To:

Patricia Hewitt
Tessa Jowell

cc:
PS/Stephen Timms
PS/Kim Howells
PS/Sir Robin Young
[redacted]
Andrew Ramsay
[redacted]

From:

[redacted]
Abbey Orchard St., G03/04
[redacted]

4 October 2002

Paddy Feeny
Bill Bush
Kitty Ussher
[redacted]

COMMUNICATIONS BILL: DRAFT RESPONSE TO PLS REPORT

Issue

1. Response to the report of the Joint Committee on the Draft Communications Bill (the PLS Report).

Timing

2. Urgent – it is important that this letter and draft should issue as soon as possible because of the need to seek LP and DA clearance before publication.

Recommendation

3. That you approve the attached draft Memorandum and draft covering letter to LP and DA Committees.

Background

4. Tessa Jowell and Stephen Timms wrote to LP on 19 August to seek their permission for us to respond to the PLS report before introducing the Communications Bill to Parliament. Robin Cook, in his response of 16 September, gave us clearance to do so, provided that we cleared a draft of our response with LP and DA Committees. Robin Cook also stressed that our response to the PLS report should 'emphasise the extent to which the Pre-Legislative Scrutiny process has been of value to the development of the Bill'. The tone of the attached Memorandum is therefore intended to emphasise this message.

5. Following our meetings with you regarding the PLS Committee's recommendations, the attached Memorandum sets out our response to the Committee's report. It also includes our response to the points made by the Delegated Powers and Regulatory Reform Committee, who responded directly to the PLS Committee. The introductory section at the beginning of the attached Memorandum explains that we intend to accept the majority of the Committee's recommendations. However, we would draw your attention to the following responses, which are on areas of particular sensitivity:

- general duties (recs. 2-4);
- media ownership (recs. 79-93).

6. Given our desire to finalise and publish this response before we introduce the Bill (i.e. mid-late October), **we recommend that you should allow only five clear working days for colleagues to comment.** The need to pursue clearance on a tighter timetable than the Cabinet Office guidelines in this case is primarily because LP Secretariat has informed us that we are likely to be invited to the final LP in the week of 4 November, rather than the week of 18 November. Building in time to finalise any disagreements with other Departments, and for publishing the final document before this date, we believe that a deadline of 5 working days from dispatch is essential.

[redacted]

Annex A: DRAFT LETTER TO LP COMMITTEE

The Rt. Hon. Robin Cook MP

President of the Council and Leader of the House of Commons

2 Carlton Gardens

LONDON

SW1Y 5AA

COMMUNICATIONS BILL: RESPONSE TO JOINT COMMITTEE ON DRAFT COMMUNICATIONS BILL

We are writing to seek your views on our draft response to the Joint Committee on the Draft Communications Bill, which includes our response to the points raised by the Delegated Powers and Regulatory Reform Committee. As a result of the time pressures for us to finalise and publish this response before the Bill is ready for introduction, we should be grateful for any comments from colleagues by [FIVE CLEAR WORKING DAYS].

In your letter of 16 September, you gave us clearance to proceed with our proposed timetable for publishing our response to the Joint Committee on the Draft Communications Bill. You also asked us to send a draft of our response to LP and DA Committees. We have therefore prepared the attached draft response, which we intend to publish as a Command Paper before the Bill is introduced to Parliament.

We are copying this letter to the Prime Minister, members of LP and DA Committees and to Sir Andrew Turnbull.

TESSA JOWELL AND PATRICIA HEWITT

DRAFT

MEMORANDUM CONTAINING GOVERNMENT'S RESPONSE TO THE REPORT OF THE JOINT COMMITTEE ON THE DRAFT COMMUNICATIONS BILL

Introduction

The Joint Committee on the Draft Communications Bill said that their aim was "to make a good bill better". The Government has approached its response to the Committee's report in the same positive light and welcomes the report, accepting it as an invaluable contribution to the development of a key piece of legislation.

The Government appreciates the work and commitment involved in preparing the report. In taking evidence from across the communications industry, analysing the draft clauses and making detailed drafting recommendations, the Committee has been able to suggest a wide range of improvements and provided valuable observations on the Bill.

We have seriously considered each of the Committee's 148 recommendations and our response is set out below. We have accepted, in full or in part, more than 110 of the recommendations. Some we have adopted verbatim. On others we have agreed with what the Committee is trying to achieve, but we intend to take a different approach in the Bill to the one proposed. In some instances, we agree with the sentiment being expressed, but do not believe changes are needed to the Bill to effect the recommendation.

There are a few limited areas where we do not agree with the substance of the Committee's recommendation. What cannot be assumed, however, is that because we have not accepted the recommendation, we have not carefully considered the detail of the Committee's analysis and proposal. In many respects, the Government and the Committee share the same policy goals and the Committee's views have helped focus our minds on ensuring that the Bill will deliver these goals.

Our thanks, therefore, go to Lord Puttnam and the Committee for their work. As a result of their contribution, we are confident that the Bill will be better.

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The next step for us will now be to revise the draft Bill, with a view to introducing it to Parliament in due course.

DRAFT

The Committee's Conclusions

Chapter 1: Introduction

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).

Our response to the Delegated Powers and Regulatory Reform Committee is set out at the end of this Memorandum.

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).

The consultation process, both formal and informal, has contributed to the development of this Bill and we welcome the Committee's recognition of our work. We will shortly be publishing a summary of responses and our reaction to the public consultation.

Chapter 2: The framework for the new regulator

(i) The general duties of OFCOM

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).

While the Government is satisfied that the definitions in the draft Bill cover those not in a commercial relationship with a provider but seeking to be so, we appreciate that as far as possible terms need to be easily recognised and understood. We will therefore amend the Bill to clarify the language.

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 electro-magnetic 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).

The Government shares the Committee's view that OFCOM's duties should be clearly and concisely articulated so as to give certainty to OFCOM and its stakeholders. We do, however, have concerns about the clause proposed by the Committee, in particular that it appears to omit from the principal duty two of the original seven: those relating to protection of the public from offensive and harmful material and to protection of fairness and privacy.

It is important that the duties properly reflect the breadth of all OFCOM's responsibilities, both economic and cultural, and follow the proposition set out in the White Paper that each duty is of equal weight. The Government is reviewing the drafting of the General Duties clause with these principles in mind.

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).

The Government agrees with the Committee's recommendation on this point.

(ii) The structure and functions of OFCOM
(a) The main Board

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).

We welcome the Committee's recognition of the importance the Government has placed on the need for the main Board to remain small and focused on providing strategic leadership to OFCOM in the interests of the communications industry throughout the UK as a whole.

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).

In considering the recent appointment of the non-executive members of the Board, we gave careful consideration to the Committee's views and those of the newly-appointed Chairman of OFCOM. Whilst believing that a Board of up to six members would be appropriate during the early stages of the transition process when OFCOM are preparing to take on its regulatory functions, we accept that there is a need for OFCOM to have a greater degree of flexibility in future to appoint further members in accordance with its

operational requirements. We have, therefore, announced recently the intention to use the powers contained in the OFCOM Act 2002 to increase the size of the Board to nine, in accordance with the Committee's suggestion and to appoint a sixth non-executive member to the Board. It will also provide OFCOM with flexibility to make further executive appointments in addition to the Chief Executive. We also agree fully with the Committee's comment that any increase in the number of members appointed to the Board should not be for representative purposes

(b) The Content Board and media literacy

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).

The draft Bill provides that the Content Board's functions shall include, broadly, those relating to the content of broadcast services and to media literacy, and (in relation to OFCOM's broadcasting functions) requires the Board to ensure that OFCOM are aware of the different factors which OFCOM need to take into account as respects different parts of the UK. This would certainly enable the Board to carry out the functions recommended. However, while the Committee has identified what appears to be a logical division of responsibility, OFCOM must function as a unified regulator and will have formal legal responsibility for the decisions and actions of the Content Board.

We expect OFCOM to provide a clear statement about the extent of the functions of the Content Board giving its members, citizens and the communications industry clarity about its role.

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).

We see merit in the Committee's proposal that two non-executive members of OFCOM be appointed to the Content Board, but do not believe that this needs to be specified in the legislation.

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).

As indicated in our response to recommendation 8 above, it is important that OFCOM are, and are seen as, a unified regulator: the Content Board will be an integral part of OFCOM rather than a parallel or rival regulatory body.

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).

We note the Committee's observations, although it is not the Government's intention that either OFCOM or the Content Board should "examine" anything other than broadcast content, in the sense of regulating it.

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).

As noted in response to recommendation 8, we see this clearly as one of the Content Board's main functions, but do not believe that its precise scope should be specified in legislation.

(c) The Consumer Panel

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).

We accept this recommendation.

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).

The Government shares the Committee's view that there is no case for the creation of a separate small business panel whilst recognising that the Consumer Panel should properly represent the interests of small business as well as domestic customers. This will be reflected in the composition and remit of the Consumer Panel. Additionally, we have received representations that the proposed threshold for a small business of 50

employees is too high. The intention behind the threshold is to ensure that small businesses that have little or no negotiating power in the communications market place have access to the same mechanisms for representation and redress as domestic consumers. We consider that a threshold of ten employees will better reflect this criterion, and will also ensure that the Consumer Panel has the right focus.

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 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).

We agree entirely with the Committee that the Consumer Panel should be the conscience, not the creature, of OFCOM. It will have a vital role in providing OFCOM, and other relevant bodies, with advice on the interests of consumers in the provision of electronic communications networks and services and in a number of related areas, as set out in Clause 96. In this role, it will be expected to provide a counter-weight to advice and lobbying from the corporate sector. The Panel also needs to be able to criticise OFCOM, without fear for its future standing.

However, we do not consider that the interests of either the Panel or OFCOM will be well served by the Committee's proposal that appointments to the Panel should be a matter for the Secretary of State. This would have the effect of creating a wholly separate Non-Departmental Public Body, with the associated extra legal complexity, bureaucracy and expense. The provisions in the draft Bill reflect closely those adopted for the Financial Services Consumer Panel in the Financial Services and Markets Act 2000, which we consider a preferable model in the OFCOM context. The approval of the Secretary of State for all Panel appointments and removals has been introduced as the best method of guaranteeing the independence of the Panel, and will ensure that it does not become simply an extension of the regulator. This will also help to underpin the Panel's standing with the external world.

In a similar vein, we do not agree that the Panel should elect its own Chair. The Chair will need particular personal qualities to do the job, which will be identified at the time

of appointment. Nolan principles will be applied fairly, throughout the appointment process. These qualities will not necessarily be the same as those required of individual Panel members.

We agree, however, that the Panel should be able to determine any committees of the Panel and we are considering whether any amendment is necessary to the current draft of the Bill to permit this.

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).

The Government welcomes the Committee's endorsement of our proposals.

(d) The economic dimension

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

We welcome the Committee's agreement.

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).

We agree with the Committee's recommendation.

(e) Employment and training

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).

We have noted the views of the Committee and the Delegated Powers and Regulatory Reform Committee. The provisions in clauses 11 and 224 currently provide for the promotion of equal opportunities. As drafted, the Secretary of State will have the power to extend the scope of the existing obligations to cover additional forms of discrimination, and in practice will use the power where new general discrimination legislation is introduced in future.

Such general discrimination legislation may not, however, encompass the obligations provided for in clauses 11 and 224: hence the need for the order making powers. We

believe that this approach is justified in the broadcasting sector because diversity of content is supported and enhanced by ensuring equality of opportunity and fairness in recruitment and employment. We therefore intend to retain these powers but, in view of the concern that has been expressed, will make them subject to the affirmative resolution procedure.

(f) Representation of nations and regions

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).

We have noted the proposal of the ITC to develop its viewer consultative councils in the nations and regions into more representative Content Panels. However, we consider it important that OFCOM should themselves consider and develop consultative mechanisms appropriate for their own needs. The powers to create the Content Board are, of course, contained in the Bill and include power for OFCOM to authorise the Board to establish advisory committees of their own. The provisions of the OFCOM Act 2002 also enable OFCOM themselves to establish advisory and executive committees as they see fit. It will be a matter for OFCOM to determine how best to ensure that proper consultative mechanisms are put in place to ensure that the views of relevant devolved institutions are taken into account.

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).

As stated in response to recommendation 15, we are considering whether any amendment to the current draft of the Bill is necessary to permit this.

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

We have given clear commitments that OFCOM should maintain offices in Scotland, Wales and Northern Ireland. We are happy to underscore these commitments in the way the Committee recommends and will include an appropriate provision in the Bill.

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).

There is nothing to preclude OFCOM from reporting in their annual report on their activities in Scotland, Wales and Northern Ireland.

(iii) Better Regulation?
(b) The level of regulation

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).

Clause 3 sets out that OFCOM should have regard to "the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed". We recognise the Committee's concern that Clause 5 implies a different set of standards, rather than properly reflecting that it is setting out the duty to review regulatory burdens. We will therefore reconsider the clause title that refers to "light touch" regulation.

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).

It is important to link OFCOM's regulatory activities to their functions and the Government believes that the current drafting adequately achieves this objective.

(c) Self-regulation
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).

The Government recognises that self-regulatory bodies can play an important role in helping OFCOM achieve their objectives. We will make provision in the Bill to allow for the development of self-regulatory bodies as an alternative to statutory regulation, where appropriate.

OFCOM will also be able formally to contract out its functions to another body in accordance with orders made under the Deregulation and Contracting Out Act 1994.

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).

As set out in our response to recommendation 26 above, the Government has reviewed the position and will modify the Bill to ensure there are no unnecessary barriers to self-regulation. Broadcast advertising regulation is an area where OFCOM may consider contracting out arrangements to be appropriate, subject to the industry coming forward with suitable proposals.

(d) Regulatory impact and charging

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).

OFCOM will be required to carry out and publish impact assessments where they have a significant impact on individuals, businesses or the general public. In line with the guidance, such assessments now include an appraisal of the competition impact.

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).

We agree entirely with the Committee. We expect OFCOM to be efficiently and effectively run and will not countenance waste or inefficiency. But we also expect OFCOM to be a world class regulator with highly skilled, professional personnel capable of delivery quality regulation.

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).

As the Committee recognised, clause 29 of the draft Bill sets out principles underpinning charges relating to the providers of electronic communications networks and services, in line with the requirements of the Authorisation Directive. We agree with the Committee that OFCOM should similarly set out the underpinning principles it proposes to apply for charging other sectors.

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).

We agree with the Committee's comments about the need for OFCOM to employ high quality staff with the relevant expertise and that it should be adequately funded to carry out its competition functions. We note the Committee's comments about possible alternative means by which funds might be provided to OFCOM to meet the costs of such work. We are at present discussing this and other funding issues with HM Treasury.

(e) Promptness standards

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).

As the Committee is aware, Clause 6 requires OFCOM to set timetables for dealing with those functions where these are not specifically covered elsewhere in the Bill. The Government believes that OFCOM will need flexibility to decide the timescales for each, taking into account its resources, the urgency of each matter and the impact of not acting

quickly. Putting the standards on the face of the Bill will remove the operational flexibility that OFCOM need to run effectively and efficiently.

However, we do appreciate that it is crucial for industry that there is certainty in the timeliness of its dealings with OFCOM and their promptness standards need to be both realistic and effective. The Bill will therefore contain a provision giving the Secretary of State powers to intervene and set promptness standards where she believes it necessary to do so.

Under the legislation, OFCOM shall have regard to the promptness standards and where they do not do so, they will be in breach of their statutory duty.

In respect of paragraph 7 of Schedule 5 and paragraph 7 of Schedule 6 to the Competition Act 1998, the Government's intention is to bring these into force shortly.

(f) Transparency

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).

We welcome the Committee's acceptance that it should be for the OFCOM Board to determine the best means of ensuring that the public can engage with its work.

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).

We agree with the Committee's comment that it will be desirable for OFCOM to reach a balance between being open and transparent in the way it interprets its duties and an unnecessarily burdensome and formulaic approach in explaining all of its decisions with reference to it general duties. We would, however, expect OFCOM to set out wherever it has needed to resolve significant conflicts between its duties in relation to particular decisions. We also agree that OFCOM should be encouraged to give reasons for its decisions wherever possible.

(g) Accountability

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).

We agree with the Committee's recommendations. The Bill will be amended so that any changes will be made by the Secretary of State by Statutory Instrument (negative procedure).

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 theCulture, 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).

The Government acknowledges the Committee's comments; the way in which OFCOM are held accountable to Parliament is a matter for Parliament itself.

(iv) The transition to and culture of OFCOM

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 fulfillment 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).

Just as there is nothing within the provisions under section 2 of the Office of Communications Act 2002 to prevent OFCOM publishing statements of intention regarding the fulfillment of their regulatory functions, so there is no impediment under the provisions of section 4 of the Act to the existing regulators having regard to any such statement OFCOM may make in fulfilling their functions before they are transferred to OFCOM.

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).

There is wide agreement on this point and we strongly endorse the Committee's comments.

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).

There is very wide recognition that OFCOM needs to be a completely new organisation, with a culture to match, and that a much more radical change is needed than a mere brigading together of the five existing regulators. It is for the recently appointed Chairman, Lord Currie, working with the main Board, to decide how to take this forward, but the Committee's observations on this point are welcome.

(v) OFCOM and the Secretaries of State

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).

We accept the Committee's recommendation and will remove these provisions from the Bill.

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).

Unlike directions under Clause 7 of the Bill, directions made under Clause 8 must be given by order, and under clause 254(1) the order must be a statutory instrument. Since statutory instruments must be published, there is no need for the obligation the Committee suggests.

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).

We believe the functions of the Secretary of State and OFCOM, as set out in the Bill, to be quite distinct. The Secretary of State would be carrying out her functions in the context of wider policy considerations. In doing so, it would be open to the Secretary of State to import broader considerations of public policy than could OFCOM in carrying out their functions in accordance with their general duties. We do not therefore accept that it would be appropriate in general for the general duties to also be applied to the functions undertaken by the Secretary of State.

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).

The Government agrees with this recommendation and we will be including a provision in the Bill.

Chapter 3: Economic Regulation

(i) The importance of economic regulation

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).

We agree with the fundamental importance that the Committee attaches to economic regulation across the full range of markets that OFCOM will regulate. OFCOM will be equipped with all the appropriate regulatory tools, including the power to apply general competition law across the sector, as well as appropriate powers specific to the sector. Of course, the recently appointed chairman of OFCOM is a distinguished regulatory economist.

(ii) Regulation of networks and services
(a) Implementing the EC Directives
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).

We understand that the Committee has in mind section 60 of the Competition Act, which is valuable in securing a broadly consistent competition regime whether the particular case concerns interstate or national trade and whether it falls under EC or UK jurisdiction. The electronic communications Directives, however, are required by Article 249 of the EC Treaty to be directly transposed into domestic law. This is accomplished, for the most part, by the Bill. The courts are also obliged to construe UK

legislation, in so far as they are able, consistently with Community law. Thus a provision analogous to section 60 of the Competition Act is unnecessary.

(b) The scope of networks, services and associated facilities

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).

Our reasoning behind the definitions in the Bill is set out below:

On software and stored data, the Directive refers to "... switching and routing equipment and other resources which permit the conveyance of signals ...". It is generally the case that modern switching and routing equipment is software-controlled, and will not function without the appropriate software and stored data. These are therefore appropriate and necessary to include within the definition of "electronic networks". Doing so does not, of course, extend the scope of the Bill to software and stored data in other contexts.

As the Committee has already noted, the Government takes the view that information society services, which do not have as their principal feature the conveyance of signals, would fall outside the scope of the definition of electronic communication services in any case, and no specific exclusion for information society services is necessary.

The proposal that the definition of associated facilities should be qualified by "is used" would have a restrictive effect not present in the Directive.

We agree with the Committee that the "other services" mentioned in Cl. 22(3)(b)(ii) of the draft Bill are not necessarily electronic communications services, and that this faithfully reflects the meaning of the Directive.

(c) Designation, notification, condition-setting and enforcement

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).

We shall be introducing a right of appeal against a decision by OFCOM not to pursue an investigation. However, having regard to the requirements of the relevant EU Directives, we do not think it appropriate to make statutory provision to align further the sectoral enforcement procedures with those under the Competition Act. The two sets of procedures already have much in common, for example, the procedures proposed in the Bill require OFCOM to make a substantive, appealable decision before imposing any penalty. In general, such material differences as exist are, we consider, justified and necessitated by the difference between a general competition regime such as the Competition Act, which applies across the economy and lays down general requirements only, and a sectoral regime such as that in the Bill, under which specific rights and obligations are laid down in advance. In the latter case, the risk of 'inadvertent' breaches by persons acting reasonably and in good faith is likely to be small. Moreover, in contrast to the Competition Act, no penalty can be imposed under the sectoral regime if the person concerned promptly takes appropriate corrective action once the matter is drawn to their attention.

The detailed procedures by which OFCOM will handle individual cases are an operational matter for OFCOM. We would expect OFCOM to issue appropriate statements of policy and practice on these matters, as OFT and the sectoral regulators do at present.

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).

We welcome these recommendations and agree that, as the powers to vary maximum penalties and the multiplier may involve issues of policy rather than simple inflation proofing, they should be subject to affirmative resolution. We are also taking the opportunity to make comparable powers in sections 36 and 69 of the Broadcasting Act 1996 subject to the affirmative procedure, rather than the negative procedure that currently applies.

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).

We welcome the Committee's recommendation on this point and agree that, in order to maintain consistency with the Competition Act, the power in clause 77(5) should be removed.

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).

We welcome this recommendation and will be introducing an appropriate formulation.

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

Section 6 of the Human Rights Act 1998 already secures the effect that enabling powers set out in legislation, or other executive powers, must be exercised compatibly with the requirements of the Act, unless the legislation in question expressly provides to the contrary. It is not therefore necessary to provide that new powers proposed in legislation are to be exercised compatibly with the requirements of the Act, and it is generally undesirable to do so because it could cause confusion as to the effect of section 6 of the 1998 Act.

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).

We agree with the Committee that these powers are not absolutely essential and Clause 94 has been dropped.

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).

The power is only intended to allow OFCOM to assist a person who is otherwise unable to take action against an operator. It is intended to address an imbalance in the law. The deletion of Clause 94 puts both the operator and any person assisted by OFCOM on an equal footing.

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).

Although we believe the clause as currently drafted is sufficient to ensure that the Secretary of State must take all necessary interests into account before making a direction, for reasons of good practice, we propose to amend the clause to provide that the Secretary of State may make a direction if she reasonably believes that it is necessary to do so.

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).

The Government believes that a provision broadly equivalent in effect to Section 94 of the 1984 Act is still necessary to address a number of issues that are not addressed by the Regulation of Investigatory Powers Act, the Intelligence Services Act or other legislation.

Such powers are naturally used rarely, only where strictly necessary, and in accord with the requirements of the ECHR and the Human Rights Act. It is not, in the nature of the issues addressed, possible to give a general account of the use which has been or may be made of the powers; and the range of issues covered means that they do need to be broadly drawn, albeit sparingly used. Directions which have been issued in the past have dealt with matters including aspects of emergency planning, adherence to appropriate standards in the security vetting of staff, where that is necessary, and sensitive operational matters considered necessary for protecting national security, some of which were issued in the aftermath of the events of 11th September 2001. The telecommunications companies, which are subject to existing directions, concur that these powers remain necessary.

Section 94 is being revised so that it can be effectively applied, where necessary, within the new regulatory framework set out in the Communications Bill. Consideration is also being given to introducing a new safeguard for those who might be affected by such a direction, by making it clear on the face of the statute that a direction can only be issued where it is both necessary and proportionate to the end to be achieved. This is consistent with the provisions of RIPA, which governs the issuing of interception warrants.

(d) "Must carry" / "must offer" / "must distribute"

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).

We accept this recommendation in principle. The intention behind the review was to ensure full consultation with all the effected parties and to check that the list of must carry services is the most appropriate possible, taking into account the public service benefit of any service, capacity constraints and the principle of proportionality, and we will seek to amend the Bill accordingly.

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).

The Government sees these provisions as a "failsafe", as are the similar current provisions. However, we agree with the Committee that the timing of implementation should not be limited and the Bill will be amended accordingly. These provisions can be brought into force at any time, and will be commenced by order when appropriate.

(e) Universal service conditions

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)

Clause 50 will serve to implement any revision of universal service requirements arising from a review by the Commission. It also serves the prior purpose of defining what services are to be provided throughout the UK to meet the requirements of the Directive, when the new framework is first incorporated into UK law. As these requirements are centrally motivated by concerns of public policy, and moreover the provisions of the Directive allow a degree of discretion at national level, at least as regards provision for the disabled, it is considered more appropriate that the requirements should be specified

by Ministers rather than the regulator. However it will be for OFCOM to consider how best to give effect, within the overall regulatory framework, to the requirements that Ministers choose to specify. These must of course be consistent with the terms of the Directive.

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).

It is not envisaged that Ministers would wish to give more than general guidance on the pricing of universal services, for example, in relation to geographic averaging of charges. In these circumstances, there does not appear to be the need for further involvement of Ministers as the Committee proposes. The use that the Secretary of State makes of the powers in Clause 50, will, of course, be fully accountable.

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).

Nothing in the Bill prevents public funding of the kind permitted under Article13 (1)(a) of the Directive. The Government has however no proposals to provide public funding for such services, so the question of explicit provision does not arise. We are considering whether the drafting of the Bill needs any clarification to allow for a limit on turnover as permitted by Article 13(3).

(f) Access-related conditions

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).

We welcome the Committee's conclusions on this point. OFCOM will ensure that all broadcasters are provided access on fair, reasonable and non-discriminatory terms.

(g) Significant market power conditions

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).

We are considering whether the drafting of the Bill can be improved on this point.

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).

We are considering whether the drafting of the Bill can be improved on these points.

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

We welcome this recommendation and will amend the Bill in order to make clear the mandatory character of periodic market analyses.

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).

We do not think the Directive is to be read as creating a requirement for the OFT to be involved in the market reviews to be carried out by OFCOM under the terms of the Directives, except to the extent that it would be appropriate to do so. There is extensive sharing of experience and coordination between Oftel and the OFT on matters of common interest, including the procedures and concepts used for market analysis, and we expect that this coordination will be carried forward by OFCOM. Moreover in the context of the responsibilities of the two bodies under the Competition Act, there are both formal and informal mechanisms in place to ensure consistency of practice. We consider that these arrangements work well, and that no requirement for the OFT to be engaged in the market reviews required by the Directives would be necessary or desirable.

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).

Clause 68(4)(b) transcribes Article12(2)(b) of the Directive. We consider that the feasibility referred to in the Directive is technical feasibility, and that this is evident from Recital 19. OFCOM is required under other provisions, for example those in clause 64(4)(a), and (c), as well as by virtue of its general duties (clause 3), to take account in its decisions on network access of the costs incurred by the provider in doing so.

(iii) Spectrum use and management

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).

We agree with the Committee that OFCOM's objectives on spectrum should be consistent with the general duty on spectrum and we believe that the draft Bill already achieves this. Section 2 of the Wireless Telegraphy Act 1998 sets out the factors to which OFCOM will be required to have regard, in particular, in setting spectrum licence fees. These factors may also be taken into account by OFCOM to the extent that is appropriate in carrying out spectrum management functions. However, we agree it would be helpful to clarify the Bill to make this explicit.

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).

We welcome the Committee's recognition that there is a wider public interest in the allocation, assignment and management of spectrum that OFCOM may not be best placed to judge and, therefore, its acceptance of the need for Ministerial powers of direction. We accept the Committee's view, also expressed by the independent review of

radio spectrum management by Professor Martin Cave, that the detailed implementation of spectrum management policy should be a matter for the independent regulator. In order to meet the concerns expressed by the Committee and the independent review, we intend to amend the Bill to require approval by Parliament of directions under the clause to be prospective instead of retrospective except in case of urgency. In addition, we propose to add a requirement that the Secretary of State should consult OFCOM and other stakeholders before giving a direction except in case of urgency.

We have carefully considered the Committee's further suggestion that directions should focus on the purposes to be achieved rather than the details of how they are to be achieved. In practice, the distinction between purpose and implementation is not clear-cut and it is difficult to draw a clear dividing line that will be appropriate in all circumstances.

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).

We agree with the Committee about the desirability of transparency. We remain committed to charging public sector users on a comparable basis to the private sector and have reaffirmed this principle in our response to the independent review. The amount paid by departments to the Radiocommunications Agency for access to spectrum is separately identified in the Agency's report and accounts. There is no need to amend to the Bill to ensure continuing transparency.

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).

As stated in our response to the independent review of radio spectrum management, we agree with the Committee that broadcasters should pay for spectrum but that the introduction of spectrum pricing and its timing should be linked to digital switchover. This is the rationale underlying our response to the review, in which we agree that the main spectrum efficiency gain will come from the move to digital-only broadcasting of television programmes. Incentive pricing for analogue spectrum should therefore only be implemented in a way that demonstrably provides an additional incentive for the broadcasters to do what they can to achieve the switchover conditions.

On radio astronomy, our response to the independent review confirms the Government's commitment to support space science in the UK. As stated in our response, we agree with the Committee that incentive pricing is not appropriate in some radio astronomy bands though it could have a role to play in others where international regulations do not preclude the use of spectrum for commercial use. However, it is not our intention that the introduction of incentive pricing should reduce the overall resource currently devoted to radio astronomy.

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).

This is a matter for the Trade and Industry Committee.

(iv) Appeals

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).

We agree with the Committee that it would be desirable to bring to bear the expertise of the Competition Commission on issues of price determination, where these are raised in an appeal, and also that this should not entail a further appeal on the merits. We are revising the appeal proposals to meet these points.

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).

We do not believe it is practical to set statutory time limits for the consideration of issues which may be raised by the parties in proceedings before a court of law, and we are not aware of any precedents for applying such limits to a judicial body deciding such matters. It is of course good practice for courts to seek to establish timetables and to adhere to them as far as practicable, but the courts must ultimately have sufficient flexibility to

The notion of a cross-media plurality test was one of the options put forward in the Government's *Consultation on Media Ownership Rules*. It was not popular with respondents, mainly because of the uncertainty involved in its application on a cross-media basis: businesses generally preferred to be able to plan according to a clear set of rules. This accords with the Government's view that the only way to guarantee sufficient levels of plurality on a cross-media basis is to set clear, specific limits on ownership through a number of key rules. Since these rules, which will apply to all mergers, are directed at the same objectives as a general plurality consideration, we do not see the need to provide additionally for a general plurality test in the Enterprise Bill merger control regime. Furthermore, we only plan a plurality test in the one area where the market is not regulated, newspapers.

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)

The Government welcomes the Committee's conclusions on this point. We agree that the first such review will be of particular importance.

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).

The Government does not believe that there are grounds for making significant changes to Part 4 of the Enterprise Bill to allow market investigation references to the Competition Commission to be made, like merger references, on the basis of public interest concerns. The two processes are not intended to operate in the same way. In merger cases it will be possible, under the new regime, for the Secretary of State to refer a transaction to the Competition Commission because it may be expected to operate against a specified public interest, whether or not she believes that it will substantially lessen competition. By contrast, a market investigation reference, whether made by the OFT, a sectoral regulator with concurrent powers or a Minister, can only be made on competition grounds. Where a public interest intervention notice has been issued, the Competition Commission is required to reach a view only as to whether features of the relevant markets adversely affect competition, to consider how to remedy any such adverse effects, and to consider how the Secretary of State might wish to modify her

"ideal" set of remedies for the competition problems in the light of the specified public interest considerations.

The Government's view is that market investigations should only seek to address competition problems arising from the structure of markets, and the conduct of firms and their customers in them. More general aspects of the market, which do not affect competition, or have detrimental effects on consumers, are better addressed in other ways. As the Committee noted in recommendation 80, OFCOM will be required to review all media ownership rules at least every three years and to recommend any amendments needed to maintain the correct balance between competition and plurality of voice.

(ii) Specific restrictions on ownership

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).

The Bill makes clear that local authorities will only be able to use broadcasting licences to provide information about services provided by or on behalf of the local authority within the local authority area. Under section 2(1) of the Local Government Act 1986 there is already a statutory prohibition on local authorities publishing party political material. Local authority services requiring a licence will also be subject to the standards objectives set out in the Communications Bill, which OFCOM will be responsible for enforcing through programme and advertising standards codes. The Audit Commission will monitor local authority activities in this area in the same way as other local authority activities. Advertising, if carried, will be subject to the specific requirement in the Broadcasting Act 1990 that there should not be any unreasonable discrimination against or in favour of advertisers.

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).

The Government appreciates the Committee's concern that there may be a conflict of interest between the ownership of an advertising agency and a commercial broadcast licence. However, this is precisely the sort of market issue that can be dealt with by the

new, strengthened competition regime, and we therefore propose to remove the existing prohibition.

(iii) Restrictions on religious ownership

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).

The Government's aim is to ensure that limited spectrum is distributed so as to satisfy as many viewers/listeners as possible, and to avoid giving one religion an unfair advantage over another, so that everyone's beliefs are equally respected. For example, where there are few constraints on spectrum, as in the case of cable or satellite broadcasting, religious bodies can already hold licences. Furthermore, the Bill will allow OFCOM to award religious bodies TV licences for digital programme services, digital additional service licences and restricted service licences. As regards radio, OFCOM will be able to award local digital sound programme licences. Conversely, where spectrum is extremely limited, as in the case of national analogue radio services, there is a restriction on religious bodies holding any of the three available licences.

It follows that, as spectrum availability increases, the case for restrictions diminishes. It is inevitably a matter of judgement where the line should be drawn. In the case of national digital terrestrial radio services, there are currently ten channels for commercial radio. Three of these are simulcasts of the national analogue stations, leaving seven for other services. The Government's view is that this is insufficient to justify removing the restriction on religious broadcasters holding national digital terrestrial licences: to allow all the main UK religions to be represented would mean little or no capacity was left for non-religious broadcasting; if only one were represented, the Government's aim of seeking not to disadvantage some religions at the expense of others would not be achieved. In the event that more spectrum becomes available, the Government would have to review this position. The Government has considered this question carefully in the light of the representations it has received and concluded that its current proposals are compatible with ECHR.

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 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).

The Government is continuing to consider this recommendation.

(iv) Restrictions on nationality of ownership

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).

We will, of course, consider any new evidence arising from the ITC review of programme supply. However, we are unconvinced that there is any further evidence to gather in this area, any reason why the evidence would be clearer to OFCOM or anything to be gained by delay. No predictions can be made about the level of foreign investment that will result from our proposed changes, that is down to the individual businesses concerned. It is clear, however, from empirical studies of other industries, that foreign ownership, and in particular US ownership, tends to increase the productivity of UK industries. Increased productivity and efficiency, allied to new management, skills and ideas that foreign ownership could contribute, should mean better programmes for viewers and listeners.

The Committee is concerned by the risks posed to the UK broadcasting ecology by the entry of large American companies into the market. The Government believes these risks are slight. The Bill makes provision for content regulation that will prevent any 'dumping' of US programming in the UK. In the television industry, Channels 3, 4 and 5 will be subject to obligations for original programming, made for first screening to a UK audience, above the EU requirement for a minimum of 50% EU-originated content. There will also be additional obligations for independent production and for regional production and regional programming on ITV. In radio, local stations will have to maintain the formats they agreed with the regulator. Whenever a local radio licence changes hands, OFCOM will be able to vary the licence to make sure the local character

of the service is maintained and OFCOM will also be given a new power to protect and promote the local nature of local radio.

Such provisions will act as a guarantee of quality and diversity. It is also clear, however, that British viewers and listeners are discerning and demand high quality British content. Any company that fails to deliver such content will suffer in terms of ratings and revenues and there is no reason why American companies would be more likely to ignore this fact than the giant European companies, such as Bertelsman, who already control Channel 5, or Vivendi, the New York-based French company, who are already entitled to buy into our market.

The Government wants UK programming to be of the highest possible quality and believes that the removal of foreign ownership rules could create opportunities for new investment, new initiative, skills and management to come to our broadcasting industries from a wider range of sources. The end beneficiaries of these changes would viewers and listeners.

(v) Ownership of Channel 3 licences and Channel 5

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).

As the Committee indicates, the Government believes that such matters are best dealt with by competition law, and this is reflected in our proposals. However, as indicated above in our response to recommendation 79, we do not consider a plurality test to be necessary in addition to the existing provisions of competition law, the specific rules that will be introduced to govern the ownership of Channel 3, and the content regulation that will be applied to Channels 3 and 5.

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).

We welcome this recommendation. Under our proposals, OFCOM will be required to review the ownership limits relating to the nominated news provider, along with the other media ownership rules, at least every three years.

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).

The Government does not accept this recommendation. Our policy is to deregulate wherever possible, but to retain those ownership rules that represent key safeguards of our democratic fabric. The rule that prevents major national newspaper owners holding Channel 3 licences is clearly one such key rule. ITV is the only mass audience, public service commercial channel universally available to the UK population. As such it represents a highly influential media 'voice' that must remain independent of the editorial slant of the largest national newspaper companies.

Channel 5, however, is a very different service. It does not have universal access, covering just over 80% of the country, and has a small audience share of around 6%, compared to ITV's 25%. We therefore propose to remove all rules on the ownership of Channel 5, to allow it to grow through as many sources of investment as possible. If the market positions of ITV and Channel 5 were to change as a result of new investment, the Bill contains the flexibility to allow amendment of both the ownership limits relating to Channel 3 licences and the scope of the public service obligations that apply to Channel 5.

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).

We note that the issue of vertical integration has raised concerns in consecutive consultation exercises and agree that it needs to be given the necessary regulatory attention. However, we believe media ownership rules to be an inappropriate means of regulation in this area.

We said in the White Paper that we did not believe it right to ban the vertical integration of companies in any form. First, such a ban would slow down investment and second,

network operators would in any case pursue exclusive agreements with other content providers in order to deliver attractive packages to the consumer. We stated then that we believed the right approach was for the regulator to be able to act forcefully to prevent any abuse of vertical integration. We suggested that the regulator should have the power to judge at what point a network should be opened up to all content providers and we proposed that where a vertically integrated company has a dominant position in one market, the regulator should also take account of the effects of its activities on competition in any related markets.

In reviewing media ownership rules, OFCOM will be free to recommend whatever changes they think are appropriate within the scope of the legislation.

(vi) Radio ownership and regional cross-media ownership

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).

[The Government notes the Committee's concern about the need for clearer definition of our radio ownership proposals. The detail of the scheme we propose will be made absolutely clear, through the publication of a draft Order alongside it rather than on the face of the Bill.]

92. We recommend that the "three plus one" rule applying to local radio ownership in welldeveloped 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).

Having consulted at length on the proposed radio ownership scheme, we are now considering carefully all the arguments we have heard for and against the 'three plus one rule' before deciding what policy to pursue. We welcome the Committee's support for our original proposal.

The Government accepts the logic behind the recommendation of a 'sunset' provision, but is committed to an alternative proposal that would allow any radio ownership scheme, like all other ownership rules, to be reviewed by OFCOM at least every three years and amended by the Secretary of State through further secondary legislation. Such

an arrangement would provide the same degree of flexibility that the Committee advocates in this area.

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).

The Government notes the Committee's uncertainty over the precise nature of the proposals for local cross-media ownership rules. These are intended to be part of any local radio ownership scheme. Again, the detail will be made clear through the publication of a draft Order alongside the main Bill.

(vii) Newspaper mergers

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).

We welcome the Committee's endorsement of extended jurisdiction for the new newspaper regime. We also share the Committee's desire to achieve a deregulatory outcome through these reforms, provided that this is consistent with the need to protect the particular public interests that arise in relation to newspaper transactions.

In striking this balance, we attach considerable importance to the effect of the removal of criminal sanctions and the ending of prior notification requirements. The existing regime places a disproportionate burden on parties to newspaper transactions by requiring all transactions satisfying the legislative thresholds, regardless of whether or not they raise concerns, to seek the prior consent of the Secretary of State. Unless a case falls within a statutory exception, the Secretary of State cannot give this consent until she has received a Competition Commission report. In future, regulatory intervention will be better focused on those transactions that raise real competition concerns or involve the specified newspaper public interest considerations. Straightforward transactions will not be unnecessarily delayed or subjected to the costs of a Competition Commission reference.

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).

The Government welcomes the Committee's conclusions on this point. We agree that OFCOM will be able to develop the necessary expertise to make a valuable contribution and continue to intend to include this as part of the new regime.

(viii) Parliamentary control over legislative change

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).

The Government is strongly of the view that one of the faults of the existing legislation has been its inflexibility in the face of rapidly changing technology and markets. We do not therefore accept this recommendation. The proposal in the draft Bill, to give the Secretary of State the power to amend legislation after it has been reviewed by OFCOM, will provide flexibility in the long term, as well as stability and certainty for business in the immediate future. The Government does not envisage that there is a case for OFCOM to review ownership rules very much before the initial 3-year period has elapsed, there would have to be a very clear rationale behind any earlier review.

Chapter 5: Content regulation

(i) The scope of the licensed sector

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).

We hope that the VoD industry will be able to provide sufficient assurance about the robustness of a self-regulatory system so that no provisions will be required in the Bill.

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

As the Committee is aware, we are working with the industry to ensure that the scope of "television licensable content services" is right. However, we believe that amendments to that definition must be subject to Parliamentary approval and not left simply to

OFCOM's discretion, since the definition determines whether the provider of a particular service would be committing an offence if he offered that service without a licence.

(ii) Standards codes and complaints procedures

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).

We welcome the Committee's conclusions on this point.

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).

We note the Committee's remarks, and are giving careful consideration to this as recommended.

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).

We welcome the Committee's conclusions on this point.

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)

We agree with the Committee's conclusions on this point.

(iii) The regulation of commercial radio

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).

We agree that the Bill should adopt a similar approach for both the TV licences and ILR licences. We therefore intend to amend the Bill to have equivalent fines for both INR and TV licences, so far as possible.

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).

The Government agrees with the Committee about the importance of the characteristics of local radio, hence there will be a new duty on OFCOM to promote and protect it. This duty will not impose new duties on existing licensees but will clarify and reinforce existing obligations on licence holders.

The Government agrees with the Committee's views about the need for licences to cater for a broad range of interests within each local radio area. Under section 105 of the Broadcasting Act 1990, the Radio Authority has a duty, when considering an application for a local licence, to take into account the extent to which any proposed service would cater for the tastes and interests of persons living in the area and the extent to which it would broaden the range of services available in the area. This duty will continue after the new legislation and the Government believes that it should meet the Committee's concerns.

(iv) Access radio and local television

105. We welcome the provisions in the draft Bill to enable the structured development of a notfor-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).

We agree with the Committee's conclusions on this point.

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).

The Government agrees on the importance of local television services. The Bill already gives the Secretary of State the power to provide by order for the licensing of local television services, providing the proposed service has a number of key characteristics relating in particular to benefits to the community to be served. We believe these provisions give enough flexibility to allow a variety of local television services to

develop, now as well as after switchover. Due to the scarcity of spectrum in the analogue world, there is currently little scope for new local services but a post-switchover plan will be developed to give a clearer indication of long-term prospects for local television services. At that time we will know more about the fully digital broadcasting market and how best to ensure the provision of secure and commercially viable licences.

(v) Television services for the deaf and visually impaired

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).

We agree with the Committee's conclusions on this point.

(vi) Government powers in relation to broadcast content

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).

This power has been available since the start of broadcasting and we are aware of only one case of its exercise in living memory. It is nonetheless important that Ministers should ultimately have the opportunity to make announcements important to public well-being and these could in principle extend beyond those only concerned with national security. In exercising this power, Ministers would of course have to act in compliance with Convention rights and it should be noted that broadcasters are explicitly enabled to state clearly that the announcement is a ministerial announcement and therefore are able to dissociate themselves from editorial responsibility. We believe that these provide sufficient safeguards and significantly mitigates any interference with their rights under Article 10.

(vii) The economics and regulation of content production

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)

We do not believe that broadcasters should be directly responsible through licence conditions for the training of persons they do not employ. However, we recognise the importance of a well-trained freelance sector to the overall creative and economic health of the industry. We have therefore ensured that OFCOM's general function relating to employment in broadcasting extends specifically to persons "for work in connection with the provision of [television and radio] services otherwise than as an employee", thereby

embracing freelancers. We would expect OFCOM to work closely with Skillset in discharging this function.

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).

We note the Committee's views and agree that the broadcasters are a vital and integral component of the British film industry. There is much to be gained by a close relationship between the broadcasting and film industries, as also noted by the Film Policy Review Group in its 1998 report *A Bigger Picture*. We would expect OFCOM, where appropriate, to contribute to efforts in this area.

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).

We will consider this recommendation further in the light of the findings of the recently announced review of the television programme supply market that the Secretary of State for Culture, Media and Sport has asked the ITC to undertake.

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).

The Government has considered whether independent productions should be defined in this way but we have not thus far been persuaded of the arguments. The independent productions quota is intended to increase competition, multiply sources of supply and stimulate creativity and new talent. It is hard to see how a definition that allowed, for example, productions by the BBC for ITV to count as independent, could be squared with these objectives. We await with interest the conclusions of the ITC television programme supply market review. We have recognised the importance of a strong regional ITV production base in the draft Bill with specific measures to ensure that programme production by regional ITV companies is sustained.

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).

We agree with the Committee that the programme supply market is an area that needs further analysis and we will ensure that OFCOM have the necessary powers to conduct reviews. In order to identify without delay the main issues and concerns requiring further attention, the Secretary of State for Culture, Media and Sport has asked the ITC to undertake an initial review of this area. We will consider carefully the findings of this review, which may form the basis for further investigation by the OFT or OFCOM.

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 coproduction 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).

We share the Committee's concern that this clause as drafted contains no requirement for original productions to be made in Europe and we will take steps to tighten the relevant definitions. We will also include a requirement for an appropriate proportion of original productions to be shown at peak viewing times.

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).

The Government notes the Committee's views. We will ensure that OFCOM have the flexibility to alter the tier 2 production and programming quotas for public service channels in response to changing circumstances and conditions after consulting the licence holders.

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).

We agree with the Committee's conclusions on this point.

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).

We note the Committee's views about the wording of this clause but do not consider that amendment to the draft Bill is necessary. There is no reason why a "suitable" amount cannot be a "substantial" amount and, indeed, we would expect it to be so. However, the current wording provides for flexibility so that targets can be maintained at appropriate levels. Channel 3's production requirements for regional programmes are covered in clause 194. We do not propose to introduce licence conditions on regional production for Channel 5 at this stage, reflecting the intended hierarchy of public service broadcaster obligations, from the BBC at the top to Channel 5 at the bottom.

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

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).

The Government welcomes the Committee's overall conclusion concerning the public service remit. It notes the reservations about the word "requirements" and proposes to reconsider this wording. The Government has looked again at the detailed description of programme content in clause 181(5). We believe that the wording used will be well understood by all concerned and is not therefore persuaded of the need for any further expansion. We do, however, propose to take steps to include international issues and science in the list of specific programming topics included within the remit.

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).

Determining the frequency of OFCOM reports on the public service remit is clearly a matter of judgement. The Government considers that two-year intervals would be too frequent for in-depth reviews of the public service broadcasting sector. However, we have concluded that factual and statistical information on the broadcasting market should be collected and published on a relatively frequent basis. We therefore propose that OFCOM should be required to review and report annually on the United Kingdom broadcasting market as a whole, covering both radio and television and dealing principally with factual and statistical matters. The Government also proposes that, as a separate obligation, OFCOM should be required to undertake reviews of the public service broadcasting sector, assessing the fulfilment of the public service remit set out in clause 181, at intervals not exceeding five years.

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).

The Government agrees that OFCOM's reviews should play a central role in the debate on public service broadcasting. We therefore accept the substance of the first two recommendations and will bring forward appropriate amendments to clause 181. We are not, however, persuaded of the need to extend OFCOM's public service broadcasting reviews to include broadcasters other than the BBC, S4C and the providers of licensed public service channels. OFCOM's five-yearly reports will play a key role in respect of the qualitative obligations formally applying to public service broadcasters. To require that these reports consider the output of other broadcasters would, in the Government's view, be inappropriate and could well be a source of confusion. OFCOM's annual reviews of the broadcasting market as a whole will encompass non-public service broadcasters.

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).

The Government accepts this recommendation.

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).

The Government sees no need for an amendment on the lines proposed. The Bill already provides for OFCOM to specify, for each Channel 3 service, the proportion of overall broadcasting time to be allocated to original productions and programmes of regional interest.

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).

The Government accepts this recommendation.

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).

The Government believes that it is perfectly proper for the Bill to include provision for the public service remits, both general and individual, to be amended by order if changing circumstances warrant this. Such an order can be made only on the recommendation of OFCOM, who must have satisfied the consultation requirements - as amended in accordance with recommendation 121 - and will be subject to affirmative resolution procedure.

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)

The Government agrees with this proposal and will amend the draft Bill accordingly.

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).

We are not persuaded of the case for such a change. Our overall approach to the third tier regime has been to create a framework that is genuinely self-regulatory, whilst at the same time ensuring that OFCOM are able to intervene promptly and effectively where there is clear evidence of a fall-off in quality. The requirement on broadcasters to publish an annual statement of programme policy but to consult OFCOM only where the statement involves a significant change as compared with previous years, is an integral aspect of this overall approach. While the Government would expect OFCOM to review licensed public service broadcasters' performance annually, it sees no reason to provide in the Bill for a formal annual reporting process in respect of the public service sector.

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).

We believe that when licences have been awarded following a competitive process in the first instance, it is not appropriate to change the financial conditions of the licences during their term and may be seen as unfair by failed bidders.

Furthermore, the payments for 75% of the total amount are based on the actual income of the licensee and therefore already take significant account of changes in the advertising market. We do recognise, however, that the Committee has identified an issue that continues to concern licensees and are considering how we could meet that concern.

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).

We agree that there is a need to clarify what will happen after 2014 and we therefore propose to revise these provisions to meet concerns both expressed by the Committee and in response to our consultation.

(ix) The remit and regulation of S4C

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).

The Government sees no case for such a change. The need to amend the Authority's public service remits may not necessarily stem from a review by the Secretary of State of the Authority's fulfilment of those remits. An amendment could equally arise from other factors, such as a request from the Authority itself. Any order amending the Authority's public service remits will be subject to the affirmative resolution procedure.

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).

The Government agrees that, in considering the case for an increase in the level of the Welsh Authority's public funding, the Secretary of State should be able to take into account factors broader than just transmission costs, as section 61(4) of the Broadcasting Act 1990 currently provides. However, extending section 61(4) to enable additional payments to be made to S4C to support the development of digital services would still limit the considerations on which an increase could be based. The Government therefore proposes a broader amendment to section 61(4) of the 1990 Act to enable the Secretary of State to increase the level of the Welsh Authority's funding if she considers it is appropriate to do so, having regard to the cost to the Authority of providing its public service television channels and arranging for the broadcasting or other distribution of those services.

(x) Gaelic broadcasting

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).

We agree with the Committee that the relevant provisions on Gaelic broadcasting should not inhibit the future development of a Gaelic television service.

(xi) OFCOM and the BBC

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).

The Government accepts the sentiment of this point but does not believe that an amendment is necessary.

We consider that clause 144 is sufficiently clear as drafted. OFCOM's functions under competition law in respect of broadcasting are fully set out in Part 5 (notably, clauses 246 and 247).

UK and EU competition law, and in particular the Competition Act 1998, applies to the BBC as to other broadcasting organisations. The Bill gives OFCOM concurrent powers (with OFT) to apply competition law to broadcasting and related activities.

In addition, the BBC is required to comply with the BBC Fair Trading Commitment. The primary purpose of the BBC's Fair Trading Commitment and Commercial Policy Guidelines is explained in the BBC's supplementary evidence to the Joint Scrutiny Committee. They are internal documents, like those used by many companies. These aim to ensure that the BBC is properly equipped to comply with competition law in carrying out its activities, and that all those activities are consistent with and supportive of the BBC's core purpose as a public service broadcaster. They are a set of internal requirements and guidelines for those undertaking commercial activity within the BBC, specific to the undertakings and circumstances of the BBC. They underpin compliance with the law, but do not substitute for it.

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).

The Government's overall policy is that the new regulatory regime introduced by the Bill will apply to the BBC in a way which takes account of the BBC's unique role and constitution, in particular its special relationship with Parliament and the core responsibilities of the BBC Governors. Within this framework the provisions of the Agreement will mirror those of the Bill wherever appropriate. The Government aims to make available a draft for consideration by Parliament alongside the relevant provisions of the Bill.

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).

The Government accepts this recommendation. In practice the BBC already fulfils these requirements.

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).

The Government accepts this recommendation.

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).

The BBC will be placed under an obligation to pay to OFCOM such contributions to OFCOM's revenues as the parties may agree between them. The contributions will need to take into account the fact that OFCOM's role in respect of the BBC will be more extensive than that of the current Broadcasting Standards Commission, given that OFCOM will be responsible for monitoring the BBC's compliance with Tiers 1 and 2. In the event of failure to reach agreement, the amount of the contributions will be determined by the Secretary of State.

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).

The BBC's Statements of Programme Policy and annual reports already encompass each of its radio services. A formal requirement to this effect will be embodied in the Agreement.

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).

The Government accepts this recommendation.

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).

Having now considered the issue very carefully and noted the views of the Committee, the Government accepts the case for empowering OFCOM to impose financial penalties on the BBC. It proposes that such penalties should be available in the case of infringement of requirements under the first and second tiers of the new regime, other than those relating to accuracy and impartiality in programme content, which will continue to be regulated by the Governors, and advertising and sponsorship.

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).

The Government notes the Committee's comment and agrees that the issue is an important one. The BBC's commercial activities help ensure that the full value of licence payers' assets are realised and generate income streams that can be ploughed back into public service programming. However, such activities must be conducted in a fully transparent manner and must not divert any public funds to commercial ventures or distort competition in commercial markets. The BBC's fair trading commitment and commercial policy guidelines are designed to satisfy these requirements and have been validated by a succession of independent reviews.

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).

The current Charter will expire on 31 December 2006 and the Government expects to commence the task of reviewing it in 2004. It is too soon to formulate detailed proposals as to how the review will be conducted. However, the Government intends that it should provide the occasion for a comprehensive appraisal of the BBC's role in the digital age, taking forward issues emerging from the debates on the Communications Bill. The review will encompass an extensive process of public consultation and discussion, including debate in both Houses of Parliament. The Government will look to OFCOM to make a full contribution to the review.

Chapter 6: Further Conclusions

(i) The resilience and adaptability of the proposed legislation

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

We are very grateful for the contribution made by the Committee, who have studied the draft Bill with great thoroughness. We have made a commitment to expose a greater

number of Bills to pre-legislative scrutiny and we believe that the Committee's efforts are a testament to this process.

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).

We note the Committee's comments on this point.

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).

We have considered the Committee's concerns in this area and have accepted a number of the recommendations regarding the degree of Parliamentary control on the exercise of the delegated powers in the Bill. As a result, we expect to take delegated powers only where changes will be required from time to time, for example, penalty levels or where we expect there to be regular reviews, for example on radio ownership.

(ii) The merits, limits and future of pre-legislative scrutiny

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).

We welcome the Committee's comment on this point and, as we have said elsewhere in this response, are grateful for the Committee's positive response, which we believe has made a valuable contribution to improving our draft Bill.

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).

We believe that the Committee has power to interpret its own terms of reference and the Government would not interfere with that. The Committee was in a unique position, since it is composed of and reporting to, the Parliamentarians who will conduct 'line by line' scrutiny of the Bill as eventually introduced. They are in a different position from those involved in the wider consultation process and the Government is entitled to ask

others to respond in a way it would find helpful. The Committee, of course, has power to ask witnesses for things not requested by Government.

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).

The Government wishes to give all the committees scrutinising draft legislation adequate time in which to conduct their inquiries. However, we acknowledge that the circumstances for establishing a joint committee for this purpose means that it may require more time to develop its working methods than, for example, a pre-existing departmental select committee. The Government will endeavour to take these considerations into account in future scrutiny by joint committees and will aim put forward any motions to establish a joint committee to consider a draft Bill well before such a Bill's publication.

However, this is not entirely in our control. There need to be negotiations on Committee composition, terms of reference and timetable both between parties and, on occasion, within parties, before any proposals can be put forward for decision by each House. The Parliamentary process itself takes time and can be unexpectedly protracted. Although we will be mindful of the Committee's recommendation, it is hard to see how the Government can guarantee a timetable which depends on so many factors it does not control. We hope the Committee's recommendation will be heeded by others involved in the process.

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).

As well as seeking to provide enough time for committees to complete their work, the Government would like to ensure that the Parliamentary enquiry complements the consultation undertaken by Government departments. Of course, there are a number of constraints on the amount of time available for each draft Bill, including the Parliament's legislative timetable. The Government has to take such factors into account when seeking to find the optimum period for consultation. The Government believes that its current

approach is more likely to produce effective scrutiny than by determining standard deadlines for every draft Bill.

As the Committee recognises, there can be many timetable constraints on a draft Bill. In time, with more pre legislative scrutiny, some of these may ease, especially if Parliamentary procedures adapt in response to such scrutiny. However, at present, if a Bill is needed by a particular time, the period available for pre-legislative scrutiny may be limited. That period could only be extended by reducing the time available for scrutiny of the Bill proper, which Parliament is unlikely to welcome, or reducing the time for the Government to consider the Committee's report and revise the Bill, if appropriate, which is equally undesirable. Given these constraints, the Government can face a choice between reducing the time for public consultation on the Bill or proposing a timetable in which consultation and pre-legislative scrutiny coincide. The Committee has commended the degree of public consultation on the draft Communications Bill, and will understand that this is a difficult choice, which is best made in the context of the particular circumstances surrounding each Bill. The Government undertakes to bear the Committee's concerns in mind when considering the timetable for future draft Bills and will be prepared to reduce periods for public consultation if appropriate.

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GOVERNMENT RESPONSE TO POINTS RAISED BY DELEGATED POWERS AND REGULATORY REFORM COMMITTEE

Clause 11

Clause 11 places on OFCOM certain duties relating to the improvement of training, etc. of persons working in radio or television. Subsection (2) sets out a duty to promote equality of opportunity. Subsection (4) limits this to equality between men and women, different racial groups and between those who are or have been disabled and others. Subsection (6) allows the Secretary of State to amend subsection (4) by extending the scope of equality of opportunity. (Paragraph 4 of Annex 6 to the Report of the Joint Committee on the Draft Communications Bill)

When the Committee first examined the draft bill, it was concerned about the width of subsection (6) in the context of a clause placing on a regulator the duty of influencing the employment policies of the bodies it regulates – a provision for which we are not aware of a precedent. The Department says that the Henry VIII power to extend this clause to other forms of "equality" is intended to allow the clause to be brought into line with general equality law if that should be extended in the future, for example to age or religious discrimination. We find this explanation unconvincing, as any general extension would require primary legislation, and we take the view that legislation could itself make the appropriate amendment to the clause. We have considered the degree of Parliamentary control over this power, and concluded that negative procedure is appropriate here only if the power is to be used to reflect changes in the general law and not to make special provision for bodies regulated by OFCOM. (Paragraph 5 of Annex 6)

- Please see our response to recommendation 49 above

Powers to Vary Maximum Penalties

There are Henry VIII powers to vary maximum penalties in clauses 28, 32, 77, 91, 101, 132. The amount of the penalty in a particular case is determined by OFCOM and is recoverable by civil process. The powers are subject to negative procedure. The Committee always scrutinizes with particular care any delegation of a power to increase penalties. We consider that such a power should be subject to affirmative procedure unless it is to be used only to take account of the change in value of money. Paragraph 16 of the memorandum (Annex A) states that the power in clause 28 will allow the maximum to be raised if the Secretary of State "believes that the amount set as a fine is not sufficient to provide a deterrent effect" However, in response to our questions about these clauses the Department replied:

> *"any changes.... would not represent any change of policy, but simply maintain the effectiveness of the level of financial penalty applicable, principally in order to take account of inflation".*

These powers are not confined to inflation proofing, and unless words are added to confine them in that way, we recommend that they should be subject to affirmative procedure. In any event, we suggest that affirmative procedure should apply to the powers in clauses 32(9) and 77(5) which are concerned with varying multipliers rather than sums of money and so cannot be needed for inflation proofing. (Paragraphs 6-7 of Annex 6.)

- On the powers in clauses 28 and 32, please see our response to PLSC recommendation 48. We will also make similar amendments to clauses 77(5), 91(8), 101(9) and 132(8).

- We will take the opportunity to amend comparable powers in sections 36 and 69 of the Broadcasting Act 1996 to substitute the affirmative draft procedure for the negative resolution procedure for which those sections currently provide.

Clause 49

This clause includes a Henry VIII power to vary the list of "must-carry" services. Negative procedure is applied. In response to our inquiry the Department has suggested criteria which will determine what amendments should be made by an order under this clause. The Department envisages that the criteria used to add a service to the list of must-carry services will be:

- *its public service remit;*
- *its importance for social inclusion, on a national or a local basis;*
- *its unavailability by other means for a significant proportion of people using the platform.*

We suggest that this is a subject which is of particular concern to Parliament and that either affirmative procedure should apply or the list of criteria should be added to the bill. (Paragraph 8 of Annex 6.)

- The Government accepts this in principle. We will add provisions to clarify the criteria that will determine which amendments should be made by an order under this clause.

Clause 82

This clause is concerned with the electronic communications code which is set out in Schedule 2 to the Telecommunications Act 1984. One element of that code is concerned with compensation for damage caused to the property of third persons by works carried out on behalf of one of the telecommunications bodies. At present there is a lower limit of £50 below which compensation under the code is excluded. This limit was first set out in 1965 and the clause confers on OFCOM a power to change the limit. That power is not subject to Parliamentary control.

We see the need to update the limit but this could be done in the bill without conferring a power to vary it. If the power is to remain, we consider that it should be exercisable by the Secretary of State and not by OFCOM. If the power were to be used simply to uprate the amount in line with changes in the value of money, we consider that negative procedure would be appropriate. If, however, it were to
be used to impose an increase in real terms it should be subject to affirmative procedure. (Paragraphs 9 and 10 of Annex 6.)

- We agree. It is intended that any change in the lower limit for compensation would reflect a change in the value of money, and any changes will be made by the Secretary of State by Statutory Instrument (negative procedure).

Clause 245

This clause gives the Secretary of State power to define what is a "television receiver" for the purposes of Part 4 of the draft bill (Licensing of TV reception). We are concerned that the draft bill should give the Secretary of State such wide power to define the scope of this part of the bill. We consider that it would be preferable to include, on the face of the bill, a definition of "television receiver" which takes account of the present state of television technology, while giving the

Secretary of State the power to modify this definition in the light of future technological developments. (Paragraph 11 of Annex 6.)

- The Government's proposal to define a television receiver in regulations, rather than in primary legislation, follows the approach adopted under current legislation. The Government doubts the benefits of departing from this approach at a time when changes in technology and patterns of use are taking place faster, and are more difficult to predict than in the past.

- Defining a television receiver in primary legislation, with a restricted power for that definition to be amended by order, could create a situation where the power was inadequate to keep the definition up to date, which could jeopardise the future of the licensing system. If, however, the power to amend the statutory definition was unrestricted, the proposed amendment would offer no safeguards that are not already contained in the structure which the Government proposes. Both the order defining a television receiver and any subsequent order amending that definition will be subject to the negative resolution procedure.