



To SECRETARY OF STATE

cc

PS/Patricia Hewitt  
PS/Stephen Timms  
PS/Dr Kim Howells  
PS/Baroness Blackstone  
Andrew Ramsay



From



File Ref

Date 16 May 2003



Bill Bush  
Sarah Hunter

**LETTER TO SKY RE. "ECONOMIC REGULATION" OF BROADCASTING & PLURALITY**

**Issue**

1. Letter to Sky following your meeting on 2 April.

**Timing**

2. You should write to Sky before the clauses on broadcasting competition are reached in Lords Committee. At the earliest, this will be Thursday 22 May.

**Recommendation**

3. That you send the attached draft letter (at Annex A) to Tony Ball.

**Summary**

4. At your meeting with Sky you discussed "economic regulation of broadcasting; OFCOM's 'plurality' duty; and Recognised Spectrum Access (RSA). You promised to write to Sky about "economic regulation" of broadcasting, and it would be helpful, at the same time, to clarify how the new plurality duty will be applied in relation to mergers.

5. Stephen Timms will write to Sky on RSA.

**Economic Regulation of Broadcasting**

6. Sky left with you a paper on this issue (attached at Annex B), which does not raise new issues, and Tony Ball has written to you enclosing a copy of advice on this issue from Ian Glick Q.C. (at Annex C). This legal advice is consistent with our own lawyers' advice on these clauses, although there might be room for saying that Mr Glick is too pessimistic about the prospects for a successful judicial review being brought by a broadcaster.

## 7. Sky's concerns are four-fold:

(i) *Sky claim that when OFCOM use their Broadcasting Act competition powers when the Competition Act would have been the more appropriate route, broadcasters would not have grounds for judicial review since OFCOM does not have a duty to use the Competition Act where it would be more appropriate.*

a. During Committee, Dr Howells said that "Broadcasters can apply for judicial review if they consider that OFCOM has wrongly used its sector-specific powers when the Competition Act powers would have been the more appropriate route". Sky are implying that this is incorrect. I have sought legal advice on this, and can confirm that the availability of judicial review does not depend on there being a duty to use the Competition Act. A broadcaster can, for example, challenge OFCOM if they fail to consider whether or not the Competition Act is "more appropriate", or if they reach a perverse view on that question.

(ii) *Sky are concerned that if OFCOM undertakes "economic regulation" other than for a competition purpose e.g. to promote the interests of consumers, broadcasters would not have a route of appeal to the Competition Appeal Tribunal.*

a. OFCOM does not have a duty to regulate the economics of broadcasting *per se*, but has two objectives for regulating broadcasters' economic arrangements: competition and consumer interest. Sky consider that an intervention, which to them is "clearly economic regulation" (such as pricing/packaging of channels) but made in the interests of consumers, should be treated in the same way, in terms of route of appeal, as a competition intervention.

b. By way of example, OFCOM may wish to intervene in Sky's packaging of channels so that consumers could have more choice of packages (without having to buy a lot of unwanted channels as a minimum). Such an intervention would have a significant economic impact on Sky, but the purpose of the intervention would be a subjective question of what represented an acceptable amount of consumer choice.

c. However, OFCOM's duty "to further the interests of consumers" is qualified by the parameter: "where appropriate by promoting competition". (This seems not to have been mentioned specifically by Ian Glick Q.C.). It is therefore difficult to see that OFCOM could justify intervening in the packaging of channels in the consumer interest, without being able to show that it was not appropriate (via the extended general and sectoral competition powers that OFCOM will have) to resolve the issue by encouraging more competition in the pay-TV market. If Sky thought that OFCOM had not properly evaluated these options, it could challenge OFCOM under judicial review that it had not used its powers properly.

(iii) *Following on from (ii), Sky say that if OFCOM were to undertake "economic regulation" claiming that it was not for a competition purpose (e.g. to promote the interests of consumers), not only would broadcasters not have a route of appeal to the Competition Appeal Tribunal, neither would they be able to apply for judicial review on the basis that OFCOM's intervention was, in fact, for a competition purpose.*

a. This argument suggests that OFCOM have an unfettered power to use the Broadcasting Act powers or Competition Act powers at their discretion. However, Clause 310(2)<sup>1</sup> of the Bill has the effect that OFCOM's initial step before using any Broadcasting Act power must be to see whether it is being used "for a competition purpose". Some Broadcasting Act conditions (e.g. content matters) could never be considered to be made for a competition purpose. However, in the case of the kinds of "economic regulation" that Sky are concerned about, OFCOM would need to assure themselves that they were not wrongly characterising their intervention as (say) consumer protection when, in fact, it wholly or mainly served a competition purpose. This decision would be subject to judicial review.

(iv) *Where OFCOM give a competition purpose as a subsidiary reason (i.e. not the main or only purpose for the intervention) for acting, broadcasters would not have a right of appeal to the Competition Appeal Tribunal to the extent of that competition intervention.*

a. The Bill specifically provides a definition for OFCOM's power to intervene for a competition purpose, where such a definition did not previously exist (the ITC's powers to ensure fair and effective competition were derived from its general duties). Therefore, OFCOM are now steered towards considering more carefully how they characterise their interventions, since the clear definition of "competition purpose" provides more scope for judicial review on the grounds that the intervention was for a competition purpose but characterised as something else.

b. In addition, OFCOM are under a duty "to further the interests of consumers where appropriate by promoting competition". If one of their interventions was, in the main part, made to further the interests of consumers, and a subsidiary purpose of that same intervention was a competition purpose, they would lay themselves open to the argument that the subsidiary purpose showed that the pursuit of competition was an appropriate way of furthering the interests of consumers in that case, and that they should have used sectoral or general competition powers, for a competition purpose.

c. In the event that an OFCOM decision is motivated equally by competition and non-competition grounds e.g. cross-promotion, packaging of channels, OFCOM would need to be clear about the main reason for the intervention. Broadcasters would have a right of appeal via judicial review if they

<sup>1</sup> (2) Before exercising any of their Broadcasting Act powers for a competition purpose, OFCOM must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998.

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considered that OFCOM's real reason for the intervention was a competition purpose, not some other reason that they may have stated. If OFCOM could not clearly show its true motivation, judicial review might succeed on the grounds that the test in clause 310(2) was not properly applied. It would not, however, be appropriate for that question to be considered on appeal to the CAT, since it is a matter of choice of powers, not the details of their use.

d. In the unlikely event that the purpose of an intervention is genuinely 50% for a competition purpose and 50% for a consumer interest purpose (and neither OFCOM nor the Courts determine that either reason is subordinate to the other), our policy is that the route of appeal on the substance of the intervention should be via judicial review, and not the CAT. A route of appeal to the CAT would contradict the principle that the CAT's role is restricted to considering competition issues. By definition, a 50/50 decision is not "wholly or mainly" a competition issue. Moreover, the Courts would consider the whole decision, including the competition elements (albeit on the terms of judicial review). In contrast, the CAT would disregard the non-competition elements entirely as outside its remit and expertise.

8. Sky's paper, as expected, raises two peripheral objections to our policy:

- i) *Part 2 of the Bill (networks and services) allows appeals for most of OFCOM's decisions to the Competition Appeal Tribunal.*

Part 2 of the Bill deals with completely different matters to those under Part 3. There are, for example, no content issues in the regulation of Networks and Services. In regard to broadcasting, by contrast, many of the issues for decision will involve an assessment of a wide range of public interest issues, many of them not related to competition or other economic matters. Since the duties on OFCOM under Part 3 of the Bill are quite different in nature to those under Part 2, the appeals mechanisms are necessarily different.

- ii) *OFCOM can intervene in the packaging of licensed satellite channels, but not in the packaging of channels by cable operators who are not licensed.*

As retailers of channels, neither satellite nor cable are licensed. Therefore, Sky are correct that cable packagers do not require a licence under Part 3 of the Bill, but neither does Sky as a packager of satellite channels. Since Sky operate a vertically integrated platform in which they both package channels and own Broadcasting Act licences to provide content in their own channels, they consider that they are singled out from cable operators. However, if a cable operator were to own their own channel, then they would be treated in precisely the same way as any other licence holder.

9. These points have been raised by Sky before (in the case of (ii), during Commons Committee), and I propose that we stick to your assertion at the meeting that we would only consider new arguments. I have not therefore referred to these in the draft reply.

**Plurality**

10. With regard to Sky's concern about the application of OFCOM's plurality duty, there is certainly no intention that the duty could be used to block a merger. If a merger is compliant with the rules, the decision to prevent it from going ahead could only be taken on competition grounds.

  
  
**Broadcasting Policy Legislation Team**

Department for Culture, Media and Sport

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May 2003

At our meeting on 2 April, I promised to consider your paper on the regulation of the Broadcasting sector, and to write to you to clarify our policy. I'm sorry that I haven't written sooner. Thank you for your letter of 30 April enclosing legal advice you received from Ian Glick Q.C.

I have now received legal advice on your concern that broadcasters could not apply for judicial review against a decision by OFCOM wrongly to use its Broadcasting Act competition powers when its Competition Act powers would be more appropriate. I can reassure you that a broadcaster can apply for judicial review if, for example, it alleges that OFCOM have not properly considered whether the Competition Act would be more appropriate than Broadcasting Act competition powers, or have irrationally concluded that the Competition Act powers would not be more appropriate, or have wrongly used their Broadcasting Act competition powers where they have concluded that the Competition Act would be the more appropriate route.

On the issue of a right of appeal to the Competition Appeal Tribunal on matters of "economic regulation", having reflected further on the arguments in your paper, we think that the main difference of view between us derives from the references in it to 'economic regulation'. In our view, regard needs to be paid when considering appeal mechanisms to the purpose of the regulator's intervention, as well as to its effect.

Almost any intervention in the commercial affairs of a business is likely to have an economic effect. However, the intervention may in some instances be aimed at a different objective, for example, ensuring an appropriate level of consumer choice. Such an intervention would undoubtedly have an economic effect, but would not have been undertaken for an economic purpose, and consequently, appeal to the

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Competition Appeal Tribunal would not be appropriate.

I can reassure you that if OFCOM chose to use its Broadcasting Act powers for (in your words) "economic regulation" other than for a competition purpose, broadcasters would be able to apply for judicial review if they considered that it was, in fact, for a competition purpose. Clause 310(2) of the Bill has the effect that OFCOM's initial step before using any Broadcasting Act power must be to see whether it is being used "for a competition purpose" – which is defined in clause 310(7). OFCOM would need to be able to demonstrate that they were not wrongly characterising their intervention as (say) consumer protection when, in fact, it served a competition purpose. This decision would be subject to judicial review.

Your letter raises the concern that broadcasters would have no right of appeal to the Competition Appeal Tribunal even in the case where a competition purpose was only a subsidiary reason for an intervention. In such a case, OFCOM would need to be clear about the "main reason" for the intervention. It would then be entirely right for the route of appeal for that intervention to be in accordance with that "main reason". If the "main reason" is not as defined in clause 310(7), then the route of appeal should not be to the Competition Appeal Tribunal. If OFCOM could not clearly demonstrate their motivation, a judicial review might succeed on the grounds that the test in clause 310(2) had not been properly applied.

With regard to our discussions about plurality, there is certainly no intention that the plurality duty in clause 3 could be used to block a merger. If a merger is compliant with the media ownership rules, the decision to prevent it from going ahead could only be taken on competition grounds, and by the Competition Commission, not OFCOM.

I understand that Stephen Timms will write to you about Recognised Spectrum Access, the policy on which, as I explained, is led by DTI.

TESSA JOWELL

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## COMMUNICATION BILL REGULATION OF BROADCASTING SECTOR

The Bill contains no express provisions for the economic regulation of the broadcasting sector. The problems that this creates are as follows:

- **Uncertainty regarding extent of OFCOM's broadcasting jurisdiction**

There has been some uncertainty regarding the extent to which OFCOM could seek to use its Broadcasting Act licensing powers to undertake economic regulation of broadcasters. Officials had advised Sky that OFCOM would not do so. However, Kim Howells made it clear in the Commons Committee Stage that one of OFCOM's functions would be to undertake economic regulation of broadcasters, in circumstances where the Competition Act powers could not be applied because, for example, there was no abuse of a dominant position.

Kim Howells said that broadcasters could apply for judicial review if they consider that OFCOM has wrongly used its Broadcasting Act powers when its Competition Act powers would be more appropriate. This is not correct. OFCOM does not have a duty to use the Competition Act where it is more appropriate – it has a discretion as to which set of powers to use, so no ground for a judicial review could ever arise.

It is clear that OFCOM can use both its Competition Act powers, as well as its Broadcasting Act powers, to undertake economic regulation of broadcasters. The discretion as to which to use rests with OFCOM. OFCOM's Broadcasting Act powers are twofold:

- The Bill (part 3) gives OFCOM power to regulate the broadcasting sector via broadcasting licences (ie. currently the ITC licences under which Sky operates its channels). The Broadcasting Acts allow the ITC to impose licence conditions and directions on licensees in fulfilment of its duties.<sup>1</sup> This gives OFCOM enormous latitude to impose whatever licence directions on Sky or other licensees as it sees fit (subject always to the general principles in the Bill regarding unnecessary burdens in regulation);
- OFCOM has been given an additional power to impose in broadcasting licences a "fair trading" condition. This is any condition OFCOM considers appropriate for ensuring fair and effective competition in the provision of licensed services or of connected services. This was a power given to the

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<sup>1</sup> These duties are now set out in the Bill as duties of OFCOM. The new draft of the Bill just issued effectively gives OFCOM a primary duty to further the interests of consumers in relevant markets, where appropriate by promoting competition, and to further the interests of the community as a whole in relation to communications matters. A number of other duties must be fulfilled in the course of fulfilling this primary duty, including the availability throughout the UK of a wide range of television and radio services, and the maintenance of plurality of providers of different television and radio services.



ITC because the ITC did not have concurrent competition powers. OFCOM has been given concurrent competition powers, but in addition to those, and to its general Broadcasting Act powers, OFCOM is given an express fair trading power by the Bill.<sup>2</sup>

- **Lack of due process**

Where OFCOM exercises its Broadcasting Act powers to undertake economic regulation of broadcasters, there are no express provisions providing for due process in the Bill. For example:

- It appears that OFCOM could introduce a Code or a licence condition for just about anything it chose, provided it was able to tie it back in some way to the fulfilment of its duties. There are no express parameters around what types of conditions it could impose, or the process it must go through before imposing or modifying any such conditions;
- This is to be contrasted with the provisions regarding OFCOM's standards Code for programming content, the objectives and parameters of which are expressly set out in the Bill.
- Likewise, under Part 2 (Regulation of electronic communications networks and services) there are express Clauses (Clause 42) about the *types* of conditions that may be imposed on operators of electronic communications networks and services. Furthermore, there are express Clauses (Clauses 44 and 45) which set out a test which must be passed before conditions can be set or modified<sup>3</sup>, and a procedure for setting, modifying and revoking conditions is set out (Clause 45), which includes consultations and adequate timescales for responses. There are limited safeguards where OFCOM is acting under its fair trading condition powers<sup>4</sup>. However, there are no express safeguards in relation to licence directions, conditions or Codes that relate to the economic regulation of broadcasting.
- The Bill should therefore include at the least:
  - (i) provisions akin to Clause 44, setting out the test to be applied before licence conditions or directions can be imposed on broadcasters under Broadcasting Act powers, or Codes can be issued;

<sup>2</sup> Even in the absence of the fair trading power, OFCOM's general Broadcasting Act powers are so wide they could impose conditions pursuant to this end as licence conditions or directions in any event.

<sup>3</sup> Namely that the condition is objectively justifiable in relation to the networks, services, facilities etc to which it relates; it must not discriminate unduly against particular persons; it must be proportionate to what the condition is intended to achieve; and, in relation to what it is intended to achieve, it must be transparent.

<sup>4</sup> Section 311 provides that OFCOM must review any Code made by them or direction issued *under the fair trading provision*, but the provision only covers Codes etc issued under the fair trading provision, and not under any of OFCOM's other Broadcasting Act powers; further, the provision only provides for consultation when a Code or direction is being modified, not when it is being set in the first place

- (ii) provisions akin to Clause 45, which sets out the procedure to be applied before any licence condition, direction or Code can be imposed.

- **Lack of appeals process**

Rights of appeal on the merits to the Competition Appeal Tribunal are available under the Bill in the following three circumstances:

- Following a decision taken by OFCOM under its Competition Act powers;
- Decisions under Part 2 (Electronic Communications Networks and Services); and
- Decisions taken by OFCOM under its Broadcasting Act powers "for a competition purpose".

This leaves a gap, where decisions could be taken by OFCOM in the nature of economic regulation of broadcasting but where there is neither any due process leading to the decision nor appeal against it.

A key example of how OFCOM could avoid due process and impose requirements on broadcasters from which they have no right of appeal is as follows. OFCOM could decide that it is unhappy with Sky's retail pricing and packaging of its channels. However, instead of following the detailed procedures which would apply under a Competition Act investigation, OFCOM might choose instead to avoid all of the hurdles of having to define Sky as dominant in a relevant market and then having prima facie grounds for suspecting an abuse. Instead, OFCOM could simply direct Sky to package and/or price its channel offering in a different way, by way of a TLCS licence direction, relying on its duty to further the interests of consumers, "in particular in respect of choice, price, quality of service and value for money." There would be no due process and Sky would have no right of appeal to the CAT.

This is not far fetched. The ITC used its Broadcasting Act powers to issue a licence direction relating to the packaging of channels by retailers, which inter alia, required all premium channels to be sold a la carte, relying on its duty to ensure a wide range of services are available, and not simply on its duty to ensure fair and effective competition in the provision of licensed services.

- **Disparity of treatment**

The effect of OFCOM using its Broadcasting Act powers in this way will be to produce inequities in the treatment of different market players. Cable operators who retail only the channels of third parties, and other retailers who retail only the channels of others (eg DTH distributors), will not hold licences under the Broadcasting Acts, as these are necessary only for the activity of broadcasting channels over which some editorial control is exercised. Therefore, cable

operators and DTH retailers will escape any form of economic regulation by OFCOM, including in relation to their packages and prices.

On the other hand, because Sky co-incidentally has some Broadcasting Act licences (due to owning some channels as well as distributing those of others), OFCOM could seek to use its Broadcasting Act powers to regulate Sky's retailing activities through the back door. These activities should strictly fall outside the scope of its Broadcasting Act licences.

It would be inappropriate and inequitable to use the fact that a television retailer holds a Broadcasting Act licence to seek to impose economic regulation of this type on it, when competitors undertaking identical activities (even in respect of exactly the same channels) are to remain unregulated. The intention of the government as to the extent of potential economic regulation of the broadcasting sector (outside the competition functions) needs to be clarified. It should be made clear that the terms on which channels and packages of channels are supplied, both at the retail and wholesale levels, are not to be regulated via broadcasting licences (including for that matter under the general trading condition), but via OFCOM's Competition Act powers.

- **Sky's proposal**

Clearly the current position contains a gap and a right of appeal for matters of economic regulation of this nature should be written into the Bill. However, Sky's position on this has been misrepresented. Sky is NOT saying that all decisions with an element of economic regulation should be appealable. Sky recognises that almost every editorial, content-based decision has some economic impact and that it is the intention that these should be judicially reviewable and no more. However, it is unacceptable that matters which are clearly economic regulation, such as regulation of pricing and packaging issues, should not be afforded due process and a right of appeal, which they would if they were being reviewed under the Competition Act.

Sky suggests that a right of appeal to the CAT be included in the Bill for decisions made by OFCOM under its Broadcasting Act powers, but that this right of appeal should not be triggered if the issue at hand relates to Chapter 4 Part 3 of the Bill (unless of course such a decision is expressly made "for a competition purpose"). These Clauses are those that relate to the traditional content-related jurisdiction of the ITC for which Sky understands that the only remedy is judicial review.

This is not a difficult amendment to the Bill and Sky has already prepared a Clause that could be applied to plug the lacuna that currently exists in the Bill.

**BSkyB**  
**April 2003**



Tony Ball Chief Executive

30 April 2003

The Rt Hon Tessa Jowell MP  
Secretary of State  
Department of Culture, Media and Sport  
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London  
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Dear Tessa

I am writing further to our meeting on 2<sup>nd</sup> April where we discussed, amongst other things, the lack of a formal appeals process against decisions of OFCOM where it seeks to undertake economic regulation of broadcasters using its Broadcasting Act powers.

It had been suggested by your team at the meeting that OFCOM's functions in undertaking economic regulation would be carried out "for a competition purpose" under Clauses 309 and 310 of the Bill, and that in the event that OFCOM sought to use its Broadcasting Act powers for such a purpose, its decision to use those other powers could be successfully judicially reviewed.

We explained that it could be argued that the Bill allows OFCOM to undertake economic regulation under its Broadcasting Act powers by reference to its general duties, without any reference to its sector-specific competition powers. An example we gave would be the possibility of OFCOM, relying on its general duty to further the interests of consumers, seeking to impose licence directions on Sky relating to the way in which it prices and packages its pay-TV services. This may not be a decision "for a competition purpose" and in such circumstances would not attract any right of appeal to the Competition Appeals Tribunal. The economic nature of such decision, however, is such that it should attract such a right of appeal.

We await the letter that you confirmed you would send us on this subject, but in the meantime I thought you might be interested in seeing a copy of a Counsel's opinion from Ian Glick Q.C. which we obtained on the interpretation of the Bill in this regard.

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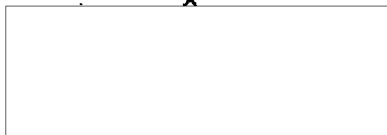
- (i) OFCOM appear to have the power to issue licence directions under its Broadcasting Act powers by reference to its general duties in the Bill, and that these directions may be made for purposes other than competition purposes;
- (ii) In the event that such a direction is issued, Sky would have no right of appeal to the CAT. This would be the case even where OFCOM gave a competition purpose as a subsidiary reason for so acting, as long as it was not the main purpose; and
- (iii) It would be virtually impossible to mount a judicial review of OFCOM's decision to use its Broadcasting Act powers instead of its sector-specific powers, if OFCOM states that it was not acting for a competition purpose, unless that assertion is patently untrue.

This gap in the Bill could be closed by making it clear in the Bill that acts of OFCOM in the exercise of its Broadcasting Act powers attract a right of appeal to the CAT, except where the matter is one of regulation of content. These latter matters could be defined to include all of the types of matters covered by Chapter 4 of Part 3 of the Bill, which, so far as we can see, encompass all of the traditional ITC-type content regulation and BSC regulation of fairness and privacy, which currently attract only a right of judicial review.

Alternatively, if the government believes that there would be no circumstance outside of those falling within Clauses 309 and 310 where OFCOM could seek to exercise Broadcasting Act powers for the purpose of economic regulation (with the exception of matters pertaining to content as above) then a Ministerial statement to this effect would be very helpful.

We appreciate you taking time to hear our concerns and we look forward to receiving your letter.

Yours sincerely



IN THE MATTER OF THE COMMUNICATIONS BILL

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ADVICE

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1. Under the new regulatory regime set out in the Communications Bill published on 5 March 2003 ("the Bill"), OFCOM will have among their statutory functions:

"to regulate ... [inter alia] television licensable content services that are provided by persons under the jurisdiction of the United Kingdom for the purposes of the Television without Frontiers Directive;"

in accordance with the Bill and the Broadcasting Acts 1990 and 1996: see clause 208(1) and (2)(b). At present the equivalent function is carried out by the Independent Television Commission (the "ITC") under section 2(1) of the Broadcasting Act 1990 ("the 1990 Act").

2. Such regulation is carried out at least in part by a system of licensing, and a provider of a television licensable content service (such as BSkyB) will require a licence granted under Part 1 of the 1990 Act: see sections 3, 4 and 13 of the 1990 Act (as amended by Schedule 15, paragraphs 1, 2 and 5, to the Bill), and clause 232 of the Bill.

3. OFCOM will be responsible for issuing such licences under Part 1 of the 1990 Act; and such a licence:

"may include ... such conditions as appear to OFCOM to be appropriate having regard to any duties which are or may be imposed on them, or on the licence holder, by or under this Act, the Broadcasting Act 1996 or the Communications Act 2003."

See section 4(1)(a) of the 1990 Act, as amended by Schedule 15, paragraph 2 to the Bill.

4. Moreover, by section 4(2) of the 1990 Act (as it will be amended):

"A licence may in particular include conditions requiring the licence holder -

- (a) to comply with any directions given by OFCOM as to such matters as are specified in the licence or are of a description so specified; or
- (b) (except to the extent that OFCOM consent to his doing or not doing them) not to do or to do such things as are specified in the licence or are of a description so specified."

5. Amongst the duties to which OFCOM must have regard in imposing conditions (and indeed, "in carrying out their functions" generally) are those set out in clause 3 of the Bill. These include, at clause 3(1)(a), the duty:

"to further the interests of consumers in relevant markets, where appropriate by promoting competition."

6. Moreover, by clause 3(4) of the Bill:

"In performing their duty under this section of furthering the interests of consumers, OFCOM must have regard, in particular, to the interests of those consumers in respect of choice, price, quality of service and value for money."

7. It follows that OFCOM will be entitled to set conditions or give directions to further the interests of consumers in relevant markets relating to choice, price, quality of service or value for money: see *R v. ITC ex parte Flextech* (6 November 1998) (unreported), where Kay J. accepted that directions given by the ITC were valid to the extent they were made in reliance on *either* of the ITC's duties set out in section 2(2)(a) of the 1990 Act. One of those duties (in section 2(2)(a)(ii)) required the ITC to ensure fair and effective competition in the provision of licensed services and services connected with them; however, the other (in section 2(2)(a)(i)) required the ITC to ensure that a wide range of services is available throughout the United Kingdom. Thus the ITC could, as OFCOM will be able to do, impose conditions and give directions for purposes other than competition purposes.

8. In setting such conditions or giving such directions OFCOM must, in accordance with clause 3(3)(b) of the Bill, where relevant have regard to:

"the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed."



Indeed the requirement that regulation should only be imposed where necessary is emphasised by the fact that clause 6 requires OFCOM to keep the carrying out of their functions under review to see it does not involve burdens which are unnecessary.<sup>1</sup>

9. If OFCOM exercises any of its "Broadcasting Act Powers", which include imposing or varying the conditions of a licence, or giving directions compliance with which is required by a licence, for "a competition purpose", the licensee has a right of appeal to the Competition Appeal Tribunal under clause 310(4) of the Bill.

10. A competition purpose, however, is defined by clause 310(7) in this way:

"For the purposes of this section a power is exercised by OFCOM for a competition purpose if the only or main reason for exercising it is to secure that the holder of a Broadcasting Act licence does not -

- (a) enter into or maintain arrangements, or
- (b) engage in a practice,

which OFCOM considers, or would consider, to be prejudicial to fair and effective competition in the provision of licensed services or of connected services."

11. If the condition is imposed or varied, or the direction given, for some other reason, or mainly for some other reason, the right of appeal does not exist.

<sup>1</sup> Moreover, under clause 7, where OFCOM are proposing to do anything for the purposes of, or in connection with, the carrying out of their functions and it appears to them that the proposal is important they must carry out and publish an assessment of the likely impact of implementing the proposal, or publish a statement setting out their reasons for thinking that this is unnecessary. A proposal would be important if, inter alia, it was likely to have a significant impact on persons carrying on businesses in the markets for any of the services in relation to which OFCOM have functions.

12. The position is therefore this. OFCOM, in carrying out its function to regulate television services pursuant to clause 208 will be responsible for granting licences under Part 1 of the 1990 Act, and in deciding on conditions to be included and on directions to be given. In so doing it must have regard to its clause 3 duties which include furthering the interests of consumers. That being so, it seems to me clear that OFCOM, in regulating television licensable content services, will be able to impose conditions or give directions affecting how such services are to be provided in order to further those interests, and that imposing such conditions or giving such directions might, depending on the facts, not be done, or not be done mainly, for a competition purpose.

13. In such circumstances an aggrieved licensee's only recourse would be judicial review. The licensee would then need to show that OFCOM's decision was outside their powers, irrational or an abuse of power. That would be very difficult, particularly as a court would be extremely reluctant to get involved in a debate as to whether a condition or direction OFCOM considered appropriate was, for example, so obviously disproportionate or unnecessary that no reasonable regulator could have imposed or given it.

14. Whether OFCOM impose a condition or give a direction for a competition purpose or for some other purpose will be a question of fact. And it will be virtually impossible for a licensee to challenge OFCOM if they say they have acted for a non-competition purpose unless that assertion is patently untrue. As already observed OFCOM are entitled to exercise their Broadcasting Act powers to impose conditions and give directions for non-competition purposes in which

case there is no appeal to the Competition Appeal Tribunal. Moreover even if OFCOM give a competition purpose as a subsidiary reason for so acting, the licensee will still be denied the right of appeal to the Tribunal.

15. Where OFCOM do act for a competition purpose, it will also be very difficult to challenge their decision to do so by exercising their Broadcasting Act powers rather than by proceeding under the Competition Act. For it is virtually inconceivable that a court, on judicial review, would interfere with such a decision provided OFCOM affirmed that, before acting, it considered under clause 310 (2) of the Bill which was the more appropriate way to proceed and then took that way.

16. There is one other issue I have been asked to consider. That is whether OFCOM are required, pursuant to clause 3(1)(2)(b) of the Bill, to secure in the carrying out of any of the functions to which it may be relevant, "the maintenance of a plurality of providers of different television and radio services." Plainly it is.

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