest) representation needed on the Panel. The Panel will be required to represent a very diverse range

of interests, but it will also need to be cohesive and tightly focussed if it is to do its job effectively. Our proposals strike a careful balance between ensuring diversity and excessively detailed legal constraints on Panel membership. National and regional interests will in any event have a clear focus in the separate network of advisory committees we are now proposing

- OFCOM will have a statutory duty to provide the Panel with information, including data from complaints, and to give public reasons when it disagrees with the Panel's opinions.

- The Panel will need to be able to stand up for a very wide range of consumer interests and concerns. The Bill expressly requires that its composition must enable it to represent effectively the interests of nations and regions, of people living in rural and urban areas, of elderly people and of disadvantaged groups such as those with low incomes and people with disabilities.

- The Panel will also be expressly required to take full account of all of these interests in its day to day work.

Q&A

Does having a Consumer Panel let the rest of OFCOM off the hook?

No. OFCOM's general duties, at Cl 3 in the Bill ensure that consumer interests will be at the heart of what it does.

1.10 Costs and Staffing

- OFCOM will need to embody a new organisational vision, have the right internal structure, the right work processes and above all the right people.

- Consultants are already undertaking the complex detailed work of examining the operational and structural requirements for establishing the new body. The Government and existing regulators are strongly committed to a policy of openness in the process of creating OFCOM. The fullest possible use will be made of opportunities to share thinking with stakeholders and take their views, as the project progresses.

- The Government remains committed to ensuring that the staff of the existing organisations who will be affected by the creation of OFCOM are treated consistently and fairly and have their rights respected.

Q&A

Will the rights of staff being transferred to Ofcom be protected?

Government is committed to ensuring that the staff of the existing regulators affected by the creation of OFCOM are treated fairly and consistently and have their rights safeguarded. We will be consulting the Board of OFCOM as soon as it is in place and the five existing organisations to discuss the best ways of ensuring this commitment is met and that the staff affected will transfer will do so on terms which are broadly comparable to those they now enjoy.

When will the chairman and other board members be appointed?

We hope to announce the Chairman and non-executive members of the Board in August. It will then be for the Chair and non-executive members to appoint a Chief Executive (subject to the approval of the Secretary of State) and the other executive member of the Board.

How much is it costing to set up Ofcom?

The Government envisages that the initial planning costs of establishing OFCOM will be of the order of £5 million spread over the period of transition. Implementation costs (e.g. premises, recruitment, IT system design) will be additional to this. It is not possible to give such a figure at this stage. Ultimately the costs will depend on what is needed to discharge the functions that Parliament gives OFCOM. Other possible expenditure may arise from pension transfer costs, severance, early retirement and payments for forfeiture of existing leases. These are all matters that are being examined in greater depth in current stage of consultancy work by Towers Perrin, Ernst & Young, and Differentis, and the Board of OFCOM will need to make decisions in the light of that and other advice.

Location and number of people in Ofcom?

The size and location of OFCOM are key questions which will need to be addressed by the Chairman and other Board members when they are appointed.

How many staff in the 5 existing regulators?

There is a combined total of some 1100 staff in the five existing regulators.

Willl there be job cuts?

Bringing together five separate organisations should provide some scope for cutting out areas of overlap and duplication. One of the major parts of the consultancy work being undertaken by Towers Perrin/Ernst and Young, will be to look at how OFCOM can be structured in the most effective and efficient way.

1.11 Other Regulators

Financial Services Authority

Average of **2156** staff employed or contracted to work for the Authority in 2000-01.

Total expenditure £181.5 million, including £157.8 million on 'mainstream regulatory activities' (the gap is mainly accounted for by spending on the UK Listing Authority, funded by listed companies, and special one off tasks such as the Pensions review).

Civil Aviation Authority

1129 staff in 2001-02 budget. Total revenue budget £160 million, of which Meteorological Services account for £25 million and Air Navigation services £29 million.

Environment Agency

10,296 staff in 1999-2000, 6 per cent up on previous year. Total budget £256 million, of which £132million covered by operating receipts (eg abstraction charges for water resources, levies for flood defence activities, capital grants from MAFF and others) and £124 million by grant-in-aid.

Ofgem

558 staff in 2000-01, due to fall to 334 in 2001-02 as a result of transfer of all regional staff to EnergyWatch. Total cash spend in 2000-01 £87 million, falling to £34 million in 2001-02 partly for the same reason.

Office of Fair Trading

Average of **443** staff in 2000, total spend £33million.

Ofwat

Total staff complement in 2000-2001 was **212**; total spending £11.1 million.

Food Standards Agency

628 staff as at June 2001 (HQ plus Scotland, Wales, NI). There are a further **1500** in the Meat Hygiene Service which is an Executive Agency of the Food Standards Agency. Total Food Standards Agency spend is budgeted for £105.4 in 2001-02; Meat Hygiene Service spend net of income is £20.1 million. Total funding from DEFRA and the devolved authorities is therefore £125.5 million.

1.12 How will OFCOM account to two SoSs?

- OFCOM's responsibilities, be they for broadcasting, telecommunications, spectrum etc, fall quite clearly within the remit of one Department or the other. The paths of accountability for the current regulators are clear and there is no reason, once OFCOM has taken over those responsibilities, why accountability should become any less clear.

- Arrangements for joint working between the two Departments have worked well thus far and there is no reason why they should not continue to do so. For example, we are in the process of jointly making the appointments of the Chairman and non-executive members of OFCOM and have been working closely together on this.

- There is no reason, therefore, why there should be any difficulty for OFCOM to be accountable to two Secretaries of State rather than one.

- There may well be areas where responsibilities could overlap, for example in relation to competition issues in relation to broadcasting. Again, there is no reason why OFCOM should not report to the two relevant Secretaries of State and, similarly, why the two Secretaries of State should not work together in their consideration of the particular issue.

Defensive points

- Some have argued for a combined Department of Communications with its own Secretary of State to whom OFCOM would report. Obviously, machinery of Government changes of this type are a matter for the Prime Minister. The current arrangements have worked perfectly satisfactorily until now – the two Departments and, indeed, both Secretaries of State have been working closely together throughout in developing policy for the Bill and creating OFCOM.

- There would be nothing to prevent either relevant Select Committee, be it that for Culture, Media and Sport or for Trade and Industry, from calling OFCOM before it or to invite the Secretaries of State to appear, as this PLS Committee has done, in order to answer questions about OFCOM and its responsibilities.

1.13 Towers Perrin

- The Towers Perrin report was an initial scoping project examining the existing regulators, their costs, work programmes, structures, organisational cultures etc. It also considered areas of work that would cease or continue and new tasks that might arise.

- But no decisions have been taken about the future size or functions of OFCOM.

- OFCOM as a whole will need sufficient flexibility to attract, retain and motivate the expert staff it needs. But it will do so within a clear framework of public scrutiny that will keep a firm lid on overall costs.

- We will not in any circumstances tolerate waste or inefficiency on OFCOM's part.

- We shall ensure that its finances will be exposed to tough public scrutiny. As a start, we shall expect significant efficiency savings arising from the merger and from the elimination of duplication between the existing regulators.

2 TELECOMS AND INTERNET

2.1 BT

- The Bill sets out a general framework, not provisions on individual companies. Within this systematic framework, OFCOM will be reviewing the key markets. Where these reviews show that anyone has a dominant position in any of these markets, the regulator will propose appropriate controls.

Are you considering referring the fixed communications market to the Competition Commission (as some of BT's competitors have suggested)?

The Government keeps under review the question of what action might be necessary to ensure effective competition in communications markets. This includes looking at all the options and considering any serious arguments which industry put to us. I have no proposals at present and have not reached the view that a reference is necessary.

2.2 Broadband

- Important that the Bill is technology neutral in the same way that it is proprietor neutral. OFCOMs general duties and powers will give it everything it needs to tackle broadband roll-out – no need for specific provisions.

- Government working hard to make the broadband market more extensive and competitive. Making good progress – around two-thirds of the population can access affordable broadband. Over 600,000 users and rising at 20,000 per week. Our principle challenge now is in extending access to rural areas.

- We have a strategy in place which looks at competition, supply, demand and content. One important piece of work will be using our Government spending on ICT to ensure we get maximum benefits for the country.

2.3 Speed of regulation/decisions

- Want OFCOM to be 'fleet of foot' and able to make decisions in a timely way - so OFCOM will be under an obligation to publish and meet promptness standards. Industry will be able to plan more effectively, knowing when they can expect a decision to be made.

- And the Bill gives a full right of appeal, on the merits, against OFCOM's decisions on matters connected with networks, services or spectrum.

- The Bill implements the new harmonised European framework for regulation of communications services which will make it easier for UK companies to enter European markets, and will strengthen competition. It also requires OFCOM to systematically review the key communications markets, and to remove the more onerous competition obligations (price caps, etc.) where it finds that a market is effectively competitive.

- As well as operating promptly is also important that OFCOM consults properly on new or amended regulations it plans to introduce. There are provisions in the Bill ensuring OFCOM consults and carrys out impact assessments on changes it proposes. Important to get the balance right.

- Some witnesses have argued for specific time limits to be laid down in the legislation. We do not believe this is necessary as OFCOM is required to publish and meet promptness standards. There have also been calls for time limits on appeals. Some of the issues that might go to appeal are extremely technical and would require the appeals body to engage in a

substantial amount of detailed and technical research. Others might be quite simple in nature. It is difficult to envisage setting hard and fast timescales for the completion of appeals that would make sense in all cases.

2.4 Appeals

The Bill provides a full appeal on the merits where this is required by the EC Directives.

- The reason for having a different appeal process for decisions on content is that decisions on content are closely related to the implementation of public policy. So an appeal on the merits would be unnecessary and inappropriate. (As content does not fall within the scope of the EC Directives, there is no requirement for an appeal on the merits.)

- We will of course be considering the interesting alternative put forward by the Competition Commission, along with any other relevant points which may be raised in the consultation process. We will discuss with the Commission and the Appeal Tribunal before deciding on the most appropriate process.

- **(If pressed on Mr Morris' view that it would be disastrous for the CAT to handle appeals on price reviews)** I think it is a question of which is the right process. If there is a need in this context for a broad review of the market, then the Commission undoubtedly has the experience and the track record. But if the issues can be satisfactorily resolved by an straightforward appeal procedure, allowing both sides to bring in the evidence and expertise they think appropriate, I think the Tribunal would be an entirely appropriate body for that kind of process. For the moment, I have an open mind between these alternatives.

- **(If pressed that there is a need for consistent decisions across regulated sectors)** I agree there should be a broadly consistent conceptual

framework, but I don't think that means that all the decisions need to be taken by one body.

2.5 Internet – are we regulating it?

- We were clear in the White Paper and we remain resolved to give OFCOM NO powers of statutory regulation over the Internet. We remain committed to self and co regulation as the best way forward and OFCOM can work with industry to help make that fully effective

- The Internet is not a stable and readily definable system. It is constantly evolving. Must recognise that in such technologically advanced and fast-developing sectors, there is a particular difficulty in framing definitions that are future proof. Flexibility is the key - not so that regulation can be introduced at a later date, but to keep pace with change.

- Important to distinguish two sides of the Internet. First, it is the content which people all over the world make available. The Bill does not regulate Internet content - it is already regulated by the application of existing UK law – the law applies as on-line as much as it does off-line.

- Then there is the physical Internet, a set of connected communications networks, which will be brought into OFCOM's remit more fully than at present, as the means by which the Internet is accessed. The Bill will give OFCOM the powers it needs to respond to the growth of the Internet and ensure that there is continuing competition and availability in the provision of Internet access services.

Q&A

Has legislation been left behind by the expansion of the Internet? (self-regulation)

Regulation of the Internet itself needs to be international, and the Government is already working in international fora to tackle Internet crime. e.g. (the Cyber-crime Convention; e-safe which is the continuation of the EU Safer Internet Action Plan, work with the International Content Rating Association). It also includes work with existing law enforcement agencies overseas. Elsewhere self-regulation by the industry and co-regulation by Government and industry are best placed to cope with the changing face of the Internet.

It is Government policy to seek to ensure that the law in the UK applies on-line in the same way as it does in the off-line world. For instance, the Obscene Publications Act 1959 applies to material published on the Internet and the Criminal Justice and Public Order Act 1994 extended the laws on obscenity to cover material available on computer networks. Similarly laws relating to such subjects as sales of goods, copyright and libel, apply on-line as much as off-line

Should we not be regulating the Internet to protect children?

Whilst laws apply whether on line or off-line, the Government recognises that there are particular problems with the international facet of the Internet and strongly supports the measures taken by the industry to tackle potentially illegal material. The Internet Watch Foundation (www.iwf.org.uk), a group set up and funded by the UK Internet service providers (ISPs), operates a hotline to which people can report potentially illegal material, particularly child pornography.

The IWF passes reports about such material to the police, when it originates in the UK, or to the National Criminal Intelligence Service when it originates overseas, so that the relevant law enforcement agencies can consider whether to take action. The IWF also passes reports to ISPs so that they can remove illegal material they are hosting. If the ISP fails to remove the site, following notification by the IWF they can also be liable to prosecution. There have been a number of high profile cases recently which indicate that the co-operation between the industry and law enforcement agencies is effective.

2.6 Content on the Internet

- Already there is considerable interaction between licensed broadcasters on conventional delivery platforms, their websites, and increasingly webcasting of their programmes.

- UK licensed broadcasters have well established brand names and images, and we do not expect they will want to offend viewer expectations of their programming on the internet. The same will be true of most other broadcasters licensed in Member States of the EU.

- The European Commission is examining the possibilities of rating systems and filter devices which might be the subject of EU wide co-operation, along with existing self-regulatory systems such as the Internet Watch Foundation. There is the possibility of extending these to non-EU European states on a voluntary basis. There is also the Council of Europe Convention on Crime in Cyberspace to combat illegal content; it extends to North America and potentially to Japan and Mexico.

- These largely self-regulatory systems will provide safeguards in the event that, over time, much more broadcast material is delivered on a strictly one to one basis. OFCOM will keep developments under review so far as Tier One is concerned, with Video-on-Demand already anticipated as falling outside its regulation.

2.7 Why regulate mobile industry?

- The EC framework will require OFCOM to review the relevant markets. If it finds that any market is indeed effectively competitive, it is prohibited from applying any specific controls to individual companies in that market. Naturally, this process of review is a matter for the regulator and not for Government; it is not for me to anticipate what the review of the appropriate markets may find

3 BROADCASTING

3.1 BBC

- Key principle: to treat the BBC on a similar basis to other public service broadcasters, whilst taking account of the BBC's unique role and constitution. Core responsibilities of the Governors to be retained but the BBC will in addition be subject to new external requirements monitored and enforced by OFCOM.

- BBC's obligations: to be set out in its Agreement with the Secretary of State, rather than in the Bill. Details of the main amendments proposed have been published for consultation alongside the draft Bill.

- Tiers 1 and 2: BBC will for the most part be subject to OFCOM regulation. (Exceptions include eg continued Governors' sole responsibility for regulating accuracy and impartiality.)

- Tier 3: BBC will be required to publish annual statement of programme policy and report on performance against that policy. In preparing SPPs BBC will be required to consider any OFCOM guidance to the extent that it includes general comments of relevance to the BBC. Will also consider OFCOM 's overview reports on public service broadcasting to the extent that these raise general issues relevant to the BBC.

- Tier 3 backstop: powers will be with the Secretary of State and Parliament, not OFCOM. This intention was made clear in the White Paper and respects

the BBC's relationship with Parliament through the licence fee. Government and Parliament have the ultimate backstop power: not to renew the Charter and Agreement when they expire or tighten up the obligations they place on the BBC.

- OFCOM sanctions: BBC will be required to comply with OFCOM direction to issue apology, correction etc. No decision yet on whether OFCOM should be able to fine the BBC. Agreement document sets out the arguments both ways and asks for views.

- New BBC services: Responsibility for approval will remain with the Secretary of State. This again reflects special relationship with Parliament. But the Secretary of State will look to OFCOM to give formal advice on the market impact of such proposals. OFCOM will also be involved in the independent review of the BBC's digital services promised in 2004.

- Access to information: BBC will be under a formal requirement to supply OFCOM with all information that is reasonably required to enable OFCOM to undertake its functions in relation to the BBC.

- Cooperation: Gavyn Davies has confirmed that BBC will want actively to cooperate with OFCOM in the interests of the overall broadcasting ecology. Government obviously welcomes that commitment.

3.2 PACT 'S PROPOSED CODE OF PRACTICE

- Aware of PACT's proposals and will be giving them full consideration.

- Will need to be convinced of the public policy justification, and that ex-ante regulation is necessary in the light of OFCOM's competition powers.

Background

1. PACT propose that OFCOM should draw up, publish and regulate a Code of Practice concerning the production, supply and distribution of content for transmission by public service broadcasters over all delivery platforms. The Code is intended to "provide a check against the dominance of public service broadcasters in commissioning content and bring some balance to the tensions that exist between those broadcasters and their suppliers". It would apply only to PSBs.

2. PACT propose that the Bill should provide for the Code, but the detail should be left to OFCOM. They envisage that it would cover matters such as equal access to programme making opportunities, fair dealing and third party dealings. There would be a right of appeal to the Competition Commission (CC).

3. PACT's proposals raise a number of questions: what they would add to the Competition Act regime and what the public policy purpose of them would be: is there a general public interest rather than simply the interests of the independent producers.

4. PACT have taken their inspiration from the Utilities Act and the Code of

Practice on Supermarkets' Dealings with Suppliers, where the public interest is much clearer. But neither example is analogous to the broadcasting market: the Utilities Act regulates a former monopoly market; the supermarket code deals with a market where the dominant players do not have statutory public service functions.

5. It is not immediately obvious why ex-ante regulation is necessary in this area. The normal Competition Act powers, as they have been developed recently and in the Enterprise Bill, will apply and should be sufficient to deal with any abuses of dominant position. There was no specific legislative provision for the supermarket code, which is a voluntary agreement arising from a CC investigation. Codes of Practice can have a role in satisfying the CC that identified abuses have been dealt with, but the competition authorities have not so far been persuaded that there are currently abuses in the relationships between broadcasters and producers - PACT have made a complaint to the OFT which was ultimately dismissed and a second, and similar, complaint is now before them.

6. Looking at it from the other side, it seems hard to see the public policy justification in determining terms of trade between PSBs and independents rather than all broadcasters and especially between the BBC and independents. If there is no abuse of competition it is unclear why the Communications Bill should be a vehicle for skewing the relationship in a way detrimental to the BBC and potentially more costly to licence-fee payers.

7. We will be submitting full advice on PACT's proposals shortly.

3.3 Television/Radio Licensable Content Services

- We have sought to establish a system for licensing which will provide for continued regulation and licensing of services which we all recognise as broadcasting, but without regulating the Internet.

- We recognise that this is difficult and have sought views. We shall welcome the Committee's views and those you have sought from witnesses, though we have yet to see any detailed proposals.

- The current position is unsatisfactory. As Simon Hochauser of Video Networks told the Committee, the 1990 Broadcasting Act theoretically provides for regulation of the Internet. The ITC have wisely made it clear that they do not intend to do so, but regulatory discretion over what is and is not licensable does not provide adequate legal or regulatory certainty.

- Our aim is that industry and services can develop without inappropriate regulation but that audiences can watch and listen to broadcast services matching the standards they have come to expect whatever the particular delivery technology chosen.

- The definition in the draft Bill may need to be changed, but according to specific criteria set out in the draft Bill at clause 156 and subject to affirmative parliamentary resolution.

Background

The provisions of clause 156 allow for the definition to be changed having regard top one or more of the following:

a) the protection which, taking account of the means by which the programmes and services are received or may be accessed, is expected by members of the public as respects the contents of television programmes and text services;
(b) the extent to which members of the public are able, before television programmes or text services are watched or accessed, to make use of facilities for exercising control, by reference to the contents of the programmes or services, over what is watched or accessed;
(c) the practicability of applying different levels of regulation in relation to different services;
(d) the financial impact for providers of particular services of any modification of the provisions of that section; and
(e) technological developments that have occurred or are likely to occur.

3.4 Detail - improved content regulation

- Quality PSB to be protected.
- Universal access to the PSBs on all main platforms to be secured.
- "Due prominence" for PSBs on electronic programme guides.
- Content Board as integral part of OFCOM with voices of Nations and Regions.
- OFCOM to safeguard core remits of PSBs.
- Backstop powers available if PSBs fail to deliver.
- Quantifiable targets of PSBs will be agreed and regulated by OFCOM, such as independent production quotas, new original production quotas, new quotas for regional programming and production.
- OFCOM will be able to vary any licence on change of control, to ensure that the character of the service is maintained. For Channel 3, this will protect regional production and programming requirements.
- New duty to protect and promote the local content of local radio services.
- OFCOM will have important role in maintaining impartiality. Given lightening of ownership regime, OFCOM will have power to investigate news and current affairs programming of any local radio service.

- OFCOM will oversee the nominated news provider system for ITV, to ensure choice of high quality and independent news on free-to-air public service television.

- Consistent standards across the industry: no "double jeopardy" of ITC/Radio Authority AND Broadcasting Standards Commission investigating standards. Single regulator to consider viewers'/listeners' complaints.

- OFCOM will not regulate the Internet, but will work with industry to promote effective self-regulation of the Internet.

- Also new role for OFCOM to promote media literacy: helping people to understand the tools available to manage their and their children's use of the Internet, such as rating and filtering technologies.

3.5 Political advertising

- Recent Swiss case has raised issues of whether a ban on political advertising is contrary to Community law. This is obviously an issue that HMG has to consider very carefully. [Line to be cleared with lawyers].

3.6 Must carry/must offer

- Strong commitment that Public Service Braodcasters are available on all the main platforms both before and after switchover

- This means
  - PSBs must "offer" to all the main platforms
  - Platform operators must "accept" (carry or distribute) them

- To meet this commitment, different arrangements are needed for different platforms

- **On cable** we roll out the present system (must offer and must carry) for BBC channels; C3, C4/S4C, C5, public teletext service

  - We might also add new channels subject to reasonable compensation, and, in doing so, will take into account the technical and financial implications for the network operator

  - These arrangements will be reviewed on a regular basis, as required by the EU legislation.

- **On terrestrial**, PSBs have got guaranteed capacity and have got to use it (if they don't, they lose their licence).

- **On satellite,** there will be provisions

- To require PSBs to offer their channels to satellite packagers
- To provide solus cards to those viewers who, after switchover, will no longer be able to receive terrestrial signals
- To require satellite packagers to provide the PSBs to all their subscribers at no additional cost.
- The list of the PSBs channels subject to these provisions may vary.

- These special provisions on cable and satellite will be brought into effect only if and when necessary
- I hope we will be in a situation in which contractual arrangements make the implementation of these provisions superfluous. But if that isn't the case, an order will bring them into effect

3.7 Definition of Public Service Broadcasting – Cl 181

Why doesn't the definition of Public Service Broadcasting at clause 181 of the draft Bill include international issues and science, since these were specifically referred to in the White Paper?

- We do see these as part of the core of public service broadcasting. They are of course already part of the mix, even though not referred to in the BBC Agreement, from which the list is taken, and would remain part of the mix expected both from the BBC and from the licensed commercial public service broadcasters, as reflected in their initial Statements of Programme Policy.

- But, nonetheless, I am sympathetic to the proposal to include these two genres only, specifically on the face of the Bill.

BACKGROUND

There is a lobby to add "international issues" to the list of PSB responsibilities. We recommend making this concession now, to avoid unnecessary activity by those lobbying and in responding to the lobbying. If we remain silent, Clare Short is also likely to want to take action.

International issues and science were mentioned as part of the core PSB proposition in the Communications White Paper. Late in drafting the Bill the decision was taken to base the core PSB remit on the list in the BBC's Agreement, which refers to international news coverage, but not other programming exploring international issues. There is quite a wide range of

NGOs pressing to specify that PSB should include broader coverage of international issues and they have the support of DfID and Clare Short. Their arguments were bolstered by the analysis of the 11 September events.

There are two potential downsides, but not persuasive. Conceding might lead to pressure to add to the BBC Agreement similarly, but that need not be troublesome: best addressed at Charter renewal though. There is usually also pressure to add to any such list, but that will happen anyway and we can defend the line at the list in the White Paper (there are no other categories which appeared there but aren't already in the Agreement/Bill list).

3.8 Public service broadcasting licences

- Firm intention to ensure continuation of commercial public service broadcasting

- Current licences would not allow licensees to provide a digital only service, after switchover

- Therefore we give them the option to renew their licence now : it will allow them to provide a digital service, and to simulcast it in digital until switchover.

- Current Channel 3 and 5 licences end between 2007 and 2011:

    - if licensees take a new digital licence, this new one will run until 31st December 2014. This will give them a significant extension of the licence, and will allow them to make the necessary investments towards digital world

    - If they keep their current licence, they will be able to renew it at its term (or to take a new digital licence then), but for a period ending either on switchover, or on 31st December 2014 whichever is earlier.

Q&A

What happens in 2014 ?

All the Channel 3 and 5 licences will be re-tendered under the Broadcasting Act 1990 (Quality threshold to be passed, then licence awarded to the highest bidder of those who have passed this quality threshold)

Why this "cut-off" ?

- There is no reason why companies should benefit from a perpetual licence to use a scarce and valuable resource such as spectrum.
- 2014 will be a good time to revisit the way public service broadcasting is delivered!
- we propose a fair deal to these companies : we extend their licence until 2014, (which will mean they could have had a licence for 23 years), but we also act in the best interest of the citizens : it is fair from time to time to have the ability to change the rules.
- It is impossible to guess what the state of the various audio-visual markets will be at that point, and therefore how best ensure the viability of traditional commercial public service broadcasting.
- We could by instance be in a situation in which we no longer need to use terrestrial spectrum to broadcast public services, because of the development of the market (everybody on ADSL, etc...);
- Alternatively, we could need to amend radically amending the licence conditions, which will need to go through a new process.
- Our proposals give us flexibility, and extend the certainty given to existing licensees until 2014, in 12 years time!

These are our objectives, the mechanisms are open to consultation.

3.9 Radio

- Our proposals broadly adhere to the joint position reached last summer by the CRCA and the Radio Authority. We will remove all limits on radio ownership at national level, and rely on a simpler system that can ensure there are at least 3 commercial operators, in addition to the BBC, in every area with a well-developed range of services. An additional effect of our proposals would be to ensure there are at least 3 separate local or regional media owners in almost every local area.

- We believe that these proposals will allow significant consolidation in radio markets while safeguarding the plurality of different voices that citizens need to make informed decisions in a democracy.

- Our position is one developed with the industry and the Radio Authority over the course of a series of consultation exercises. However, we will of course consider any convincing arguments that are made for a different approach over the course of this final consultation on the draft Bill.

- It's important to remember that this Bill is intended to be a flexible piece of legislation, unlike previous Broadcasting Acts. OFCOM will review the ownership regime at least every three years, and will then be able to make changes through secondary legislation. So once we see how the new rules are working, and how the market is developing, we will have the ability to make any necessary changes.

Q+A

Radio- why aren't penalties in line?

These proposals discriminate against radio, by being over-regulatory.

Our proposals are proprietor-neutral, and are certainly not meant to be discriminatory in any sense. The radio ownership proposals are based on the industry's own agreement with the regulator, and we feel, as they did last year, that they will allow significant consolidation while protecting plurality. However this is a consultation process, and our approach has always been to remove needless regulation. We will therefore obviously consider any well-made arguments, and will look at whatever evidence the radio industry brings forward to back up its case.

Things have moved on since the Radio Authority/CRCA agreement last year.

I'm not clear exactly how the radio market, or the likely effect of these proposals, has changed significantly in the last year. However, we are of course willing to listen to the views of the industry on the effect that our other proposals might have on the radio sector, and to consider our position in light of those views.

Lord Eatwell said your proposals would create 'extreme anomalies'

I don't think he has made clear how such anomalies would be created, or what they would be. Our proposals are, after all, substantially the same as those agreed by the CRCA last year. We have only added a cross-media rule that would ensure 3 local media owners in total. However, I would be glad if he could provide me with evidence of the anomalies, so we could consider what to do about them.

Why is there no detail in the Bill? Is it to allow you to change the policy as and when you like?

It's true that the draft clauses only contain broad order-making powers with reference to radio ownership. This will enable the Secretary of State to change the ownership scheme without the need for primary legislation. It is consistent with the Government's stated desire to respond quickly to changing circumstances in the market, in technology or in public expectations. Setting out the details of an ownership scheme (which will be lengthy and technical) in the Bill would mean even the most minor of technical adjustments would need a change in the primary legislation. However we anticipate the relevant orders being published in draft in time for the Bill's passage through Parliament, so that everyone can be clear about our intentions.

Background

Last summer, the Radio Authority and the CRCA made joint proposals for a '3+1' formula for local radio ownership. They said they were both satisfied that this would allow significant consolidation and would protect plurality to an adequate degree.

In our Consultation on Media Ownership Rules, in November, we said we were strongly attracted to those proposals. Since we were consulting, we also said we would consider arguments for further deregulation. The CRCA said they would prefer a '2+1' rule but produced few arguments as to why.

We considered both a '3+1' and a '2+1' option and proposed the former in the draft Bill. The radio industry have since gone back on their agreement with the

Radio Authority, and now say they want radio ownership to be regulated by competition law alone, with a separate cross-media rule to ensure at least 3 separate owners across local/regional newspapers, radio and TV in every area. Our proposals are for a '3+1' rule for radio that would also be applied to ensure 3 owners across media.

3.10 Digital switchover

- Still on course to switch off the analogue signals between 2006 and 2010. Challenging but achievable.

- UK leads the world in DTV take-up over all platforms. Over 9 million households (that's over 1/3 of households) have digital television. This is over twice the European average.

- Criteria for switchover remain in place.

Q&A

Failure of ITV Digital?

Failure of company not of technology. Policies and targets, which the Government set for digital TV are not dependent on any one platform and can be achieved in a variety of ways.

Expected that the ITC will re-award licences on 4th July (update)

Background

The criteria announced by Chris Smith in September 1999 that analogue signals will not be switched off until –

- everyone who can currently get the main public service broadcasting channels in analogue form must be able to receive them on digital systems,
- switching to digital is an affordable option for the vast majority of people, and

- as a target indicator of affordability, 95% of consumers must have access to digital equipment.

Current Take-up

	Sky Digital	DTT	Digital Cable
Digital Television take-up (June 2002)	5 900 000 (almost six million)	1 200 000 (over one million)	2 027 563 (over two million)

Action Plan

- Action plan has created the framework for successful alliance between Government, industry and consumers which will enable the UK to meet the criteria for switchover.
- Task groups are working well. Market Preparation Group is soon to finalise its strategic marketing and communication plan.
- The Technology and Equipment first report will be available shortly outlining all the technological issues that need addressing.
- The Spectrum Planning Group is continuing to provide technical support and planning advice; developing a range of switchover planning options and outline assignment plans.

4. MEDIA OWNERSHIP AND NEWSPAPERS

4.1 Media ownership

- We will retain rules on media ownership to make sure democracy works. Citizens expect and deserve to base their decisions on a range of different voices and opinions. The market cannot guarantee this, so the State must.

- Our rules will ensure a plurality of media voices exists wherever there is a focus for democratic debate - in national, regional and local communities.

- However, we have removed and reformed the inconsistent and needless elements of existing regulation. We want to encourage investment, competition and economic growth. Deregulation will bring increases in productivity and efficiency that can only be good for the consumer, who will receive new, cheaper and better services as a result.

- The new rules will be subject to regular review and should therefore be able to adapt to change in rapidly developing markets.

Detail

We are protecting plurality/democracy:

- There will continue to be at least 3 separate free-to-air TV broadcasters
- Nominated news provider will ensure quality and impartiality of the news most people watch and trust

- Rules will ensure there are at least 3 commercial operators in every well-developed local radio market
- There will still be a special regime to consider significant plurality concerns about newspaper mergers
- 3 Cross media ownership rules will work to protect plurality in 2 important ways:

ONE - Joint-ownership of newspapers (the most editorially influential medium) and ITV (the only mass audience public service broadcaster with universal access and regional programming requirements) will be limited. No one could be a major owner of both, at either national or regional level.

TWO - Newspaper and TV proprietors will be subject to rules on local radio ownership that will ensure the existence of at least 3 separate local or regional commercial media voices in most areas.

- Where we propose to remove rules (largely within individual media markets), we will rely on content regulation and competition law to maintain diversity and plurality. Where competition law will not guarantee the plurality of ownership we need (particularly with regard to cross-media ownership) we propose to retain some rules.

Will the flipside of lifting ownership restriction be that we require closer/heavier regulation to ensure quality, plurality etc?

The regulatory framework provided by the rest of the Bill will ensure that any increased concentration of ownership does not dilute the quality, diversity or impartiality of broadcast content.

For example:

- ITV will still consist of regional licences, with requirements for UK regional production and programming, as well as independent production and original production;
- Under the new regulatory regime for public service broadcasters, Channel 5 will also have requirements for independent production and original production;
- There will be a power to introduce a nominated news provider system for Channel 5 if, comparable to ITV's share, it gains a significant share of the audience for free-to-air news;
- OFCOM will have a new duty to protect and promote the local content of local radio services, and they will now be able to vary the licences for such services on a change of control, to maintain their local character.

The industry say you're not going far enough - will these rules inhibit the growth of UK companies on the world stage?

This package represents a considerable deregulation, one which will UK companies to grow and should bring a beneficial increase in inward investment. We have retained only those rules that we feel are necessary for the health of democracy, where competition law will not guarantee the plurality of ownership that democracy demands. There will be scope for further review every 3 years.

4.2 20/20 rule

- Newspapers are the most editorially influential medium we have. ITV is the only commercial public service television station with universal access to the whole population, and it has by far the largest audience share of any commercial channel - 25%.

- If someone were able to be a significant force in both these media the overall reduction in plurality would be too much for democracy to bear.

Q+A

What happens to this rule if Sky buys Channel 5 and increases its audience share?

I don't want to speculate on possible market developments. However it's important to remember the flexibility that is built into these ownership proposals in the form of regular reviews and powers to amend the rules. If Channel 5 ever did approach the same audience share as ITV, we'd have more vigorous competition in free-to-air TV and that would be a good thing. Obviously at that point it would be proper to consider removing the 20% rule for ITV if it seemed disproportionate or unnecessary. And Channel 5 could be given more regulatory commitments to reflect the size of its audience, such as a nominated news provider system and increased requirements for original production.

There's no real difference between ITV and Channel 5 - you've created one to appease Murdoch?

Our proposals recognise and legislate for the clear differences between ITV and Channel 5 in the existing media ecology. In the current situation ITV is by far our

largest and most influential commercial broadcaster. It is the only commercial public service broadcaster with universal access to the UK population (C5 reaches only about 80%). It has an audience share of 25%, compared with Channel 5's 6%.

ITV and Channel 5 have different public service requirements to reflect the differences in their scale and importance. We suggest that ownership rules should also take account of those differences. The whole regulatory system, however, will be flexible, and if there is a significant change in the relative influence of Channel 5 compared to ITV, the extent of both ownership rules and content regulation will be open to review.

This rule is just a way of penalising Sky. No one else is really affected.

That's simply not true. Our proposals are proprietor neutral. This particular rule is targeted at large newspaper groups and their subsidiaries, because we are concerned to prevent one company owning both a significant share of the national newspaper market and a major part of our most influential commercial TV channel. So a range of companies are affected.

Background

The national 20% rules we propose to keep [for ITV but not C5] are:

(a) no one controlling more than 20% of the national newspaper market may hold any licence for Ch 3;

(2) no one controlling more than 20% of the national newspaper market may hold more than a 20% stake in any Ch 3 service;

(3) a company may not own more than a 20% share in such a service if more than 20% of its stock is in turn owned by a national newspaper proprietor with more than 20% of the market.

4.3 Vertically integrated companies and CH4

- We are engaged in a consultation process on the draft Bill, so we welcome Channel 4's suggestions and will of course consider them carefully before we introduce the final Bill.

- We have absolutely no plans to privatise Channel 4.

- Our proposals rest on the assumption that the economics of the TV market will continue to work roughly as they do now, and that Channel 4's core revenue will be sustained.

- Within that context, we want to encourage more investment and competition by freeing up the ownership of ITV and Channel 5.

- As public corporations, Channel 4 and the BBC will play a vital role in maintaining the diversity of content available.

Q+A

Your proposals risk allowing a single company to dominate the advertising market. OFCOM should have a specific duty to police the advertising market.

Such matters will continue to be dealt with by the competition authorities.

Larger, vertically integrated broadcasting companies will distort the markets for programme-buying and rights.

We said in the White Paper that we do not believe it right to ban the vertical integration of companies. First, such a ban would slow down investment in high-speed networks; secondly, network operators would in any case be able to pursue exclusive agreements with content providers in order to deliver attractive packages to the consumer. We stated then that the right approach was for the regulator to be able to act forcefully to prevent any abuse of vertical integration, and we stand by that view.

Joint bids for free-to-air and pay TV rights should not be subject to OFCOM approval OR There should be additional rules limiting the joint ownership of platforms and content providers.

Vertically integrated broadcasting companies already exist (the ITV companies, for example) and they can already put in joint bids for free-to-air and pay TV rights. So there's no new problem here, and no obvious reason why competition law shouldn't be able to cope in future.

Detail

We propose to remove:

- the rules that prevent non-European companies owning Channel 3 or Channel 5 licences
- the rules that prevent the formation of a single ITV company (although the competition authorities would still want to scrutinise any merger, and its affect on the advertising market)
- the rule that prevents large newspaper companies owning Channel 5

Channel 4 has no problem with deregulation per se, but is concerned that the changes we make may strengthen ITV and Channel 5 to the point where Channel 4 will struggle to compete in markets for:

- advertising
- production
- rights (eg sports rights)

If Channel 4 does struggle, they have suggested they may find it difficult to continue to supply the diversity of their current service, and could need to be privatised in order to survive.

4.4 Foreign ownership, foreign investment and reciprocity

- The rules on foreign ownership are inconsistent and difficult to apply. Why should Viacom be kept out of the market, when Vivendi are allowed in?

- The Government wants to open as many possibilities as possible for inward investment. We want the UK to have as many opportunities as possible to benefit from new ideas, skills and technologies. If this can help to increase efficiency and productivity it will be good news for consumers, who will get better services.

- Content regulation will maintain requirements for high quality, original programming.

Q+A

Won't Foreign ownership will bring a dilution of quality UK content?

Public service television licences will retain requirements for independent production and original production (and in the case of Channel 3 for UK regional production and regional programming). OFCOM will be given a new duty to protect and promote the local content of local radio. Whenever a regional ITV or local radio licence changes hands, OFCOM will be able to vary its conditions to maintain the existing character of the service. So different ownership, foreign or not, will not mean a dilution of the quality and diversity we expect from British media.

What evidence is there that foreign ownership will lead to increased investment?

There are no guarantees that the removal of these rules will attract foreign companies interest, or that the amount of investment will necessarily increase. Those are matters for individual companies to decide. The Government's position is simple - we want to create as many possibilities for investment as possible, and we will therefore remove unnecessary, inconsistent and outdated regulation like this. The result should be the involvement of new competitors, and they will hopefully bring new ideas, skills and technologies to the market.

Why aren't you demanding reciprocity?

We believe in taking this positive step now. We're not going to wait simply because other countries still impose such rules - we think they're over-restrictive and that their removal can bring benefits to UK consumers. However we are aware that UK companies could benefit from reciprocal arrangements elsewhere, and we are already initiating a dialogue with other nations on this issue.

Detail

The existing restrictions prevent non-European companies owning Channel 3, Channel 5 or analogue radio licences.

We propose to remove all restrictions.

4.5 New newspaper merger regime

- There are special public interest considerations that arise in the context of newspaper transfers. But the current system for regulating newspaper transfers is too inflexible and imposes unnecessary burdens both on business and on the authorities.

- The Bill will replace it with a streamlined and less burdensome regime that focuses regulatory action on those newspaper transfers that appear to raise competition or plurality concerns.

- The new regime will be integrated with the new competition-based system for non-newspaper mergers that will be introduced by the Enterprise Bill. However, newspaper transfers that potentially raise plurality concerns require wider regulatory scrutiny, to protect the additional public interest concerns that arise in relation to these transfers.

- The Secretary of State will therefore retain the power to refer newspaper transfers for wider investigation by the Competition Commission by an extension of the provisions in the Enterprise Bill dealing with "public interest cases". This will be directed to those cases that involve the public interest in accurate presentation of the news, free expression of opinion and plurality of views in the Press.

- The new regime will be applicable to all newspaper transfers that satisfy the jurisdictional criteria for mergers in the Enterprise Bill. However, the new regime also will apply if the newspaper that is acquired has a 25% share of supply in a substantial part of the United Kingdom regardless of the identity or

existing business interests of the persons acquiring the newspaper. This will extend the regime in some respects (because there is no requirement that the transfer has a consolidating effect) but will exclude the very smallest local newspapers that are unlikely to raise plurality or competition concerns.

- There will be no requirement for the Secretary of State's prior consent to newspaper transfers. Criminal sanctions will also be removed.

- The final decision on any action to take with respect to issues raised by a newspaper transfer within the public interest provisions will rest with the Secretary of State on the basis of a public interest test that will take account of both plurality and competition. However, the Secretary of State will not be able to dispute the findings of the OFT or the Competition Commission on competition, and she will seek the advice of OFCOM on the public interest aspects of the transfer.

- In the case of local newspapers, the Competition Commission will be expected to carry out effective tests of local opinion, for example by means of Citizens' Juries.

Q&A

Why is the new regime so deregulatory?

The new newspaper provisions are not overly deregulatory – the wider public interest will be protected by making special provision for intervention where a newspaper transaction raises plurality concerns.

The regime will be better targeted and will focus resources on those transactions

that raise real competition or plurality concerns. We will have the ability to intervene in relation to any newspaper transaction where a change of ownership may have an impact on plurality issues – the existing regime only applies to transfers to someone who already owns a UK newspaper.

The regime will be equally applicable to significant local newspapers. The public interest in the accurate presentation of news, free expression of opinion, and plurality of views applies as much to local publications as to the national dailies.

There will be full opportunity for wider public interest concerns to be voiced in relation to newspaper transactions. We are building in a role for OFCOM – as the specialist sectoral regulator – to inform and advise on the wider implications of newspaper transactions. Provision will also be made for full account to be taken of local opinion – for example by means of Citizen's Juries.

Decision making in cases raising plurality concerns will rest with the Secretary of State, rather than the specialist competition authorities. The additional public interests that are relevant to newspaper mergers are fundamental to the preservation of debate that is central to democratic government and Ministers will continue to exercise powers over these matters.

There will be a power to intervene in relation to newspaper transfers – as for all mergers – for four months from the later of the effective date of the transfer or its announcement. The relevant authorities will have extensive interim powers to prevent action being taken during the course of a reference that might prejudice their ability to take effective steps to remedy any concerns that may be identified.

Why is the new regime still so heavily regulatory?

The new newspaper regime will be better targeted, delivering effective regulation whilst lifting unnecessary regulatory burdens.

The existing regime places a disproportionate burden on parties to newspaper transactions by requiring all transactions satisfying the legislative thresholds to seek the prior consent of the Secretary of State. Of the 175 cases considered under the regime since 1980, only four have been refused and five cleared subject to conditions. In future the newspaper regime will be integrated with that applying to all other mergers – the relevant authorities will have powers to intervene where appropriate, but uncontentious transactions can proceed unencumbered.

The regime will be better targeted: the EPI provisions will only be invoked in relation to those transfers which are thought to raise wider public interest concerns. Uncontentious transfers will not be unnecessarily delayed or subjected to the costs of a Competition Commission reference.

The regulatory burden will be wholly removed in relation to the very smallest transfers i.e. those where the company acquired has a turnover of less than £45 million and neither the acquired entity nor the combined entity has a 25% share of supply in a substantial part of the United Kingdom.

Criminal sanctions will be removed. These are an anomaly that places a heavy burden on those involved in newspaper transfers. Removal will promote consistency with the mainstream merger regime, and will facilitate confident decision making by businesses.

The regime will be fairer: the same processes will apply to all newspaper transactions. The existing regime distinguishes between existing and new

newspaper proprietors, without regard to whether there are any substantive differences in the issues raised by their acquisitions.

The new regime is consistent with the Enterprise Bill regime for mainstream mergers; where transactions only raise competition issues, these will be passed back to the specialist competition authorities to deal with.

What is the process for the competition authorities to examine Murdoch takeovers - either of other newspapers or TV assets?

Mr Murdoch will be subject to the same rules as everyone else. Any Murdoch transaction would be examined in accordance with the relevant regulatory regime.

Mergers falling within the scope of the European merger control rules are examined by the European Commission. There will be no change to this.

Mergers in media sectors other than newspapers fall within the normal merger control provisions applying in the UK. Under the Enterprise Bill decisions on merger control will in future be made solely on the basis of the competition impact of the transaction, and decision making power will rest with the specialist competition authorities. [Note: Currently a public interest test applies and final decisions rest with Ministers] This Government is therefore de-politicising this process.

In relation to newspapers, special rules currently apply, and will continue to apply to such mergers, to protect the broader public interest in ensuring diversity within the press. The new regime will be better targeted to focus the resources of the Competition Commission on those transactions which raise competition or

plurality issues.

The Government's running scared of newspaper proprietors - why else won't they place firm limits on ownership?

Our concern is to have a system of regulation that will ensure the maintenance of effective competition, and provide a mechanism to protect the additional public interests relevant to newspaper transfers. The regime will apply as much to transfers of significant local newspapers as to national publications, and we need a regime that is sufficiently flexible to deal with all of the different publications and markets that may be in issue. In this context absolute limits are inappropriate; the range of publications that a small town can be expected to support will likely be smaller than could be expected in a major urban area.

How will the new newspaper regime work alongside the new competition law?

It will form a part of the new competition regime. The competition aspects of newspaper transactions will be examined by the OFT and, where appropriate, the Competition Commission, in the same way as for any other merger. However the legislation will identify the public interest in newspaper transactions - relating to the accurate presentation of news, free expression of opinion, and plurality of views in the UK press - as an exceptional public interest that may be examined in addition to competition considerations.

Where a particular newspaper transaction is identified as raising these additional public interest concerns there will then be a power for Ministers to intervene and seek the advice of the OFT as to whether the Competition Commission should examine these aspects of the transaction. The Competition Commission will

report to the Secretary of State with their conclusions as to the competition impact of the transaction and their recommendations as regards plurality issues.

[Note - their recommendations as to competition remedies will not be binding on Ministers, who will where necessary balance the interests of competition and plurality, although a direct conflict between these two principles is in any event unlikely]

You're putting Ministers back into merger decisions aren't you?

Competition judgments on newspaper mergers will be made by the specialist competition authorities. The additional public interests that are relevant to newspaper mergers are fundamental to the preservation of debate that is central to democratic government. The exceptional public interest regime will be invoked only in relation to those transactions that raise public interest issues beyond pure competition concerns. It is appropriate that Ministers rather than the specialist competition bodies continue to take responsibility in relation to these matters.

[Note: competition analysis will be carried out by the competition authorities, and their findings as to competition will be binding on Ministers. But their recommendations as to remedies will not be binding on Ministers, who will where necessary balance the interests of competition and plurality, although a direct conflict between these two principles is in any event unlikely.]

How is it acceptable for one company to own all the newspapers in an area? Why aren't you doing anything to stop this?

It will be for the independent competition authorities to assess whether a

qualifying merger has led or would lead to a substantial lessening of competition in the relevant market.

Under our proposals the mainstream competition regime will apply equally to newspaper acquisitions. It will then be for the OFT to consider whether the transfer of the titles might be expected to lead to a substantial lessening of competition in the relevant market. If they do hold that view they will refer the transfer to the Competition Commission for a full inquiry. If the Competition Commission agrees that the transfer would or has led to a substantial lessening of competition it will be able to block the merger, or attach conditions to it – such as ordering the divestment of part of the business. Any acquisition which gives a company 100% of the market in a substantial part of the UK will therefore be assessed by the independent competition authorities, and will only be permitted if it is considered that it will not have an adverse effect on competition in that area.

The plurality implications of transactions leading to significant consolidations of ownership in an area could also be examined under the EPI gateway. Such transactions will only be permitted if Ministers are satisfied there would not be an adverse effect on the public interest in plurality.

What does OFCOM know about newspapers? It shouldn't have a role in deciding newspaper mergers.

OFCOM will advise the Secretary of State on whether to refer a transfer to the Competition Commission because of plurality concerns. It will also advise the Secretary of State on the plurality aspects of the Competition Commission's findings.

As the independent media and communications regulator, OFCOM is the body

best placed to advise the Secretary of State on newspaper mergers. At present officials in the DTI advise the Secretary of State on the competition and plurality aspects of these transfers, both before and after a reference. As the independent media regulator, we feel that OFCOM will make a useful contribution to such analysis in the future. Furthermore, OFCOM will have some background in newspapers since the Radio Authority enforces the cross media rules in relation to local newspapers and local radio. And a better understanding of the whole span of the media, assisted by greater involvement in newspaper cases, can only help it in considering cross media issues in general and the operation of media ownership rules as a whole.

Why do newspapers, alone of all media, need a 'special regime', when consolidation is being allowed elsewhere? What's wrong with normal competition law?

Plurality of views and opinion in the Press is a vital public interest. However, the newspaper industry is alone among the mainstream media - television, radio, satellite - in not requiring licences from the independent media authorities to operate. Through the award of licences, the authorities are able to ensure diversity and plurality in these media. By contrast, the plurality dimension of a newspaper transfer will only be investigated if it appears to raise concern. It is therefore a 'light touch' regime.

The competition aspects of newspaper mergers will be assessed by the competition authorities against the same tests as mergers in other sectors. In the case of those mergers that also raise plurality concerns, the final decision on whether to block or clear the merger, or whether to apply conditions to the merger will remain with the Secretary of State. This is because the Secretary of State will need to take account of both the competition and plurality aspects of

the case when deciding whether it may be expected to operate against the public interest.

Why don't you consult local people about local newspaper mergers that affect them?

Under the current regime both the DTI and the Competition Commission seek the views of interested local parties such as competitors and advertisers as well as local councils and MPs. In addition, a number of private individuals usually respond to the requests for views. This will continue in the new system. The Competition Commission will be expected to carry out effective tests of local opinion, for instance by means of Citizens' Juries.

All this is, and will continue to be, taken into account in the Competition Commission's assessment of the transfers likely effect on the readers of the newspaper in question.

Weren't the policy proposals on the new newspaper merger regime included/amended as a panic reaction to the Desmond affair?

Special rules for newspaper mergers are not new and we have always made clear that newspaper mergers raised particular issues that justified different treatment from other mergers.

The Government's proposals in this area predate recent press interest in the acquisition of Express Newspapers by companies owned by Richard Desmond.

The new regime will apply to newspaper acquisitions that appear to involve the public interest in the accurate presentation of news, free expression of opinion and plurality of views in the Press, without regard to whether a purchaser has existing newspaper. It will therefore be focused on those newspaper transactions where identified public interests are at stake, on a non-discriminatory basis.

There has been no panic reaction. The proposals were published for consultation nearly two months ago. The proposals will also be examined by the joint committee of both Houses of Parliament that has been set up to examine the draft Communications Bill.

Would Desmond's acquisition of the Express be caught by the new regime?

Yes. Northern & Shell's acquisition of the Express titles did not fall under the current regime as it was not an existing newspaper proprietor. The new regime will apply irrespective of whether or not the buyer is an existing proprietor. That deal would be caught by the regime as the turnover of the titles exceeded £45m.

Newspaper Society criticisms

Why have local newspapers not been taken out of the regime as promised in earlier consultations?

The very smallest newspapers will be taken out of the regime, because they will not have a turnover of £45 million or reach the 25% share of supply threshold in a substantial part of the UK.

The treatment of local newspapers needs to be seen in the context of the reforms to the regime as a whole. The new regime will be very different from the current regime, on which we were consulting on parallel changes. In particular, the prior written consent of the Secretary of State, on pain of criminal sanctions, is no longer necessary. So the regime is being substantially de-regulated.

We believe that plurality and freedom of expression issues can in arise in respect of local newspapers. We do not believe it is wrong for the authorities to be able to investigate further where plurality concerns sufficient to warrant a Competition Commission inquiry have been identified.

In addition, the tests are the same as those which identify a deal as being of sufficient significance as to bring it within the Enterprise Bill merger regime, save that there is no need for any increase in the share of supply, which is not as relevant to plurality as competition assessments.

Why is a plurality test being extended to cases where it wouldn't have applied before – for example, because the buyer wasn't an existing proprietor or the combined circulation was less than 500,000?

Wrong to think that newspapers which fall outside the current special newspaper regime, but are nevertheless caught by merger control, escape scrutiny beyond competition. The current merger regime applies a public interest test which would allow consideration of plurality issues. For example, Ministers had advice on wider issues than competition when examining Northern & Shell's acquisition of the Express titles.

There is also a level playing field argument for applying the test to all relevant

acquisitions under the new regime.

5 SPECTRUM

5.1 Recognised Spectrum Access

- RSA would be a spectrum management tool, providing formal recognition of use of spectrum by users, like satellite downlinks, that cannot be licensed (eg because transmitters are out of jurisdiction).

- Holders would have the same privileges in spectrum planning terms as licensees and so have greater security and assurance of spectrum quality than operators who are not licensed currently enjoy.

- It will not be compulsory but we believe will offer operators advantages. It will also enable spectrum subject to RSA to be charged for and traded to encourage efficient use.

Q&A

Is Recognised Spectrum Access just a 'tax on dishes'?

No. RSA will offer benefits to operators in terms of assurance of access and quality. Independent review recommended charging to provide incentives to use spectrum efficiently. Bill includes statutory safeguards to ensure charges no higher than necessary for spectrum management purposes. Not a revenue-raising tool. [If pressed: Like other spectrum provisions, subject to review in light of Government's response and views expressed on the report.]

When will you introduce spectrum trading?

In view of the potential benefits trading could bring, would like to be as soon as possible. But cannot be before implementation date for new EC Directives in July 2003. In practice, will also depend on passage of Communications Bill and making of trading regulations by Ofcom. Radiocommunications Agency will soon be publishing consultative document on detailed implementation of trading, including timing.

5.2 Cave Review

- We welcomed publication of the review's report and will respond formally later in the summer.

- Spectrum provisions of Bill are subject to change in light of our conclusions on professor Cave's recommendations.

- Appreciate that Committee will not have an opportunity to comment on any changes to the Bill that result from Cave's recommendations. But inclusion of clauses on key features of spectrum trading and Recognised Spectrum Access give the Committee an opportunity to consider these. The Committee will also have been able to take the Cave report into account and make recommendations on the extent to which its conclusions should be reflected in the legislation.

If pressed on individual recommendations

- The Bill includes a distinct spectrum duty with the same status as Ofcom's other primary duties. We will consider very carefully any suggestions by the Committee about the precise wording.

- Response deals comprehensively and coherently with all spectrum users. Prefer not to pre-empt our response by discussing individual recommendations piecemeal

Background

1 Professor Cave's report was published on 6 March. Its 47 recommendations suggest that spectrum management reforms introduced since 1997 should be progressed further. Key messages are that:

- administrative incentive pricing should be applied more widely, including to broadcasting and satellite services, on an updated basis;

- auctions should be confirmed as the choice of first resort for assigning spectrum;

- spectrum trading should be introduced at the earliest opportunity.

2 The response has been promised "in the summer". We are hoping to publish before the summer recess and a draft response will be submitted shortly to Treasury and DTI Ministers. DCMS have been fully engaged in the process of drafting responses to the chapter on broadcasting.

3 The report mainly concerns the application of spectrum management by the Radiocommunications Agency and, in future, Ofcom. However, there are a few aspects of particular relevance to the drafting of the Bill. The main ones are as follows.

- The report strongly recommends *spectrum trading*. Clause 124 provides for Ofcom to introduce trading selectively and to regulate trading. The

Radiocommunications Agency plans to publish a consultative document on detailed implementation. This was promised shortly in the Policy document issued with the draft Bill but is awaiting clearance by DCMS Ministers.

- The report recommends application of spectrum pricing to satellites. Clauses 115 - 118 introduce a new system of *Recognised Spectrum Access*, which would provide a mechanism for this and also for Crown users, such as MoD, to lease spectrum. As for trading, a consultative document is awaiting clearance.

- The report recommends a separate *spectrum duty*. Clause 3 provides requires Ofcom *"to encourage, in the interests of all persons, the optimal use for wireless telegraphy of the electro-magnetic spectrum"*. This was based on wording from EC directives. Professor Cave's suggested form of wording, based on Australian legislation, is *"to maximise .... The overall value derived by society from using the radio frequency spectrum"*. The overall effect is similar although there are differences of emphasis.

- The report recommends an *on-line frequency register*. Clause 126 provides for a 'wireless telegraphy register'.

- The report recommends against detailed *powers of direction* on the specifics of spectrum management, such as are included in clause 112. See separate brief.

- The report endorses the policy of *charging Crown users* as an incentive to public sector spectrum efficiency. See separate brief. Clause 119

provides for the Secretary of State to make payments to Ofcom but it would not be appropriate for Ofcom to be able to impose charges on the Crown.

5.3 Powers of Direction

- Spectrum is vital raw material for communications market. Decisions on its management will affect achievement of our aim to make UK most dynamic and competitive communications industry in the world. And also to key public policy objectives of universal access to choice of diverse services of highest quality and safeguarding citizens and consumers.

- Importance of spectrum extends far wider than communications industry that Ofcom will regulate. For example, emergency services, defence, radio astronomy, radio amateurs all need access to spectrum.

- Ministers should be able to intervene on grounds of national security, public safety and health and international relations. Also that Ministers should be able to intervene in wider public interest to set strategic allocation of spectrum between public and private sectors and across broad sectors of users. For example, inconceivable that decision on switching off analogue television spectrum should be taken by unelected regulator.

- Difference of view centres on what Professor Cave describes as "specifics of spectrum management" – more detailed decisions, for example on setting licence fees or on whether particular blocks of spectrum should be assigned by auction or beauty contest and how those competitions should be designed. These are complex issue we are considering in context of our response to the review.

- In practice, difficult to separate out strategic decisions from the specifics. For example, decisions on details of fees can have profound consequences for

viability of public service broadcasters. Decisions on auction design or licence conditions can have significant impact on how markets develop and services are rolled out.

- Appreciate concerns Professor expresses about scope for Ministerial intervention in judgements of independent regulator. That is why in draft Bill we provide checks and balances to ensure powers are exercised appropriately and do not unduly compromise Ofcom's independence. Directions are required to be published and directions on the details of spectrum management are required to be confirmed by Parliament by the affirmative procedure. Ministers will have to explain and justify such directions to Parliament and persuade both Houses that the direction should be confirmed.

Background

1 Clause 112 empowers Ministers to intervene to direct Ofcom in any aspect of spectrum management, including making spectrum available for particular users or uses, exempting users from the need to be licensed and the exercise of spectrum pricing and auctions. Directions under clause 112 must be confirmed by resolution of each House within 40 days or they cease to have effect. This is an unusual Parliamentary procedure and provides for positive confirmation by Parliament of directions. It is a stiff hurdle procedurally and politically.

2 Professor Cave recommends against such detailed intervention as running contrary to the trend towards less Ministerial involvement in regulation where there is an independent regulator, as compromising Ofcom's independence and as being likely to lead to use of directions as a lever of industrial policy to the detriment of spectrum and economic efficiency.

3 The Bill reflects DTI and DCMS policy. Treasury and Oftel support the Professor's line and clause 112 was included in the Bill on the basis it would be reviewed in the Government's response to the report. At present time, this issue has yet to be resolved inter-departmentally at official level and will need to be settled at Ministerial level. It is thought that the Chief Secretary will write but time is running out for publication of the response so, if he does write, it will have to be soon. This is a sensitive issue as it is difficult to be definite about the Government's line in advance of resolution of the difference with Treasury.

4 There was discussion of powers of direction during Professor Cave's evidence to the Committee on 17 June. The line of questioning gave little indication of the Committee's likely attitude but they can be expected to probe the need for the power.

6 Vachers Biogs of Committee Members