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THE COMMUNICATIONS BILL, 2[ND] READING
BSKYB BRIEFING

BACKGROUND ON SKY

13 years ago Sky pioneered direct to home (DTH) satellite broadcasting in the UK and Ireland. At significant risk, the company initially launched four new channels including Sky News, increasing competition in television services and creating a new broadcasting platform. Other broadcasters followed and, by the mid-1990s, over 40 channels were available to UK and Irish viewers on analogue satellite.

In 1998 Sky launched its digital service (DSat) in the UK and Ireland, bringing excellent picture quality, more channels, and interactivity, allowing viewers to e-mail, shop, play games, vote, bet and manage their finances. 3 years later Sky migrated fully from analogue to digital technology and switched off its analogue signals.

To date, the company has invested more than £2 billion in digital television. More than 6.3 million satellite homes in the UK and Ireland now subscribe to Sky Digital. Sky has set a target of 7 million DSat satellite subscribers by the end of 2003. More than 11 million homes receive one or more of Sky's channels in the UK and Ireland, including through cable and digital terrestrial television (DTT).

As well as operating the DSat platform, Sky produces a range of popular channels, including Sky One, Sky News, Sky Sports and Sky Movies. Yet most of the 300+ channels on DSat are not owned by Sky, and include over 70 non-subscription channels, including those of the BBC, ITV, Channel 4 and Five.

DSat is an open platform, in contrast to cable. Broadcasters can obtain capacity from a relevant satellite operator (SES or Eutelsat) and retail or otherwise provide their own channels independently of Sky's pay TV packages. This is achieved through access being made available to the Electronic Programme Guide and, where appropriate, through the provision of conditional access services (encryption, entitlement and regionalisation). Sky must provide these services on a fair, reasonable and non-discriminatory basis, and has entered over 180 agreements with third parties for them.

Sky provides three channels on the new 'Freeview' DTT platform: Sky News, Sky Sports News and Sky Travel. None of these has previously been available to digital terrestrial viewers, and all are available on a free-to-air basis without subscription.

Sky's DTH broadcasting services are licensed and regulated by the ITC. Sky is also regulated by OFTEL, and subject to the EU competition law regime and to individual national regimes in the countries in which it operates. It is a British public company, employing more than 9,000 staff, and has created, directly and indirectly, many thousands of jobs in broadcasting, retailing and manufacturing.

BSkyB has the following comments on the Communications Bill.

MUST CARRY

Sky supports the Government's position that Public Service Broadcasters (PSBs) should pay fair, reasonable and non-discriminatory rates for use of digital satellite (DSat) conditional access (CA) services. PSBs are campaigning for clauses in the Bill that will require them to be charged less for these services than the current (discounted) rates. They also argue that, without such 'must carry' rules, the Bill's 'must offer' requirements on PSBs will not be balanced, and DSat viewers will not be guaranteed access to PSB channels in the digital future. BSkyB welcomes the Government's rejection of this campaign and support for the existing legislative regime. **Further amendments seeking must carry privileges for PSBs should be rejected for the following reasons.**

- **PSBs pay commercial rates for products and services (even regulated ones) in virtually every aspect of their business** – electricity, postage, telephony, talent, facilities and so on, and there is no reason why payments for CA services should be treated any differently. Furthermore, PSBs contribute a fraction of the amount contributed by Sky to the DSat platform (Sky itself bears over 80% of the total CA charges levied on DSat), and the CA charges for PSBs are insignificant in the context of their businesses (for the year ended March 2002, the BBC's CA charges represented 0.17% of its turnover).

- **The PSBs benefit from distributing their services on DSat. It is right that CA payments include a fair and reasonable contribution towards the investment made in the DSat platform, and not just the marginal cost of supplying CA to PSBs.** The BBC benefits from its ability to distribute its digital-only services to approximately 7 million more homes. Without Sky, the BBC's digital services would reach only 13% of UK households (as opposed to the current 40%). ITV saves millions of pounds annually from a 'digital dividend'. Granada announced on 27/11/02 that its digital dividend for the year increased to £49m, which it confirmed was 'due largely to the carriage of ITV1 on digital satellite'. Carlton's digital dividend from DSat carriage for the year to 30/9/02 was around £25m.

- **Existing legislation already guarantees access to the DSat platform through Sky's CA services on fair, reasonable and non-discriminatory terms, and is enshrined in the Bill. This regime is regulated by OFTEL, which recently found it to be working well and comprehensively dismissed the arguments from the PSBs that they should be gifted access to the satellite platform.** Furthermore, it recently completed an investigation which found no evidence that ITV's CA payments were unreasonable, unfair or discriminatory. The European Commission has also confirmed additional must carry rules on CA systems to be unwarranted, on the basis that the CA regime is economically efficient and already guarantees a right of access on fair and reasonable terms.

- **All PSB channels are currently available to all viewers through the digital satellite platform** (whether or not they are pay-TV subscribers). On the basis of the Better Regulation Task Force principles of proportionality and targeting alone, therefore, there is no need for additional must carry rules.

OFCOM PROCEDURE AND SAFEGUARDS

OFCOM's regulation of electronic communications networks and services under Part 2 of the Bill will be subject to explicit procedural requirements, which incorporate numerous safeguards regarding due process. In contrast, Part 3 of the Bill, which relates to OFCOM's regulation of the broadcasting sector, lacks comparable provisions in relation to the economic regulation of broadcasters. For example, in relation to the imposition by OFCOM of a condition or direction, the procedural rights (such as the types of condition that may be set or the test which OFCOM must satisfy) available to a mobile telephone operator under Part 2 will be considerably greater than those available to a broadcaster under Part 3 of the Bill.

Furthermore, under Part 2 of the Bill, OFCOM is obliged to give reasoned decisions relating to authorisations, conditions, market power, penalties etc. In contrast, under Part 3, OFCOM is free to issue decisions with no reasoning at all, including introducing or amending conditions in broadcasters' licences, and imposing penalties. This lack of transparency hardly represents best practice regulation, and is likely to make the effective use of the limited right of appeal under Part 3 very difficult (see below). **The procedures set out in Part 2 of the Bill should be extended to apply to OFCOM's functions under Part 3.**

RIGHTS OF APPEAL

The Bill provides full rights of appeal to the Competition Appeals Tribunal (CAT) for decisions and directions made by OFCOM under Part 2, and, pursuant to Part 5 of the Bill, where OFCOM is acting under its concurrent Competition Act powers. Clause 305(4) of the Bill also provides full rights of appeal to the CAT for "*so much of a decision*" as is taken by OFCOM under Part 3 using its Broadcasting Act powers "*for a competition purpose*". However, all other decisions/directions under Part 3 will be subject only to a limited appeals process equivalent to judicial review. Even though such decisions may amount to matters of economic regulation, OFCOM will be able to reach decisions, impose directions, and set licence conditions under Part 3, (i) which need not be reasoned, and (ii) for which there is no right of appeal on the merits.

Judicial review is an inadequate remedy where decisions are being made which may have a significant economic impact on a company, especially as the Bill gives OFCOM such wide powers. This is because judicial review only looks at the decision making process, and not the merits of the decision.

This lack of consistency in the Bill over when appeals may be made creates inequities. For example, it appears that OFCOM might attempt to introduce a condition in a Broadcasting Act licence, in accordance with the general duty in Clause 3(4) of the Bill, requiring a broadcaster to charge particular prices or to package channels in a particular way, where it considers that to be in the interests of consumers. Similar circumstances could also arise in relation to the application of the general duties set out in clauses 3(1)(c), 3(3)(i) and 3(3)(l). As the Bill currently stands, it appears that the broadcaster would have no right of appeal on the merits of such a decision on the basis that this had not been made for a competition purpose. However, if OFCOM imposes a condition on a mobile phone operator relating to the same issues of pricing and packaging, Part 2 of the Bill gives that operator a full right of appeal on the merits to the CAT.

It may be appropriate for 'pure' content issues not to be subject to full rights of appeal on the merits. In light of this, the standards objectives set out in clause 307(2) of the Bill (OFCOM's Standards Code) could form the basis of the list of 'pure' content issues for which OFCOM decisions should only be subject to judicial review. All other decisions under the Bill should have full rights of appeal. **Full rights of appeal to the CAT should be available to all decisions taken by OFCOM under Part 3 of the Bill, except those made in relation to 'pure' content regulation.**

BETTER REGULATION PRINCIPLES

It is imperative that OFCOM exercises all of its functions consistently with the Better Regulation Task Force principles (*"regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases where action is needed"*). These principles are set out in Clause 3(3)(b) of the Bill: OFCOM is not under a duty to apply these principles in all of its functions, but need only "*have regard* [to such of them] *as appear to them to be relevant in the circumstances*". These principles are so fundamental to the objective of the removal of unnecessary regulatory burdens that OFCOM should be obliged to have regard to these principles in every case. Sky **suggests that clause 3(3)(b) is amended to require that, in applying its general duties, OFCOM must have regard to the better regulation principles.**

REGULATORY OVERLAP WITHIN OFCOM

As a single regulator, OFCOM should avoid the double or triple jeopardy problems present today through the existence of several sectoral regulators (ITC, BSC, Oftel, Radiocommunications Agency). Companies have at times been required to address identical or near-identical issues with multiple regulators, bearing a significant burden (in time and expense) in doing so, and with the risk of conflicting decisions. It has also enabled 'forum shopping', raising with consecutive regulators the issues and complaints dismissed by others, in search of more favourable outcomes.

It is important that the structure of OFCOM does not perpetuate this. Specifically, the respective functions of the OFCOM main board, the Content Board and the Consumer Panel must be clear. The remit of the Content Board should be restricted to issues arising under the (present) ITC and Broadcasting Standards Commission (BSC) Codes, and should not include the consideration of issues which involve an element of economic regulation, including in relation to content, as these are the responsibility of the OFCOM main board. Clause 12 should be amended to reflect this. The Consumer Panel's remit should not, as some consumer representative organisations argue, cover content issues which are already the responsibility of the Content Board.

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