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Dear Tim,

Please find enclosed BSKyB's comments on the Joint Committee's report, published on 31st July. I do hope that these are helpful. If you or any of your team wish to discuss any of the points raised please feel free to call me on 020 7705 3712.

Kind regards,



Philip Jenner
BSkyB Public Affairs

*Dear Phil,
Many thanks for your response,
hard copy of which has arrived
safely.*

With Best wishes

THE JOINT COMMITTEE REPORT
BSKYB COMMENTS

While a number of the Joint Committee's recommendations are helpful, and will improve the Bill, overall they represent a far more interventionist approach than currently proposed, and would, in fact, lead to a greater regulatory burden on the broadcasting sector.

Please note that references below to Sky's main submission refer to its August 2002 response to the DCMS/DTI consultation on the draft Communications Bill. References to Recommendations are as set out in Chapter 7 of the Committee's report, *Summary of conclusions and recommendations*.

1. THE FRAMEWORK FOR THE NEW REGULATOR

Principal duty of OFCOM

Recommendation 4 proposes a new principal duty for OFCOM. The Government should not accept the new duty, as currently drafted, for the following reasons.

- It would require OFCOM to ensure the availability of a "*diversity and plurality*" of high quality content in TV and radio. The reference to 'plurality' runs counter to the Government's own policy, under Part 3 Chapter 5 of the Bill, to liberalise media ownership controls and would, effectively, allow OFCOM to impose its own ownership rules.
- The reference to 'diversity' duplicates the duty already set out under draft Bill clause 3(1)(e) to secure, as far as practicable, a range of services "*which (taken as a whole) are of both high quality and calculated to appeal to a variety of tastes and interests*".

Draft Bill clause 3(1)(b) imposes a duty to "*promote competition in the provision of these services and facilities*". A similar duty (although with a more clearly defined scope) is imposed by requiring OFCOM to undertake its new principal duty "*wherever possible by promoting effective competition in national, regional and local communications markets throughout the United Kingdom*". It is therefore relevant to draw the Government's attention to concerns raised previously in Sky's main submission (paras. 2.22 – 2.26) questioning the relevance of this duty, and the circumstances in which it would be applied.

The Committee proposes in **Recommendation 5** that OFCOM should "*have regard to the desirability of encouraging investment and innovation in communication markets*". Sky welcomes the recognition here of the important role played by the private sector in investment in, and development of, the communications industry. There is the danger, however, that the currently proposed wording would also encourage unnecessary intervention in the market and lead to the sponsorship of

particular technologies¹, essentially by picking winners. Sky recommends, therefore, that OFCOM should instead have regard to *"the rights of service providers, etc, to make a return on their investments"* (Sky main submission paras. 2.27 – 2.28).

The Content Board

Sky agrees with the Committee that *"the ambiguity in the proposed legislation on the functions of the Content Board is unsatisfactory"* (para. 34). It is appropriate that the Content Board be given responsibility for programme standards, the public service remit and PSBs (**Recommendation 8**), but this should only be in so far as these concern pure content issues. Responsibility for economic regulation of content should remain with the main OFCOM Board (Sky main submission, paras. 2.14 – 2.44).

Media literacy

Sky notes that clause 10 of the draft Bill outlines OFCOM's functions relating to the promotion of media literacy, and that the Committee recommends that the Content Board be given executive responsibility for these functions (**Recommendation 12**). In so far as this recommendation applies to clauses 10(1)(a) – (d), which relate solely to public understanding and awareness, it may well be appropriate for the Board to take responsibility.

The functions described under clauses 10(e) and (f), however, should not be the responsibility of the Content Board, given that they seek to secure the *"development"* and *"promotion"* of *"technologies and systems for regulating access to such material, and for facilitating control over what material is received, that are both more effective and easier to use"*. Indeed, they should not exist at all, given that media literacy only extends, by definition, to *understanding* and *awareness* of such technologies, and not to taking action to secure the development of such technologies. In so far as they do exist they should remain the responsibility of the OFCOM main Board.

Consumer Panel

The Consumer Panel should not be permitted to advise on *"matters relating to the interests of all consumers in the marketplace, rather than the customers of particular providers"*, as proposed by **Recommendation 13**. This proposal is likely to create a duplicative and over-lapping system of regulation, enabling the Consumer Panel to advise on issues which should be the sole responsibility of the Content Board and/or the main OFCOM Board (Sky main submission, paras. 2.45 – 2.49).

BRTF principles/ensuring minimum regulation

Sky welcomes the Committee's support for the BRTF principles of Better Regulation as expressed in **Recommendations 24 and 25**. It is important, however, that these recommendations do not lead to the removal of Bill clauses 5(1)(a) and (b) as drafted. These clauses should remain as an important means of ensuring the removal of

¹ For example, in the early 1990s, regulators attempted to mandate new – but soon to be obsolete – transmission standards on satellite broadcasters in order to encourage investment and innovation in high definition television at the behest of some parties.

unnecessary burdens on business, working in tandem with the principles of Better Regulation.

Sky also believes the Committee is wrong in its assertion that nothing of importance would be achieved by creating a duty on OFCOM to ensure the application of the BRTF principles (para. 62). Such a duty would ensure that application of these principles is more robust, consistent and continuous, rather than the vaguer notion of "*having regard to*" such principles "*as appear to them to be relevant in the circumstances*". (Sky main submission, paras. 2.29 – 2.31).

Promptness Standards/appeals

Contrary to **Recommendation 32**, the Bill should not include a "*4-month time limit for the completion of market analyses and market power determinations, other than in exceptional circumstances*". No such time period is prescribed by the EC Electronic Communications Directives and nor should it be by the Bill. Due process in investigations must prevail and arbitrary time limits must not be at the expense of the right of interested parties to make submissions. Investigations may, in certain circumstances, require longer than 4 months, if the rights of defence of undertakings under investigation are not to be infringed, and the Bill should accommodate this.

For the same reasons the Bill should not contain a general time limit of four months for appeals under Part 2, as proposed by **Recommendation 73**.

We welcome the Committee's recommendation (in **Recommendation 32**) that a party aggrieved by a failure of OFCOM to determine a matter promptly should be able to seek a direction from a court, as set out in paragraph 7 of Schedule 5 and 6 of the Competition Act 1998.

Transparency

In its main submission, Sky has expressed concern over the lack of guidance on how OFCOM will make decisions, and what safeguards will be put in place to ensure that they are made transparently (para. 2.34). OFCOM should be obliged to publish full reasons for all decisions, as demanded by due process and the BRTF principles of transparency and accountability.

Recommendation 34 is unhelpful in this regard in that it proposes that, in interpreting its duties in the context of a particular decision, OFCOM only 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*". Such an obligation is vague, gives OFCOM considerable discretion, and limits transparency. OFCOM should be obliged to make a statement setting out its reasons on all decisions (subject to respecting commercial confidentiality).

Sky does not believe that OFCOM should have a primary duty. We do agree, however, that the Government should accept the first part of **Recommendation 34** that "*OFCOM be required to include in its annual report an interpretation of [those duties*

that it is finally given]² and an account of the way in which that interpretation has informed its work during the period”.

2. ECONOMIC REGULATION

Sector specific regulation, competition law, and procedural safeguards

Sky believes that some of OFCOM's duties (e.g. the duty to promote competition) may lead to greater use of unconstrained sector-specific licensing powers in respect of the economic regulation of broadcasting to address competition issues, and neglect of powers under competition legislation (Sky main submission, paras. 2.22 – 2.26). It therefore welcomes the Committee's following observations regarding the need to encourage OFCOM's use of competition law as opposed to sectoral regulation:

“In the light of the experience of OfTel, we are sympathetic to the argument that OFCOM ought to be encouraged down the path of competition law regulation wherever possible, and required to signal clearly its decisions on which path to follow. The BRTF noted concern that competition law would remain under-used by sectoral regulators without further measures to encourage its use” (paragraph 207);

“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”. (Recommendation 76).

Recommendation 47 asks the Government to clarify whether its intention is for procedural safeguards for the enforcement of sector-specific powers under Chapter 1 Part 2 to match those in the Competition Act. Sky believes that this concern applies to the whole of the draft Bill, and not just Part 2. In particular, the Bill is devoid of any safeguards in respect of OFCOM's use of its powers and the application of its duties in regulating the broadcasting sector pursuant to Chapter 2 Part 3. Safeguards equivalent to those in the Competition Act should be consistently applied to all procedures of OFCOM, and all according to BRTF principles (Sky main submission, paras. 2.11 – 2.21).

The Bill should also contain provisions which constrain OFCOM's ability to use its sector-specific powers where a matter is one which is capable of being handled under its general competition law powers (Sky main submission, paras. 2.22 – 2.26).

OFT and OFCOM

In the context of **Recommendation 75**, the Bill should make clear that OFCOM cannot open an investigation into matters which have already been investigated and concluded by the OFT unless there has been a material change in circumstances. Further guidance should also be provided on the extent to which OFCOM, in the exercise of its concurrent powers, may give guidance, or adopt rules and procedures, which may deviate from those adopted by the OFT (Sky main submission, para. 2.01).

² Sky's amendment.

Must carry/must offer/must distribute

Recommendation 57, proposing that the must carry/distribute/offer provisions be given effect at the earliest possible opportunity, should be firmly rejected. All the PSB channels are currently available to viewers through the digital satellite platform. On the basis of BRTF principles of proportionality and targeting alone, therefore, there is no need to implement these requirements. Furthermore, existing legislation already ensures access on fair, reasonable and non-discriminatory terms and the proposals in the draft Bill appear to have been drafted in ignorance of the existence and workings of the current regime, which has proved very successful. (Sky main submission, section 3, and Sky August 2002 confidential response to the draft must carry proposals).

3. MEDIA OWNERSHIP

MEDIA OWNERSHIP CONTROLS AND COMPETITION LAW

Recommendation 79 proposes a new definition of plurality to be taken into consideration in decisions on media mergers. This recommendation is outside the remit of the Committee, as the issue arises under the Enterprise Bill, and therefore should not be taken into account. Detailed parliamentary scrutiny of the Enterprise Bill has already decided against plurality being named as a "public interest consideration" for mergers, and this decision should not be overruled by recommendations from another body with less relevant expertise. Furthermore, the proposal was considered under the Government's consultation on ownership, and rejected. The recommendation would also be counter to the Government's policy of relaxing the restrictions on media ownership.

In addition, such a test is unnecessary for a number of other reasons.

- General merger control, through the substantial lessening of competition test, can already adequately address the issue of plurality.
- As indicated by the Committee (paragraph 223), the Government has correctly noted that the changing nature of media markets, and in particular the greater multiplicity of outlets facilitated by digital technology, is helping to increase plurality - thus requiring fewer, and not more, controls to ensure plurality.
- The "*impartial presentation of news and factual broadcast programming*" and the "*promotion and maintenance...of a balanced and accurate presentation of news...and a clear differentiation between the two*" are already secured on television channels through existing (and continuing) content regulation.

Ownership of Channel 3 licences and Channel 5

Recommendation 89, seeking to maintain the prohibition on joint ownership of Channel 5 and a major national newspaper group, is inconsistent with the Committee's support for the BRTF principles of proportionality, consistency and targeting, and out of step with the Government's aims of introducing a deregulatory Bill. Neither does it support the Chairman's belief that the Committee has delivered

"a robust example of evidence-based advice".³ Regulation should be justified, yet no convincing justification is given for retaining the prohibition. (Sky main submission, section 6).

Controls relating to ownership of a major satellite packager

Recommendation 90 proposes 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). This is wholly contrary to the principles of proportionality, consistency and targeting, and should be rejected. A discussion of *"potential detrimental effects"* neither constitutes *"persuasive evidence"* (paragraph 259) nor leads to any logical conclusion that OFCOM must consider new and major ownership restrictions. OFCOM must be able to establish itself (and its independence) by being allowed to assess its own priorities at the time of a review of media ownership, based on evidence at that time.

4. CONTENT REGULATION

Licence conditions relating to training

Recommendation 109 proposes that OFCOM's ability to impose licence conditions in relation to training of a licensee's employees be extended *"in respect of the creative advancement of the sector as a whole"*. There is, however, no more reason to apply such a requirement (which is inconsistent with the Government's 'light-touch' objective) to broadcasting than to any other industry, and the proposal should therefore be rejected. (Sky main response, paras. 5.37 – 5.38).

TWF quotas

The transfer to OFCOM of responsibility for the interpretation and implementation of the TWF quotas should not lead to a change in the Government's well-established and highly successful policy in this area. In order to provide reassurance on this point, the Government should reject the assertion in **Recommendation 116** that *"these powers provide OFCOM with a valuable tool for strengthening the contribution of all licensed broadcasters to the European production base"*. (Sky main response, paras 5.34 – 5.36).

³ Lord Puttnam article, Media Guardian, 5 August 2002.