

Department for Culture, Media and Sport
Rt Hon Tessa Jowell MP
Secretary of State

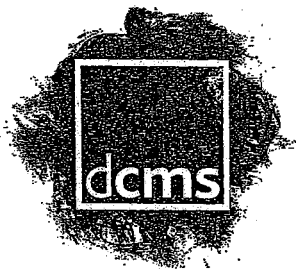
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Tony Ball
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27th May 2003

Dear Tony,

At our meeting on 2 April, I promised to consider your paper on the regulation of the Broadcasting sector, and to write to you to clarify our policy. I am sorry that I have not written sooner. Thank you for your letter of 30 April enclosing legal advice you received from Ian Glick QC.

I have now received legal advice on your concern that broadcasters could not apply for judicial review against a decision by OFCOM wrongly to use its Broadcasting Act competition powers when its Competition Act powers would be more appropriate. I can reassure you that a broadcaster can apply for judicial review if, for example, it alleges that OFCOM have not properly considered whether the Competition Act would be more appropriate than Broadcasting Act competition powers, or have irrationally concluded that the Competition Act powers would not be more appropriate, or have wrongly used their Broadcasting Act competition powers where they have concluded that the Competition Act would be the more appropriate route.

On the issue of a right of appeal to the Competition Appeal Tribunal on matters of "economic regulation", having reflected further on the arguments in your paper we think that the main difference of view between us derives from the references in it to 'economic regulation'. In our view, regard needs to be paid when considering appeal mechanisms to the purpose of the regulator's intervention, as well as to its effect.



INVESTOR IN PEOPLE

Department for Culture, Media and Sport

Almost any intervention in the commercial affairs of a business is likely to have an economic effect. However, the intervention may in some instances be aimed at a different objective, for example, ensuring an appropriate level of consumer choice. Such an intervention would undoubtedly have an economic effect, but would not have been undertaken for an economic purpose, and consequently, appeal to the Competition Appeal Tribunal would not be appropriate.

I can reassure you that if OFCOM chose to use its Broadcasting Act powers for (in your words) "economic regulation" other than for a competition purpose, broadcasters would be able to apply for judicial review if they considered that it was, in fact, for a competition purpose. Clause 3 10(2) of the Bill has the effect that OFCOM's initial step before using any Broadcasting Act power must be to see whether it is being used "for a competition purpose" - which is defined in clause 3 10(7). OFCOM would need to be able to demonstrate that they were not wrongly characterising their intervention as (say) consumer protection when, in fact, it served a competition purpose. This decision would be subject to judicial review.

Your letter raises the concern that broadcasters would have no right of appeal to the Competition Appeal Tribunal even in the case where a competition purpose was only a subsidiary reason for an intervention. In such a case, OFCOM would need to be clear about the "main reason" for the intervention. It would then be entirely right for the route of appeal for that intervention to be in accordance with that "main reason". If the "main reason" is not as defined in clause 3 10(7), then the route of appeal should not be to the Competition Appeal Tribunal. If OFCOM could not clearly demonstrate their motivation, a judicial review might succeed on the grounds that the test in clause 3 10(2) had not been properly applied.

With regard to our discussions about plurality, there is certainly no intention that the plurality duty in clause 3 could be used to block a merger. If a merger is compliant with the media ownership rules, the decision to prevent it from going ahead could only be taken on competition grounds, and by the Competition Commission, not OFCOM.

I understand that Stephen Timms will write to you about Recognised Spectrum Access, the policy on which, as I explained, is led by DTI.

*With best wishes
Yours*



TESSA JOWELL