



Tony Ball Chief Executive

30 April 2003

The Rt Hon Tessa Jowell MP  
Secretary of State  
Department of Culture, Media and Sport  
2-4 Cockspur Street  
London  
SW1Y 5DH

Dear Tessa

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

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

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

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

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This confirms that:

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

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

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

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

Yours sincerely



IN THE MATTER OF THE COMMUNICATIONS BILL

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ADVICE

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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28 April 2003

