

BPD/02/1.3J

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COMMUNICATIONS BILL: PRE-LEGISLATIVE SCRUTINY REPORT

Issue

Recommendations of the Pre-Legislative Scrutiny Committee's report published yesterday.

Timing

2. Routine.

Recommendation

3. That you note the attached paper which tries to brigade the Committee's 148] recommendations into main areas and give an initial reaction to these. Obviously this is a "quick and dirty" exercise and intended to give a brief overview. Specific policy areas will of course require more considered advice.

[Redacted]

PLS Report Summary

Summary of Joint Committee Report published Wednesday 31 July

- The attached brief is a summary, for information only, paraphrasing the key recommendations and giving an initial bullet point response to some of them. obviously we will be considering all the recommendations put forward by the committee during the coming weeks and will issue a formal response to the committee in due course.
- The brief begins at Chapter 2 (Chapter 1 is an introduction) and follows the numbering in the report. 'R' numbers are recommendations as numbered in the full list at the Annex. Paragraph numbers refer to the position of the recommendation in the main body of the report.
- The full list of recommendations is at the Annex and you have a hard copy of the report.
- The report from the Joint Pre-legislative Committee contains 148 recommendations of which 144 were agreed unanimously – it was on the issue of media ownership that the committee did not agree and four recommendations were reached by majority decision.
- The committee received 200 pieces of written evidence and took ten oral evidence sessions. The committee also held two discussions with experts on the technology background and policy issues in the Bill.
- The internet forum that was set up in and monitored by the Hansard Society attracted nearly 400 registered participants.

Chapter 2 The framework of the new regulator

i) General Duties (R3,4)

R 3 The Committee recommends that 'customer' be replaced with 'consumer' (where an economic relationship is not implied). [para 20]

- We are satisfied that the definition of 'customer' in the Bill is sufficiently wide to encompass 'consumers' but we will be considering this option for handling reasons.

R 4 The committee seeks clarity of OFCOMs duties and objectives through a principal duty replacing Cl 3(1)(a) to (d). [para 26]

- Radiocomms Agency does not want to see the importance of optimal use of spectrum for the benefit of the UK diminished. Careful consideration of pecking order of duties is needed.

ii) Structure and functions of OFCOM

a) Main Board (R6,R7)

R 7 Recommend increasing the size of the main Board. [para 30]

- This is something which Lord Currie has already acknowledged would be beneficial. Note that they do not advocate expansion for 'representative purposes'.

b) Content Board (R8-R12)

R 8 Key recommendation is that specific functions (stated in recommendation 8) are assigned to the content board in the Bill. [para 34]

- This runs counter to the overall approach taken thus far, of avoiding being prescriptive about the precise functions on the face of the Bill.

c) Consumer Panel (R13-R16)

R 15 Key change recommended is that appointments to the Panel be made by the Secretary of State to safeguard independence and that the Panel elects its own chair and determines its own committees. [para 47]

- The current draft gives the Secretary of State the final say in approving appointments to and removals from the Panel, so OFCOM will not be free to decide these matters of its own volition. This will provide a very clear guarantee of independence for Panel members. It follows the precedent of the Financial Services Consumer Panel as provided in the Financial Services and Markets Act 2000.

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- We will consider giving the panel power to determine its own committees.

e) Employment and training (R19)

R 19 Want Secretary of State's powers to add other forms of equality of opportunity (granted under Clauses 11(6) and 224(8)(a)) removed or subject to affirmative resolution procedure.[para 54]

- Will consider, though House of Lords Select Committee on Delegated Powers and Regulatory Reform concluded that negative procedure was appropriate if the power was only used to reflect changes in the general law, which is the intention.

f) Representation of nations and regions (R20-23)

Key recommendations are that the proposed national and regional councils of the Content Board should be on the face of the Bill and that OFCOM should be under a duty to maintain offices in Scotland, Wales and Northern Ireland. [para 56]

- Can consider all of these options – possibly with a view to retaining some to give as concessions if needed during passage

iii) Better Regulation (R24-36)

The committee supports 'proportionate, consistent and targeted' regulation rather than the concept of 'light touch' and has made several recommendations that we will consider on self-regulation.[para 67]

It recommends that promptness standards for OFCOM should be set out on the face of the Bill. [para 85]

- Might be impractical but we will consider this in light of responses we receive from industry as part of the public consultation.

v) OFCOM and the Secretaries of State (R40-43)

Committee feel the power to add to the powers of direction goes too far and recommend that it be removed. Recommend that Secretaries of State should be subject to the general duties in carrying their regulatory functions and that they should submit an annual report on their functions (under all existing legislation) relating to spectrum management.[para 102, 106,107]

- Might want to consider the option of an annual report

Chapter 3 Economic Regulation**ii) Regulation of networks and services****b) The scope of networks, services and associated facilities (R46)**

Recommend that the Government explain apparent divergences between definitions (of electronics communications networks, etc.) and those of the Directives. [para 124]

- Will consider. Legal advice is that the differences in wording are necessary: some commentary on the reasons seems unavoidable, but we should not commit to exhaustive explanation.

c) Designation, notification, condition-setting and enforcement

R 47 Govt to clarify whether procedural safeguards under the sectoral powers should match those in the Competition Act and respond to concerns raised by BT and others. [para 131] clauses 23-28, 32, 77 and 78

- Will consider. Not examined in detail before, though we believe the procedures in the Bill are ECHR compliant. We will re-examine the parallels between procedures under the sectoral regime and those under the CA 1998. But some differences may be justified because the ex ante nature of the sectoral rules makes it easier for companies to be clear as to what their obligations are. And the Directives require a period of grace in which the offender can put right the breach. Penalties would only be imposed if the target has failed to comply within the specified period; but there is no such period of grace under the CA.

R 51 Amend cls 98 & 99 (information to OFCOM for general monitoring/enforcement purposes) to provide protection for individuals against self-incrimination and for items subject to legal professional privilege.[para 137]

- Will consider sympathetically. Also raised by Joint Committee on Human Rights as 'serious' omission. Clause 94(3) already provides these safeguards for information supplied to assist OFCOM in exercise of its power to support third party proceedings.

R 54 Power of SoS to direct OFCOM to require a provider to suspend or restrict service [para 140] cl 106.

- Will consider. JCHR suggests this be qualified by requirement that SoS have 'reasonable grounds to believe or suspect' that the action is necessary (for security or public health or safety reasons). Query whether the additional term would add anything useful, given existing general requirements of reasonableness.

R 55 Govt. to consider whether retention of broad powers of S: 94 Telecoms Act (power to issue directions to operators on grounds of national interest) compatible with ECHR, and explain how powers have been used in the past and might be used in the future. [para 141]

- Will consider. Not possible to explain use that has been or might be made, but some statement of justification inevitable in view of the Committee's comments.

d) Must carry / must offer / must distribute (R56,57)

Recommend that there is a requirement on the Secretary of State to consult OFCOM and affected parties in carrying out a review of the list of must carry services and have regard to various things listed in the recommendation. Also recommend that resolution occurs at the earliest possible opportunity (ie not 'failsafe' provisions). [para 145]

- Because the clauses were published after the main body of the bill, we have yet to see the final response of the broadcasters and other interested parties on our "Must carry / must offer" provisions. We will need to give careful consideration to the observations of the committee over both the definition of channels to be carried, as well as the timing of any introduction, alongside other comments that we will be receiving next week from Sky, the cable companies, and the public service broadcasters.

e) Universal service conditions (R58-60)

R 59 SoS to give OFCOM guidance on relative pricing of universal services between different customers, and to retain power of final determination. [para 156]

- Will consider. Wouldn't want OFCOM or SoS to determine prices for universal services, as that would make it impossible to escape from a permanent price-control regime. But guidance, that, e.g., prices should be uniform across the UK, would be reasonable.

g) Significant market power conditions (R62-66)

Various recommendations on drafting and seeking clarification that we will consider/provide where possible.

iii) Spectrum use and management (R67-71)

The Committee affirm the importance of spectrum management in OFCOM's role and have generally accepted the thrust of proposals in the Bill. They feel that recent publication of detailed proposals on spectrum trading and RSAs would justify further scrutiny by the Trade and Industry Select Committee.

R 68 suggests making the Bill more explicit about the type of powers of spectrum direction and the associated Parliamentary procedures. Radiocomms Agency suggests the Secretary of State may wish to consider this further before responding. [para 179]

Other spectrum recommendations should be acceptable in principle.

R70 Recommend that no incentive-based spectrum charges be imposed on the BBC, Channel 4 and S4C in respect of spectrum use for analogue transmissions, until at least shortly before digital switchover [paragraph 188].

- The draft of the Government's response to the Cave report, to be published shortly, acknowledges that spectrum charging is a potentially useful tool in promoting efficient use of the spectrum: but further acknowledges that any charging should be introduced gradually, only after full consultation with the broadcasters, and only in ways that clearly incentivise digital switch-over.
- The impact of any charges will not be felt until we get very close to switchover - which coincides with the Committee's views - though we will be able to demonstrate to all other spectrum users (not least other public service spectrum users) that incentive pricing is also being applied to this sector.

iv) Appeals (R72,73)

R 72 Bodi(es) hearing appeals on networks, services and spectrum decisions will need appropriate expertise. Providing it does not create a further appeal on the merits, see a case for appeals on price controls to go to the Competition Commission. [para 196]

- The CAT already has procedures to draw in appropriate expertise as required. Will consider the case for price control appeals to go to the Commission, taking account of any views expressed in consultation responses.

v) Competition Law (R74-78)

R 74,76 OFCOM should have the resources and skills necessary to achieve swifter and better regulation under competition law; and should be required to

consider whether competition law would be preferable to any use of a sectoral discretion, and give reasons for its decision.[para 207,209]

- Will consider. The Government expects that OFCOM will generally use competition law in preference to sector-specific provisions. It will be properly resourced to carry out all its functions.

R 77 compliance by BBC with Fair Trading Commitment should, as regards competition and state aid issues, be enforced by OFCOM [paras 210-215].

- Will consider. (But impractical. The Fair Trading Commitment is part of the BBC's agreement with the SoS. Consequently, OFCOM can have no role in its enforcement as such. To the extent, however, that any particular potential breach of the Commitment would also be a breach of the CA 1998 - which is likely to be the case in at least some, but probably not all, instances - then OFCOM would be able to take action against it.)

Chapter 4 Media Ownership

i) Media ownership controls and competition law (R79-81)

Recommend a plurality test.[para 224]

- Already considered and rejected.
- The notion of a cross-media plurality test was one of the options put forward in the media ownership consultation paper. It was not popular, mainly because of the uncertainty involved in its application – businesses generally preferred to have a set of clear rules. There seems no need to have BOTH specific media ownership rules AND a plurality test, as the Committee suggest.

iii) Restrictions on religious ownership (R84,85)

Committee questions compatibility with Human Rights Convention and recommends Government consider the case for permitting OFCOM to impose additional licence conditions on religious owners to provide assurance against licence breaches. And that criteria for judging OFCOMs decisions on religious ownership be put on the face of the Bill so that Parliament can debate.[para 238].

- Reject. We have been advised that the restrictions are ECHR compatible. There are already content controls for religious broadcasting. The continuing restrictions are based on considerations of spectrum scarcity.

iv) Restrictions on nationality of ownership

R86 No to non-EEA – OFCOM should recommend change.[para 249]

- Resist. It is not clear what additional evidence OFCOM would be able to gather to enable them to make a more-informed decision.
- The existing rules are inconsistent and limit the potential for investment.
- Content regulation and UK audience expectations will prevent the 'dumping' of US content on the market.

v) Ownership of Channel 3 licences and Channel 5 (R87-90)

Cross ownership should not be allowed before OFCOMs first review of media ownership [para 89]

- We have already made the case for lifting ownership restrictions on Channel 5. We will keep only rules only where they are necessary to safeguard the nature of democratic debate.
- Unlike ITV, Channel 5 is not at present a mass-audience medium of significant influence. It covers only 80% of the UK and has a 6% audience share.
- We therefore propose to remove all restrictions on its ownership, but will retain the flexibility to alter the nature of the Channel 5 licence requirements if its audience share grows.

vi) Radio ownership and regional cross-media ownership (R91-93)

Recommend that, if the "three plus one" scheme for radio ownership is adopted, the Government amend Part 3 of Schedule 14 to place both an objective and measurable definition of a "mature" or "well-developed" local commercial radio market to which the "three plus one" scheme applies and the broad parameters of the proposed scheme on the face of the Bill [para 262]

- Consider. We are still looking at the different arguments of the CRCA and the Radio Authority on this issue.
- Under the scheme advocated by the Radio Authority, a mature or well-developed market is one containing 5 or more commercial stations.
- The detail of whatever scheme we adopt will be made clear in a draft Order, to be published alongside the Bill.

vii) Newspaper mergers (R94,95)

Recommendations do not raise any particular issues in developing the existing policy in this area. [para 279, 280]

viii) Parliamentary control over legislative change (R96)

Recommend that the provisions of the final Bill on media ownership should not include any powers for the Secretary of State to revise primary legislation by means of secondary legislation other than in the limited case of the nominated news provider for Channel 3 [paragraph 283].

- Resist. One of our key objectives has been to make the legislation 'future proof' by building in flexibility. One of the major faults of the existing Act has been its inability to adapt to fast-changing markets.

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Ownership rules must move with the times, and that means using secondary legislation.

Chapter 5 Content Regulation**i) The scope of the licensed sector (R97,98)**

Recommend that if video-on-demand is to be licensed provisions should be in the final Bill subject to full parliamentary scrutiny, rather than in secondary legislation (paragraph 298). Recommend that the Government consider the cases for removing the condition in Clause 238(5) and for granting OFCOM discretion in choosing whether to license all services falling within the definition of licensable content services [paragraph 299].

- We are currently reviewing the provisions with regard to TLCS. On the narrow issue of whether, or not, to include a provision on the face of the bill to include VoD within the licensable framework, we would need to be confident both that we did not close off future options of excluding it, or bringing other kinds of content within the licensable regime.
- On the broader issue of the different ways of approaching TLCS in the bill, we are already consulting with practitioners around similar proposals, and will consider these proposals very seriously, including the suggestion of amending clause 238 to allow OFCOM greater discretion.

vii) The economics and regulation of content production (R109-117)

R109, 110 Training conditions applied to broadcaster should apply to sector as a whole. And OFCOM's role in fostering links between broadcasting and film.[para 317, 318]

- Will consider, but not clear whether specific provision is necessary. OFCOM's general function (clause 11) relating to employment in broadcasting has been deliberately drafted to cover persons "for work in connection with the provision of [television and radio] services otherwise than as an employee" – ie freelancers. We would also expect OFCOM to develop links with other relevant bodies as part of its duty under this clause to promote the development of opportunities for training.

R111 OFCOM should monitor levels both for the time allocated to independent productions and for the value of such independent productions in line with the Secretary of State's declared intention in evidence to us that the licence fee should be "venture capital for the nation's creativity" [paragraph 324].

- Will consider, though these provisions already require broadcasters to commission a "range and diversity" of independent productions, both in

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terms of the cost of acquisition as well as the types of programmes involved.

R112 Government should set out its views on the merits of defining independent productions to include all programmes commissioned by a broadcaster from whom the producer is independent in ownership terms [paragraph 325].

- Noted. Ministers were invited to consider this alongside other changes to the 25% quota but were not persuaded of the arguments. Hard to see how the proposal can be squared with a quota designed to increase competition, multiply sources of supply and stimulate creativity and new talent. Also likely to run into difficulties with the TVWF Directive. The draft Bill contains other specific measures to ensure that programme production by regional ITV companies is sustained.

R113 OFCOM should be required to review the whole of the programme supply market, together with its associated intellectual property and other rights, including the role of the BBC in that market, with a view to determining whether the market is operating in a fair, transparent and non-discriminatory manner. Also that OFCOM be required under the terms of the final Bill to undertake the first such review immediately after the coming into force of the Act. OFCOM should then consider whether to refer the operation of the programme supply market to the Competition Commission for market investigation under the terms of the Enterprise Bill [paragraph 326].

- Will consider. This is much more acceptable than the proposed PACT Code of Practice, which put the verdict before the trial. Tessa Jowell is considering announcing a Government review of the programme supply market in next few weeks.

R114. Recommendation on definition of original productions.[para 328]

- Will consider. We are already looking again at the definition of original production to ensure that acquired US programming does not slip through the net.

R117 Channel 3's regional production requirements [para 332]

- Will consider, but no reason as drafted why a suitable amount could not be a substantial amount. Clause 193 specifically relates to regional production of network programmes. Regional production of regional programmes is covered in clause 194.

viii) The public service broadcasting remit and the remits and regulation of commercial public service broadcasters (R118 – 128)

- All these recommendations to be considered [para 338-351]. However, many of them reopen issues concerning the balance between self-regulation and OFCOM intervention which were explored at length during the Bill's drafting and which inevitably involve a diversity of views among broadcasters and others. The notion of OFCOM's reporting remit extending beyond broadcasters with a formal PSB remit would clearly involve a substantial departure from the current policy approach.

R127,128 OFCOM should have power to review financial terms of Ch3 and Ch4 licences at mid-point of licence.[para 352-355]

- Accept that there is a risk that Channel 3 and Channel 5 licensees will not see any attraction in the new digital licences and that licensees are upset about the loss of right of renewal. We are already considering further provisions and how licences will be allocated after 2014. A submission went to Ministers on 11 July recommending provisions in the Bill for a public service digital broadcasting licence, valid until 2014 and for the Secretary of State to determine by order, whether the allocation of licences after 2014 should be by re-auction or renewal, after consultation, and on the basis of a report by OFCOM, The submission also seeks a decision on the ITC proposal that there should be an automatic mid point review of the financial terms.

xi) OFCOM and the BBC (R132-141)

- All recommendations for consideration [para]. Some of those relating to the content of the Agreement cover matters we already have in hand, eg the provision of information to OFCOM and the payment of charges. Ministers have so far explicitly reserved their position on OFCOM fines. We aim to publish the draft revised Agreement for consideration alongside the Bill itself

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ANNEX

1. We recommend that, in responding to our Report, the Government respond also to the points made by the Delegated Powers and Regulatory Reform Committee (paragraph 8).

2. We commend the way the Government consulted industry and consumers in the run up to publication of the draft Communications Bill and recommend that future Bills also follow this route (paragraph 11).

3. We recommend that, in the general duties of OFCOM and elsewhere in the Bill where a specific commercial relationship between a customer and a service provider is not being referred to, the term "consumer" be used in preference to the term "customer" and that consumer be defined so as to encompass all those who benefit or might benefit from the provision of services and facilities in relation to which OFCOM has functions (paragraph 20).

4. We recommend that it be the principal duty of OFCOM, in carrying out its functions -

(a) to further the long-term interests of all citizens by -

(i) ensuring the availability of a diversity and plurality of high quality content in television and radio and

(ii) encouraging the optimal use for wireless telegraphy of the electromagnetic spectrum; and

(b) to further the long-term interests of consumers by promoting the efficiency of electronic communications networks and services, and broadcasting.

— and to do so wherever possible by promoting effective competition in national, regional and local communications markets throughout the United Kingdom (paragraph 26).

5. We recommend that Clause 3(2) be amended to require OFCOM to have regard to the desirability of encouraging investment and innovation in communications markets (paragraph 27).

6. We agree with the Government that it would be wrong to expand the main Board's membership for representative purposes that could well detract from its strategic role (paragraph 29).

7. We recommend that the Secretary of State make an order under section 1 of the Office of Communications Act 2002 to increase the maximum number of members of the Board to nine, and consult the incoming Chairman of

OFCOM on the number of members of the Board to be appointed before OFCOM assumes its regulatory functions (paragraph 30).

8. We recommend that the final Bill endow the Content Board with executive and determinative responsibility for the functions of OFCOM relating to programme standards for television and radio services under Clauses 212 to 220, including all functions relating to individual complaints with respect to fairness and privacy under Clause 219. We further recommend that the Content Board be assigned the main day-to-day role in respect of the public service remit for television and OFCOM's specific functions in relation to licensed public service television broadcasters, but subject to the ultimate decision-making authority of the main Board (paragraph 34).

9. We recommend that Clause 17 be amended to require at least one non-executive member of the main Board in addition to the Chairman of the Content Board to be a member of the Content Board (paragraph 35).

10. Over and above its contribution to OFCOM's annual report, we recommend that the Content Board be given a right to publish its views when it considers it appropriate to do so (paragraph 36).

11. Provided that such a role remains distinct from the executive, regulatory functions of the Content Board in respect of standards on licensable content services, we support the proposed provisions for the Content Board to play a role in examining content transmitted by means of all electronic communications networks (paragraph 37).

12. We welcome and support the proposed function of OFCOM in relation to media literacy in Clause 10 of the draft Bill. We recommend that executive responsibility for this function be assigned to the Content Board (paragraph 38).

13. Our earlier recommendation about the merits of the term "consumer" rather than "customer" and the need for a broad understanding of the former term apply particularly in the context of the remit of the Consumer Panel. We recommend that Clause 96 be amended to enable the Consumer Panel to advise on matters relating to the interests of all consumers in the marketplace, rather than the customers of particular providers (paragraph 41).

14. We see no case for the creation of a separate small business panel. However, it is important that the interests of small businesses, as well as those of domestic customers, are reflected in the composition of the Consumer Panel (paragraph 42).

15. We welcome the Government's commitment to the role and independence of the Consumer Panel, but we do not consider that the current proposals provide sufficient safeguards for this independence. Although OFCOM itself must have consumer interests at the heart of its work, the Consumer Panel, within its defined remit, ought to be the conscience, not the creature of OFCOM. We recommend that Clause 97 be amended so that all

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appointments to the Panel and all removals from it are the responsibility of the Secretary of State, having regard to the advice of OFCOM. We further recommend that the Consumer Panel be able to elect its own Chairman and to determine any committees of the Panel (paragraph 47).

16. We support the current proposals in the draft Bill, whereby certain issues could be examined by the Consumer Panel at the instigation of OFCOM's main Board (paragraph 48).

17. We see no rationale for an economic or competition board with executive functions (paragraph 50).

18. Paragraph 14 of the Schedule to the Office of Communications Act 2002 gives OFCOM a general power to establish committees. It may wish to exercise this power to establish an industry or economic advisory panel, but we do not favour a further fettering of OFCOM's internal structures by placing such a requirement on the face of the Communications Bill (paragraph 51).

19. We would prefer to see the powers granted under Clauses 11(6) and 224(8)(a) removed; if retained, we recommend that they be subject to affirmative resolution procedure (paragraph 54).

20. We welcome the proposal for national and regional Councils reporting to the Content Board through the designated national members and we recommend that formal provision for their establishment be made on the face of the Bill. We further recommend that, in establishing such Councils, OFCOM be required to have regard to the views of relevant devolved institutions (paragraph 56).

21. We have already recommended that the Consumer Panel be granted a power to establish such committees as it considers appropriate. We expect that this power will be exercised to establish consumer committees for Scotland, Northern Ireland and Wales (paragraph 57).

22. We recommend that OFCOM be placed under a statutory duty to maintain offices in Scotland, Wales and Northern Ireland (paragraph 58).

23. We recommend that OFCOM be required to include in its annual report accounts of its activities in Scotland, in Wales and in Northern Ireland (paragraph 59).

24. We support the duty on OFCOM to have regard to the principles that regulatory activities should be "proportionate, consistent and targeted only at cases in which action is needed". We recommend that these principles, rather than an undefined commitment to "light touch" regulation, should govern the provisions of the final Bill regarding regulatory burdens (paragraph 67).

25. We recommend that Clause 5(1) be amended to require OFCOM to review its activities and functions to ensure that regulation is at the minimum level necessary to enable OFCOM to fulfil its general duties, and for the

purpose of fulfilling Community obligations and its functions under competition law (paragraph 68).

26. We recommend that, in order to reinforce the duty to maintain the minimum regulation necessary under Clause 5, OFCOM be given a power to review and foster the development of effective and accredited self-regulatory bodies in the communications sector. Accreditation would depend upon those bodies meeting criteria relating, for example, to:

- the policy objectives to be implemented;
- the adequacy of funding available to the body;
- the independence of the self-regulatory mechanism from the sector being regulated;
- the transparency and accountability of the body, including a requirement to publish a full annual report on its activities, available to Parliament.

Accreditation would bring with it an expectation that the sector concerned would be subject to less statutory regulation. Withdrawal of accreditation similarly would imply the need for additional or re-imposed statutory regulation. Accreditation should also be able to extend to Codes of Practice as an alternative to statutory regulation, consistent with the general approach used in the Regulatory Reform Act 2001 (paragraph 71).

27. We consider that it should be an early priority for OFCOM to consult on the scope for creating a more coherent system of advertising regulation, with a greater element of self-regulation for broadcast media. We recommend that the Government seek to ensure that the final Bill does not erect unnecessary barriers to the evolution of accredited self-regulation in broadcast advertising (paragraph 73).

28. We recommend that OFCOM be required to conduct regulatory impact assessments, including competition assessments, for all of its regulatory activities that may have a significant effect not simply in terms of regulatory burdens but in terms of market behaviour and competition within markets (paragraph 74).

29. We agree that there should be some cost savings from combining five regulators as one, but we urge caution in seeking to apply too much pressure on OFCOM to secure cost reductions. This may lead to false economy and strike at the heart of the purposes of the Bill. Effective regulation does not come cheap, and the long-term costs to industry and to the public will be greater if OFCOM lacks the resources to undertake effective regulation (paragraph 77).

30. We recommend that the principles underpinning charges under Clause 29, namely that charges should be fixed in accordance with clear principles and related only to relevant functions, be extended to all administrative charges under the Communications Bill and the broadcasting legislation that it

amends, except where incentive charging for wider purposes is intended (paragraph 79).

31. To ensure that OFCOM has adequate resources to undertake its competition law functions, we recommend that those functions be funded directly by the Exchequer. We would prefer to see OFCOM's central functions funded proportionately and transparently through a levy on all companies above a certain size in the regulated sectors. If this proves incompatible with the EC Directives, we recommend that such costs should also be met from the Exchequer (paragraph 80).

32. Clause 6 fails to impose necessary requirements on OFCOM to meet promptness standards. First, we recommend that time limits be specified on the face of the Bill, including a requirement for the completion of market analyses and market power determinations under Clause 64 within four months other than in exceptional circumstances of a kind to be specified in the Bill. Second, we recommend that promptness standards under Clause 6 be determined by the Secretary of State following consultation with OFCOM and other interested parties, rather than by OFCOM itself. Third, we recommend that OFCOM be placed under a statutory duty to account for all failures to meet time limits and promptness standards in its annual report. Fourth, we recommend that, by analogy with the relevant provisions of the Competition Act, a party aggrieved by a failure of OFCOM to determine a matter for decision in accordance with time limits or promptness standards be enabled to seek a direction by a court to OFCOM if the court is satisfied that there has been undue delay by OFCOM. Finally, we recommend that paragraph 7 of Schedule 5 and paragraph 7 of Schedule 6 to the Competition Act 1998 be brought into force at the earliest possible opportunity (paragraph 85).

33. We do not favour a formal statutory duty on OFCOM to meet in public. We nevertheless urge the main Board of OFCOM and its subsidiary bodies to give early and careful consideration to ways of ensuring wider public engagement with its work; this might include regular meetings at which Board members would listen to, and exchange views with, members of the public across the United Kingdom (paragraph 89).

34. We recommend that OFCOM be required to include in its annual report an interpretation of its principal duty and an account of the way in which that interpretation has informed its work during the period. We further recommend that OFCOM be required to make a statement on decisions that, in its opinion, give rise to significant issues relating to the interpretation of the principal duty and be encouraged to give reasons generally for its decisions wherever possible (paragraph 92).

35. In respect of the proposed use of order-making powers by OFCOM under Clause 82, we share the view of the House of Lords Select Committee on Delegated Powers and Regulatory Reform that the power in question (to vary the lower limit under the electronic communications code below which

compensation is not payable) is more properly exercised by the Secretary of State than by OFCOM (paragraph 94).

36. We are in no doubt that the scope of OFCOM's regulatory activities is such that it will be incumbent on the two Houses to improve their effectiveness in holding regulators to account. The House of Lords Liaison Committee has already declared itself in favour in principle of the establishment of a House of Lords Communications Select Committee when the new legislation has come into force. This is a welcome development. As far as the House of Commons is concerned, Chris Smith has suggested that a special joint sub-committee of the Culture, Media and Sport and Trade and Industry Committees be established to monitor the work of OFCOM, receive reports from it on a regular basis and hold it to account. Although this is ultimately a matter for the House of Commons and its committees to determine, we consider that, given the breadth of OFCOM's remit, this proposal has very considerable merit (paragraph 95).

37. We recommend that OFCOM, under the general powers vested in it by section 2 of the Office of Communications Act 2002, publish for consultation initial statements of intention regarding the fulfilment of the regulatory functions it will assume under the Communications Bill. We further recommend that Clause 21 be amended to require the pre-commencement regulators to have regard to such statements in fulfilling their functions before they pass to OFCOM (paragraph 97).

38. If OFCOM becomes little more than an agglomeration of the existing regulators - badge engineering for five regulators under one roof - then the process of establishing OFCOM will have failed (paragraph 99).

39. We urge the Chairman of OFCOM, as an early priority upon appointment, to review the provisional arrangements put in place prior to that appointment, to ensure that his or her hands are not tied by assumptions made by existing regulators. The incoming Chairman needs a clean slate in order to create a new culture (paragraph 100).

40. The purposes prescribed under Clause 7(3) are wide indeed and we are unconvinced that the power in Clause 7(8) to add extra purposes is warranted. We recommend accordingly that Clause 7(8) and (9) be removed (paragraph 102).

41. We recommend that a requirement be placed on the Secretary of State to publish a direction under Clause 8 equivalent to the analogous obligation under Clause 7 (paragraph 103).

42. We recommend that the general duties in the final Bill be applied to the Secretaries of State in the exercise of their functions under that Bill as well as to OFCOM, except when the Secretaries of State are exercising powers for public interest purposes prescribed in relevant Clauses (paragraph 106).

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43. We recommend that the Secretaries of State be required to lay before Parliament a joint annual report on the exercise of their functions under the Communications Bill, the Office of Communications Act 2002, the 1984, 1990 and 1996 Acts and the other enactments relating to the management of the radio spectrum (paragraph 107).
44. The success of OFCOM will not be assessed by its ability to re-fight past regulatory battles, but by its ability to deal with current and future concerns in a proportionate, targeted and prompt manner. To a considerable extent, this will depend on its capacity, armed with increased competition powers, to bring about a step change in the effectiveness of economic regulation in the communications sector as a whole, and the telecommunications sector in particular. It is with this objective in mind that we have framed many of the recommendations in this Chapter. Only if this objective is achieved will the new regulatory regime provide the contribution to the more dynamic and competitive communications and media markets that the Government is seeking (paragraph 113).
45. We recommend that an additional provision be inserted in Chapter 1 of Part 2 with the aim of ensuring that, so far as is possible (having regard to any relevant differences between the provisions concerned), relevant questions arising under that Chapter are dealt with in a manner which is consistent with the treatment of corresponding questions arising in community law, including in the relevant Directives (paragraph 117).
46. We recommend that, in its response to our Report, the Government reply to the concerns expressed and explain in more detail its reasoning for the way in which it has translated the provisions of Article 2 of the Framework Directive into domestic law in Clause 22 (paragraph 124).
47. We recommend that the Government clarify whether its intention is that procedural safeguards for the enforcement of sector-specific powers under Chapter 1 of Part 2 should match those in the Competition Act and respond to the particular concerns in this regard raised in evidence (paragraph 131).
48. We share the view of the House of Lords Delegated Powers and Regulatory Reform Committee that the power to vary maximum penalties under Clauses 28 and 88 either ought to be explicitly confined to changes in the value of money or otherwise ought to be subject to affirmative resolution. We recommend accordingly. We further recommend that the power to vary the multiplier for the purpose of calculating the maximum penalty under Clause 32 be subject to affirmative resolution (paragraph 132).
49. We recommend that the order-making power in Clause 77(5) be removed; if it is retained despite our recommendation, it should most certainly be subject to affirmative resolution procedure (paragraph 134).
50. We recommend that OFCOM be placed under a statutory duty to prepare and publish guidance on the interpretation of appropriate and proportionate penalties in Part 2 of the Bill (paragraph 135).

51. We recommend that Clauses 98 and 99 be amended to provide protection against self-incrimination and for items subject to legal professional privilege (paragraph 137).

52. We find the absence of constraints on information-gathering under Clause 94 puzzling in view of the restrictions imposed by Clauses 99 and 104 on the other information-gathering powers under Clause 98. We recommend that information-gathering powers under Clause 94 be subject to restrictions analogous to those under Clauses 99 and 104 (paragraph 138).

53. We urge the Government to give the most careful consideration to the concerns of the Joint Committee on Human Rights about Clause 93 (paragraph 139).

54. We again urge the Government to give the most careful consideration to the concerns of the Joint Committee on Human Rights about Clause 106 (paragraph 140).

55. Before undertaking a technical revision of section 94 of the Telecommunications Act 1984, the Government should ask itself the prior question of whether such broad powers are either required or compatible with Convention rights. If the provision is retained in an amended form, we recommend that the Government, in its response to this Report, give an account of the use to which the provision has been put and an explanation of how it is envisaged it might be used in future (paragraph 141).

56. We recommend that Clause 49(4) and (5) be amended to specify a requirement on the Secretary of State to consult OFCOM and affected parties in carrying out a review of the list of "must-carry" services and to have regard to the public service benefit of any service, to capacity constraints and to the principle of proportionality in coming to any decision leading to an order under subsection (5) (paragraph 145).

57. Tessa Jowell characterised the proposed provisions on "must carry"/ "must distribute"/ "must offer" as "a failsafe". We see no logic in the Government providing itself and OFCOM with a valuable failsafe and then circumscribing the time at which it can be used. We recommend that the final Bill seeks to give effect to the "must-carry"/ "must-offer"/ "must-distribute" arrangements on all platforms and the most effective solution to regional distribution, as determined by OFCOM, at the earliest possible opportunity (paragraph 152).

58. We presume that the arrangements in Clause 50 are being made to enable the Secretary of State to give effect to any revision of universal service obligations arising from a review by the European Commission under Article 15 of the Universal Service Directive, although we consider both the Bill and the Explanatory Notes could be clearer on the linkage between the definition in that Directive and the Secretary of State's powers under Clause 50 (paragraph 154).

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59. We consider that, given the wide political and social significance of pricing for universal services, the Secretary of State should play a more direct and politically accountable role in the matter. We recommend that this aim be secured by amendments along the following lines: the Secretary of State should be required under Clause 50(3) to give guidance about relative pricing for the same service among different customers; OFCOM should then be obliged to publish proposals relating to pricing in respect of universal service conditions, including the anticipated effects on the market of the universal service in question and the arrangements (if any) proposed for recovering the relevant costs; the Secretary of State should then make a final determination (paragraph 156).

60. We recommend that, in its response to this Report, the Government clarify whether it considers that public funding of the kind permitted under Article 13(1)(a) of the Universal Service Directive could be made available without explicit legislative provision. We also note that the Government has not made direct provision for the exemption of undertakings with limited turnover, as permitted by Article 13(3). We recommend that the Government should either confirm that such exemption would be possible under Clause 56 as drafted or, if not, make such provision in the final Bill (paragraph 157).

61. The provisions of Clauses 59, 209 and 210, taken together, appear to us to provide ample provision to enable OFCOM to secure appropriate prominence for public service radio channels if it is satisfied that there is evidence that such regulatory action is proportionate and necessary. It is important that OFCOM, in preparing the Code, should have regard not only to the interests of public service broadcasters, but also to the interests of commercial broadcasters, whose classification by genre, listing and degree of prominence in programme guides may be instrumental to their business and who will need transparency in determining these matters; and, if they are dealt with unfairly, a right to appeal for independent determination by OFCOM (paragraph 163).

62. We recommend that the Government consider whether it is satisfied that the current drafting of Clause 64 fully reflects the spirit of OFCOM's obligations in respect of European Commission recommendations and guidelines (paragraph 168).

63. We recommend that Clause 67 be amended to place it beyond doubt that the aim of market analyses is to determine whether a specific market is "effectively competitive" and to ensure that SMP conditions are only imposed where there is not effective competition. We further recommend that other provisions on SMP and sector-specific regulation more generally be reviewed to ensure that they reflect the same principle (paragraph 170).

64. We recommend that Clause 67 be amended to make clear the mandatory character of periodic market analyses (paragraph 171).

65. We recommend that the Government clarify the proposed role of competition authorities in market analysis in its response to our Report and ensure that the main terms of any secondary legislation giving effect to the relevant provision are made known to Parliament at an early stage of the Bill's passage (paragraph 172).

66. We recommend that the Government (a) consider whether it would be compatible with the terms of the Access Directive to enable OFCOM to have regard to the costs of provision of the proposed network access, as an explicit aspect of feasibility under the terms of Clause 68(4), (b) report on the outcome of that consideration in its response to this Report, and (c) reflect that factor in the final Bill if it considers it possible and appropriate to do so (paragraph 173).

67. We recommend that the Government ensure that the final Bill, including amendments to the Wireless Telegraphy Acts, provides OFCOM with a set of harmonised objectives, consistent with the general duty and incorporating the factors under section 2 of the 1998 Act, in undertaking its functions relating to spectrum management and use (paragraph 176).

68. There is a wider public interest in the allocation, assignment and management of spectrum that OFCOM, even with its duty to further the interests of all citizens in its optimal use, may not be best placed to judge. It is important, however, that directions under Clause 112 concentrate on the purposes to be achieved, rather than the details of the means of achieving those purposes, and we recommend that the Government consider carefully whether Clause 112 could be amended to reflect this. We further recommend that any order containing a direction under Clause 112 be laid before Parliament in draft for approval by both Houses before coming into force unless the Secretary of State is satisfied, on grounds such as commercial confidentiality, that the procedure set out in subsection (6) for retrospective approval of such orders needs to be followed (paragraph 179).

69. We recommend that the Government ensure, by means of amendment to Clause 119 if necessary, that there is transparency about the means by which spectrum payments by Government departments are calculated (paragraph 184).

70. We recommend that no incentive-based spectrum charges be imposed on the BBC, Channel 4 and S4C in respect of spectrum use for analogue transmissions, until at least shortly before digital switchover (paragraph 188).

71. We believe that the Government's developing plans for spectrum trading and spectrum management more generally would repay closer parliamentary scrutiny than it has been possible for us to undertake given the limited time available to us and the uncertainty surrounding the Government's policy prior to publication of its response to the Cave review. We envisage that this scrutiny might be undertaken by the Trade and Industry Committee of the House of Commons (paragraph 192).

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72. The new framework of sector specific powers established in Part 2 of the draft Bill will require the body or bodies hearing appeals to secure appropriate expertise and bear in mind the specific characteristics of the powers being exercised. Provided that it would not entail a further appeal on merits, we see a case for price control appeals to be heard by the Competition Commission (paragraph 196).

73. We recommend that the final Bill establish a general time limit of four months for appeals under Part 2, subject to extension only in specified and exceptional circumstances. We further recommend that, in its response to this Report, the Government sets out its opinion on whether it would be compatible with the EC Directives and Convention rights either to introduce a "leave to appeal" mechanism or to give the appeal body powers to increase penalties in cases relating to enforcement where that body considers the appeal to have been an abuse of process (paragraph 198).

74. We recommend that, before setting conditions of a discretionary character under Clause 35, OFCOM be required to decide whether the more appropriate way of proceeding would be under the Competition Act or Enterprise Act and to give reasons for their decision (paragraph 207).

75. We have seen no convincing evidence to indicate that there will be a problem for the regulators or those in the market with regard to the division of labour between OFCOM and the OFT and we see no need for further provision in the Bill on this matter (paragraph 208).

76. The establishment at the very heart of OFCOM's structure of a properly resourced competition unit, with the full complement of skills and the will to use competition law functions effectively, will be crucial to the new regulator's success. If the Government's aim for less regulation is to be achieved, there must be swifter and better regulation under competition law. If OFCOM lacks the expertise to use competition law optimally, it will fall back on the devil it knows in the form of sector-specific powers, whether or not it is appropriate to do so (paragraph 209).

77. Insofar as the purpose of the BBC Fair Trading Commitment is to reflect how the BBC complies with Competition and State Aid requirements, we believe that, in future, it will be directly relevant to consideration by OFCOM of complaints of anti-competitive effects resulting from BBC activities and will therefore, to that extent, be enforced by OFCOM in applying its concurrent powers (paragraph 215).

78. We recommend that Clause 246 be amended to provide OFCOM with appropriate discretion in interpreting the scope of its competition law functions in broadcasting and related matters, including the creation and distribution of broadcast content (paragraph 216).

79. We recommend that the general merger regime, as introduced by the Enterprise Bill, be amended by the Communications Bill to permit the OFT and the Competition Commission to have regard to plurality, as well as the issue of substantial lessening of competition, in reaching decisions on media mergers. For these purposes, we recommend that plurality be specified as a consideration in respect of which the Secretary of State may serve a public interest intervention notice and that plurality be defined as:

"The public interest in - (i) the maintenance of a range of broadcast media owners and voices sufficient to satisfy a variety of tastes and interests; (ii) the promotion and maintenance of a plurality of TV, radio and other broadcast media owners, each of whom demonstrates a commitment to the impartial presentation of news and factual broadcast programming; and (iii) the promotion and maintenance, in all media including newspapers, of a balanced and accurate presentation of news, the free expression of opinion and a clear differentiation between the two" (paragraph 224).

80. We welcome the proposal to give OFCOM a duty to review media ownership laws including those relating to newspaper ownership on a periodic basis. We consider that the first such review, three years after the coming into force of the Act, could be of crucial importance, given the knowledge of media markets and their regulation that OFCOM will by then have acquired (paragraph 225).

81. In giving effect to OFCOM's reviews, we recommend that the plurality test, as specified above, should be a specified public interest consideration in relation to the powers to refer for a market investigation under Part 4 of the Enterprise Bill (paragraph 226).

82. It is important that the Government clarify, before detailed consideration of the final Bill, how it envisages the broadcasting licensing enforcement regime and the governance systems relating to local government working together in order to ensure proper oversight of broadcasting services provided by local authorities (paragraph 228).

83. We recommend that the prohibition on the holding of broadcast licences by advertising agencies or groups which own advertising agencies be retained (paragraph 229).

84. The case for retention of the general prohibition on religious ownership of national digital radio licences, and for the compatibility of that prohibition with Convention rights, has not been established by the Government to our satisfaction. We recommend that the Government give these matters further consideration before presentation of the final Bill (paragraph 237).

85. We recommend that the Government consider the case for permitting OFCOM, in consultation with religious organisations, to impose licence conditions on religious owners of a kind not applying to other licences, as an additional assurance against breach of licence conditions. We further recommend that the Government include on the face of the Bill criteria against

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which decisions by OFCOM about the appropriateness of religious ownership would be judged. One advantage of this proposal is that it would allow Parliament an opportunity to debate more fully the circumstances in which religious ownership of certain television and radio licences is appropriate (paragraph 238).

86. The lifting of existing restrictions on non-EEA ownership of broadcasting licences should not take place until after a review by OFCOM, and the competition authorities if appropriate, of the programme supply market in British broadcasting (a matter to which we return) and until OFCOM has established itself as an authoritative regulator of, and commentator on, commercial public service broadcasting in the United Kingdom. In the light of its experience, OFCOM would be able to facilitate a decision by Parliament based on evidence, rather than a decision based on largely unproven expectations as would be the case at present. Accordingly, we recommend that primary legislation to lift existing restrictions on non-EEA ownership of certain broadcasting licences should not be brought forward until OFCOM recommends such a change, should it do so following any of its formal, periodic reviews of media ownership (paragraph 249).

87. We agree with the Government that the economic considerations relating to single ownership of ITV will be best determined by the operation of competition law, which would be significantly strengthened by the plurality test we have recommended. We also consider that matters relating to the consolidation of ITV and Channel 5 could properly be decided through competition law, strengthened by the plurality test (paragraph 252).

88. Given the current uncertainty surrounding the ownership structure of ITV and its commitment to investment in news, we have concluded that the Government is right to include a nominated news provider Clause in the Bill, with a power to repeal that requirement. We recommend that OFCOM hold an early review of the restriction on the proportion of the Channel 3 Nominated News Provider that may be owned by any one organisation to determine whether it is the best way of ensuring that there is a strong news provider to compete with the BBC and BSkyB (paragraph 255).

89. In advance of the first review by OFCOM of media ownership, in or around 2006, we consider that the case for lifting the prohibition on joint ownership of Channel 5 and a major national newspaper group has yet to be made. We recommend accordingly that the prohibitions in Part 1 of Schedule 14 be extended to Channel 5 (paragraph 258).

90. We recommend that, as part of its first review of media ownership rules, OFCOM consider the case for specific controls relating to ownership of a major satellite packager and of certain other broadcasting licences (paragraph 259).

91. We recommend that, if the "three plus one" scheme for radio ownership is adopted, the Government amend Part 3 of Schedule 14 to place both an

objective and measurable definition of a "mature" or "well-developed" local commercial radio market to which the "three plus one" scheme applies and the broad parameters of the proposed scheme on the face of the Bill (paragraph 262).

92. We recommend that the "three plus one" rule applying to local radio ownership in well-developed local commercial radio markets be incorporated in legislation, but be subject to a "sunset" provision enabling the rule to be disapplied if OFCOM identifies that there is no further need for the rule in the light of a review of media ownership conducted under Clause 268 (paragraph 266).

93. We welcome and support the concept of three distinct media voices in the commercial sector as a benchmark for cross-media plurality at a sub-United Kingdom level, but we consider it essential, as parliamentary scrutiny progresses, for the Government to clarify how this system will operate in Scotland, Wales and Northern Ireland and in the regions and localities of the United Kingdom (paragraph 267).

94. While we have not been presented with the specific draft Clauses for the newspaper merger regime, we agree that the issue of newspaper ownership is sufficiently important to warrant extended jurisdiction beyond the de minimis limits contained under competition law. However, in doing so, we would wish the Government to have full regard to the need for a substantial deregulatory outcome for the newspaper industry, especially as regards local newspapers (paragraph 279).

95. We support the Government's proposal to give OFCOM a defined advisory role in respect of plurality considerations in the newspaper merger regime (paragraph 280).

96. We recommend that the provisions of the final Bill on media ownership should not include any powers for the Secretary of State to revise primary legislation by means of secondary legislation other than in the limited case of the nominated news provider for Channel 3 (paragraph 283).

97. If the Government does decide that it is appropriate to include video-on-demand services within the scope of the licensed sector, we recommend that it propose to do so by means of provision in the final Bill subject to full parliamentary scrutiny, rather than by means of subsequent secondary legislation (paragraph 298).

98. More generally, we support the powers for the Secretary of State to amend the definitions of licensable content services by means of secondary legislation subject to affirmative resolution procedure as an important means of "future-proofing", but remain to be convinced the Government should not go further at this stage. In particular, we recommend that the Government consider, and in its reply to this Report respond to, the cases for removing the condition in Clause 238(5) and for granting OFCOM discretion in choosing

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whether to license all services falling within the definition of licensable content services (paragraph 299).

99. In the expectation that, in carrying out its tasks under Clause 212, OFCOM would be required to have the most careful regard to its duties under Clause 3(1)(f) and (g), we have concluded that Clause 212 as drafted provides an appropriate framework for the preparation of standards codes by OFCOM (paragraph 300).

100. We support the principles underlying the proposed ban on political advertising contained in Clause 214(2) and urge the Government to give careful consideration to methods of carrying forward that ban in ways which are not susceptible to challenge as being incompatible with Convention rights (paragraph 301).

101. We agree that it will usually be in the best interests of broadcasters and viewers and listeners for complaints about standards to be directed in the first instance to the broadcaster concerned, but we view it as an unnecessary restriction upon the viewer or listener to make such a route mandatory, and we support the Government's proposals accordingly (paragraph 303).

102. While we accept that it may be inappropriate to be too prescriptive on the face of the Bill, we consider it to be of the utmost importance that OFCOM establishes specific structures for handling complaints relating to fairness and privacy and ensures that adjudication of such complaints is made only by those who have heard and considered the case in full (paragraph 304).

103. We recommend that the Government align the provisions for penalties for contravention of licence conditions between television and radio. Should it not propose to do so, it should, in its response to this Report, provide a full account of the rationale for the differences (paragraph 306).

104. Local content and character must be integral and central characteristics of local commercial radio, as fundamental obligations in return for which licensees are granted spectrum access. In principle, we support the concept of additional duties and powers to maintain such obligations. We recommend that these incorporate a duty on OFCOM to award and review radio licences in such a way as to ensure that the broadest possible range of tastes and interests is catered for within each local radio area (paragraph 309).

105. We welcome the provisions in the draft Bill to enable the structured development of a not-for-profit access radio sector, which has the potential to enrich both broadcasting and community development. It will be of paramount importance for OFCOM and the Secretary of State to ensure that these powers are exercised in a way that ensures the development of access radio that serves parts of society that commercial radio fails presently to address (paragraph 311).

106. Although we welcome the provision in Clause 167 to support the development of local digital terrestrial television services, we recommend that

the Government and the existing regulators give early consideration to means of fostering the development of local television services before analogue switch-off, in order that further provision may be made in the final Communications Bill if necessary (paragraph 312).

107. Improved provision for sub-titling, audio-description and signing is a necessity not a luxury. We welcome Clauses 203 to 207 which provide a sound framework to extend such provision across all licensed services in coming years (paragraph 313).

108. We recommend that Clause 223 be amended to specify the circumstances in which the powers available to the Secretary of State under subsection (5) may be exercised (paragraph 314).

109. We recommend that Clause 224 be amended to enable licence conditions relating to training to be applied to broadcasters both in relation to their own employees and more generally in respect of the creative advancement of the sector as a whole (paragraph 317).

110. We recommend that the Government, the ITC and the Film Council explore with broadcasters the current relationship between the broadcasting and film industries and the role that OFCOM might play in fostering and furthering the contribution of broadcasters to that relationship (paragraph 318).

111. We recommend that Clause 189 and paragraphs 1 and 5 of Schedule 8 be amended to provide that OFCOM should monitor levels both for the time allocated to independent productions and for the value of such independent productions in line with the Secretary of State's declared intention in evidence to us that the licence fee should be "venture capital for the nation's creativity" (paragraph 324).

112. We recommend that the Government, in its response to this Report, set out its views on the merits of defining independent productions to include all programmes commissioned by a broadcaster from whom the producer is independent in ownership terms (paragraph 325).

113. We recommend that Clause 189 and paragraphs 1 and 5 of Schedule 8 be amended so as to require OFCOM periodically to review the whole of the programme supply market, together with its associated intellectual property and other rights, including the role of the BBC in that market, with a view to determining whether the market is operating in a fair, transparent and non-discriminatory manner. We further recommend that OFCOM be required under the terms of the final Bill to undertake the first such review immediately after the coming into force of the Act. Finally, we recommend that, having undertaken the first such review, OFCOM consider whether it would be appropriate to refer the operation of the programme supply market to the Competition Commission for market investigation under the terms of the Enterprise Bill (paragraph 326).

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114. We recommend that Clause 190 be amended to define original productions as programmes commissioned with a view to their first showing in the United Kingdom on the relevant channel and which were also either produced in the European Economic Area or were a co-production in which a significant element of the production was within the European Economic Area. We further recommend that the same Clause be amended to permit OFCOM to establish specified levels for original productions in peak viewing times (paragraph 328).

115. We recommend that OFCOM be empowered to review production commitments of public service channels and Channel 3 licensees in response to any significant change in the revenue or audience share of the relevant channel. We further recommend that OFCOM be required to issue guidance on the changes that would trigger such reviews and give an indication of likely alterations to requirements for original production arising from such changes (paragraph 329).

116. We welcome the Government's decision to give OFCOM responsibility for United Kingdom compliance with obligations under the EC "Television without Frontiers" Directive and support the provision for licence conditions to secure such compliance in Clause 222. We believe that these powers provide OFCOM with a valuable tool for strengthening the contribution of all licensed broadcasters to the European production base (paragraph 330).

117. We recommend that the word "suitable", where it appears in Clause 193, be altered to "substantial". We also recommend that the same Clause be amended to make it clear that Channel 3's regional production requirements apply equally to network and regional programmes. We further recommend that OFCOM be granted a power to include conditions relating to regional programme-making in the regulatory regime for Channel 5. Finally, we recommend that the review provisions linked to audience and revenue changes that we have earlier recommended in respect of original production levels apply also to regional production levels (paragraph 332).

118. In general terms, we consider that the Government has struck the right balance in its definition of the public service remit. We agree with the proposition that the term "objectives" more accurately reflects the nature of the commitments involved than "requirements" and we recommend that Clause 181 be amended accordingly. We also consider that it is right that a set of objectives for all public service broadcasters should be more detailed than is necessary for the BBC with its long tradition of public service broadcasting and we therefore recommend that the Government gives careful and sympathetic consideration to the case for including fuller descriptions of topics for programming in Clause 181(5) (paragraph 338).

119. We recommend that Clause 181(1) be amended to provide that OFCOM reports on the fulfilment of the public service remit are to be published every two years (paragraph 340).

120. We have rejected the proposition that reviews of the public service remit be undertaken annually in part because we are keen to see the reports arising from the reviews as major events that play a central role in public debate on public service broadcasting. We make further recommendations with this aim in mind. First, we recommend that OFCOM be required to conduct its review with the purpose of sustaining and strengthening public service broadcasting in the United Kingdom. Second, we recommend that OFCOM be required to review the ecology of public service broadcasting, including the costs and financing of public service broadcasting. Third, we recommend that OFCOM be required to report on the contribution to public service broadcasting made by broadcasters other than the BBC, S4C and holders of licences for public service channels (paragraph 341).

121. We recommend that Clause 188 be amended to provide that an order to amend the public service remit in Clause 181 can only be made by the Secretary of State in response to a recommendation made by OFCOM in the reports arising from its periodic reviews of the public service remit and even then only after a full public consultation on that recommendation (paragraph 342).

122. We recommend that the public service remit for every Channel 3 service in Clause 182 be amended to require the provision of a wide range of high quality and diverse programming which, in particular, includes a substantial range of high quality original production and satisfies the tastes and interests of the part of the United Kingdom for which that service is licensed (paragraph 343).

123. We welcome and support Channel 4's public service remit as set out in Clause 182(3). We recommend that the Government consider the case for inclusion of Channel 4's educational role in that remit (paragraph 344).

124. We oppose the power to amend the public service remits of licensed public service channels by means of secondary legislation and recommend accordingly that this provision in Clause 188(1)(a) be removed (paragraph 346).

125. We recommend that Clause 191 be amended to retain the existing legal obligation on Channel 3 licensees to devote a sufficient amount of time throughout the day and in peak viewing hours to news and current affairs programming (paragraph 347).

126. We recommend that the provisions for prior consultation with OFCOM on changes of programme policy as set out in Clause 184 be superseded by a system of annual reports by OFCOM on the performance of each licensee in relation to the relevant statement of programme policy (paragraph 351).

127. We recommend that OFCOM be given a power to review the financial terms of Channel 3 and Channel 5 licences at the mid-point of any licence and to vary licence payments for the remainder of that licence period. In view of this added flexibility to ensure the correct balance between the benefits of

spectrum access and the burden of public service obligations, we further recommend that the possibility for exemption from detailed regulation under Clause 187(2)(a) as a result of failure to fulfil public service remits when such failure is due to economic or market conditions be removed (paragraph 352).

128. Twelve years is a long time in broadcasting. We have concluded that the Government is right in principle to establish mechanisms for measuring the overall value of Channel 3 and Channel 5 licences, beyond analogue switch-off. An explicit process of licence allocation for the years after 2014 has advantages, including as a safeguard for the regional character of ITV licences. However, there is a danger that the process may serve as a disincentive to invest in the years before then. We recommend that, in its response to our Report, the Government set out its views on the proposal by the ITC for separate spectrum charging as the best way of capturing changes in licence value before and after digital switchover and clarify how it envisages the new allocations being made for the years after 2014 (paragraph 355).

129. We recommend that paragraph 3 of Schedule 8 be amended to provide that an order to amend S4C's public service remit may only be made as a result of a review conducted under Clause 226 (paragraph 357).

130. It appears at odds with the concept of future-proofing for legislation to contain a barrier to increased funding for S4C, should the Secretary of State decide that such an increase is appropriate. We recommend that the final Bill seek to amend section 61(4) of the Broadcasting Act 1990 to enable additional payments to be made to S4C to support the development of digital services (paragraph 358).

131. If the forthcoming Communications Bill is to be future-proof in the way the Government hopes, we consider that there is a compelling case for ensuring that the relevant provisions facilitate rather than inhibit the future development of a Gaelic television service (paragraph 362).

132. We recommend that, for the avoidance of doubt, Clause 144 be amended to state that OFCOM has functions in relation to the BBC under Part 5 of the Bill in respect of competition law (paragraph 366).

133. We recommend that the Government, in its response to this Report, confirm its intention to ensure that the provisions of the revised Agreement with the BBC mirror those of the Communications Bill as enacted. We further recommend that the Government publish an initial text of the proposed revised Agreement at the same time as the Communications Bill (paragraph 369).

134. We recommend that the revised Agreement require the BBC to publish annually a statement of programme policy in respect of each of its public service television channels and report on performance against each policy (paragraph 370).

135. We recommend that the revised Agreement require the BBC to agree original production conditions with OFCOM for each of its public service television channels (paragraph 371).

136. We recommend that the Government set out in its response to our Report the proposed mechanism for determining payments of charges by the BBC to OFCOM and ensure that the final Bill or the Agreement as necessary give effect to these arrangements (paragraph 372).

137. We recommend that, in its response to our Report, the Government set out its intentions for the role of OFCOM in respect of BBC radio services. We recommend that the revised Agreement require the BBC to publish annually a statement of programme policy in respect of each of its radio channels and report on performance against each policy (paragraph 373).

138. We recommend that the proposed Agreement require the BBC to provide OFCOM with such information as OFCOM may reasonably request for the purpose of carrying out its functions under Clauses 144 and 181 and Part 1 of Schedule 8 (paragraph 374).

139. Extensive and repeated payment of fines by the BBC would be a waste of licence payers money, for which the BBC and its Governors would be held publicly accountable. This seems to us a reason for the BBC to so arrange its activities as to ensure that it does not incur such penalties, and not an argument for immunity from such penalties. We recommend that the proposed Agreement empower OFCOM to fine the BBC in respect of breaches of tier one and tier two obligations (other than those relating to impartiality) in the same way and to the same extent as other broadcasters (paragraph 375).

140. The potential tension between the desirability of the BBC expanding its commercial activities to support its primary public service role and the market impact of the BBC's activities must be borne in mind by the Government and OFCOM in consideration of the BBC's future (paragraph 376).

141. We recommend that the Government, in its response to this Report, set out its initial proposals on the manner in which it envisages review of the BBC Charter being conducted (paragraph 379).

142. Our central task has been providing means to enable the Government or Parliament to make a good Bill better (paragraph 380).

143. We make points in paragraph 384 not with the aim of questioning the rationale for the five pillars. Rather, we wish to emphasise that it would be mistaken to assume that each and every aspect of the new framework will prove enduring. In legislating this year and next, Parliament should not imagine that it will be absolved of the duty both to examine the implementation of the new framework with great care and to be prepared to return to the process of legislating again should the need arise (paragraph 385).

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144. In view of the considerable likelihood that new primary legislation may well become necessary in the medium term, we urge the Government to re-examine the general scope of, and particular proposals for, seeking power to amend the new primary legislation by means of subsequent secondary legislation (paragraph 386).

145. We welcome the Government's decision to enable the draft Communications Bill to be considered by an ad hoc Joint Committee and the positive spirit in which the Ministers have so far responded to our work (paragraph 387).

146. We have interpreted our orders of reference as requiring us to focus first and foremost on the proposed provisions of the draft Bill, from their wording to their likely practical effect. The terms of the Government's own invitation for consultation have made this process harder, not easier (paragraph 392).

147. We recommend that the Government give an undertaking that it will provide an opportunity for both Houses to debate and come to a decision on the establishment of any future Joint Committee proposed to be appointed to consider a draft Bill at least two sitting weeks before the publication of the relevant draft Bill, and further in advance if possible (paragraph 393).

148. We recommend that, as a general rule, the Government should propose to the Houses that the deadline for a Report by a Joint Committee established to examine a draft Bill be set at least one month after the deadline for submissions to Government consultation exercises on the relevant draft Bill (paragraph 397).