

The draft Communications Bill

The Policy

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Presented to Parliament by
the Secretary of State for Trade and Industry
and
the Secretary of State for Culture, Media and Sport

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The draft Communications Bill - The Policy

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Consultation on the draft 1.0 Communications Bill

1.1 The draft Communications Bill, which is published by the Government today, includes measures that will have an impact on a major sector of the economy and on virtually every member of society. We welcome comments on it from all standpoints - the telecoms industry, broadcasters, spectrum users, industry consumers, private consumers, viewers, listeners and citizens.

1.2 Our proposals have already benefited greatly from the responses to the White Paper 'A New Future for Communications' and responses to the media ownership consultation in January of this year. Your responses to the draft Bill will be valuable in ensuring that the legislation we present to Parliament takes full account of all views and delivers a flexible and modern framework for the communications and media industries. By running the consultation now we have ensured that there will be sufficient time to consider your responses and make any consequent alterations to the Bill before it is introduced.

1.3 In responding we ask that you do not offer drafting suggestions but concentrate on the substance of the Bill and what it will deliver.

1.4 The closing date for comments is 2 August 2002 which allows 12 full weeks for consultation from the date of publication of the draft Bill.

1.5 In parallel with the public consultation a Joint Committee of the House of Lords and House of Commons will be carrying out pre-legislative scrutiny of the draft Communications Bill. The Committee is expected to report by 7 August 2002. The Committee will be seeking evidence from interested parties as a separate exercise to the DTI/DCMS consultation. Unless you request otherwise, responses to the DTI/DCMS consultation will be made available to the Joint Committee.

1.6 Please indicate clearly the people and organisations represented by your response. Your response to this consultation may be made publicly available in whole or in part at the Departments' discretion on our website at www.communicationsbill.gov.uk. If you do not wish all or part of your response (including your identity) to be made public, you must state in the response which parts you wish us to keep confidential. Where confidentiality is not requested, responses may be made available to any enquirer, including enquirers outside the UK, or published by any means, including on the Internet.

1.7 The draft Bill covers both the economic and technical regulation of the communications industry and content regulation in the broadcasting sector which means that it is the joint responsibility of the Secretary of State for Trade and

Industry and the Secretary of State for Culture, Media and Sport.

1.8 The Bill and the associated documents mentioned in this paper (or links to them) can be found at www.communicationsbill.gov.uk There are links to this site on both the DTI and DCMS websites. Hard copies of this document, the draft Bill and the explanatory notes are available from the Stationery Office on 0870 600 5522 or email 'book.orders@theso.co.uk'

1.9 We would prefer to receive responses to this consultation by email, if possible, in MS Word or rich text format. Responses should be sent to: communicationsbill@dti.gsi.gov.uk

Hard copies can be sent to:

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Please contact Fiona Murray, DTI/DCMS Joint Communications Bill Team on 020 7215 4127 if you have any enquiries relating to this consultation.



Patricia Hewitt
Secretary of State for
Trade and Industry



Tessa Jowell
Secretary of State for Culture,
Media and Sport

A summary of our proposals

The communications sector has seen vast development over the last 6 years. The regulatory regime has struggled to keep pace with the rapid and revolutionary changes that have occurred. Now is the time to respond to this change and to establish a new policy framework, characterised by both resilience and adaptability for the future.

The policies in this draft Bill aim to secure the government's objectives: creating the most dynamic, competitive communications industry in the world; ensuring universal access to a choice of diverse services of the highest quality; and ensuring that citizens and consumers are safeguarded.

The need for change is clear. Across the economy, deregulation brings benefits for consumers and for businesses. In the communications sector, competition is often local and national in character but it is also increasingly global, with companies investing across continents as well as within countries. Consumers already use many different networks and change seamlessly between various means of reception and communication. Today's world combines a fast changing consumer environment with an increasingly international and competitive market place. In this world it is essential that the UK reinforces its position as one of the most attractive places for communications companies to do business. Unnecessary regulations need to be removed wherever possible. By eliminating undue burdens on business we can drive innovation, increase investment, raise employment and bring better services to consumers.

But as we create a much improved business environment we must also recognise the special nature of the media and its role in our lives as citizens as well as consumers. Governments all over the world, across Europe and America, recognise that relying on competition policy alone may jeopardise the effective operation of modern democracy. It remains essential to retain sufficient safeguards to secure a plurality of voice and a diversity of services across our media. In the emerging digital world, these safeguards can be set at lower thresholds than in the past, enabling a significant relaxation of regulation. But there remains a need for a core of measures to give people confidence in the functioning of the democratic process.

Our approach is to simplify the regulatory framework. First, we are establishing The Office of Communications (Ofcom) - a single unified body where five separate regulators currently preside. Red tape and the frictional cost of

regulation will be reduced, allowing companies to grow and invest more freely, to increase productivity and to supply new and better services to consumers. The quality of regulation itself will improve with a single coherent approach to the converging world of communications replacing the current risk of double jeopardy from multiple regulators.

Second, we will simplify and liberalise the rules on media ownership. Citizens must be able to make informed decisions and to do so they need access to a range of challenging, dissenting and divergent media voices. The competition powers proposed for OFCOM and the proposals in the Enterprise Bill will tend to encourage dispersed ownership and new market entry. However, competition law cannot always guarantee the plurality that is a necessary bedrock to our democratic process. Our aim is to retain only the minimum level of media ownership regulation necessary to ensure that a wide range of voices will always be heard.

We will abolish all rules on foreign ownership, to secure the investment and skills that a more open market offers. It makes no sense that a French, German or Italian company can buy any TV or radio licence in the UK but that American, Australian or Canadian companies, for example, cannot do so. In future, media mergers and acquisitions will be judged by rules that will prevent undue concentration of power but which are indifferent to the nationality of the companies in question.

Within individual media markets our proposals represent substantial liberalisation, scrapping restrictions on the ownership of more than one national TV or radio service. We will reform the newspaper merger regime to make it less onerous and less pervasive. The new regime will be targeted on cases where there is significant concern on competition or plurality grounds. Criminal sanctions and the requirement for prior consent to a merger will be removed.

We will reduce cross-media regulation to a core of three rules that together retain democratic safeguards at national, regional and local levels respectively. The first two rules will limit the joint-ownership of a substantial share of both the newspaper market (the most editorially influential medium) and Channel 3 (the only mass audience commercial public service television station with universal access), at both national and regional level. There will continue to be stipulations on the ownership and provision of TV news services, to ensure the independence and quality of news that people particularly trust.

The third rule will uphold the plurality of ownership that exists in local media. This will ensure that at least 3 local commercial radio operators, and at least 3 local or regional commercial media voices (in TV, radio and newspapers) exist in most local communities. In addition, we are proposing to retain content regulation that protects the quality, diversity and impartiality of programming.

The new regime will provide a clear set of rules that will give businesses the certainties they need to invest and expand. In the longer term, the development of new technologies and services may well change the way people use the media to the extent that these ownership rules become outdated or in need of further reform. We want to have the flexibility to adapt to this change, and will therefore require OFCOM to review the rules every three years and make recommendations to the Secretary of State.

Third, we will ensure that public service broadcasting (PSB) has as secure a place in the broadcasting ecology of the future as it has had in the past. The new regime introduces more self-regulation and gives commercial broadcasters greater freedom to set their own standards. Public service broadcasters will be given clear remits for their services, protecting the high standards that British viewers and listeners have come to expect. While the BBC Board of Governors will continue to protect the BBC's unique status, with OFCOM supervising the commercial PSB channels. OFCOM will have a general duty to review all public service broadcasting standards and will regulate all broadcasters on a range of key objectives.

Fourth, the draft Bill will clarify the regulatory regimes for telecommunications and the use of spectrum. It will incorporate into UK law the new EC Directives that overhaul the regulation of electronic communications. The draft Bill will remove the requirement for licensing of telecommunications systems, thereby removing about 400 licences, and replace it with a new, simpler regulatory regime for electronic communications networks, services and associated facilities. Electronic communications are vital to the UK economy and the draft Bill gives the new regulator the right responsibilities and powers to promote competition, tackle abuses and make sure that consumers' interests are protected. At the same time it gives the regulated companies full rights of appeal against the regulator's decisions.

The draft Bill also introduces a new system for the management of spectrum, including the principle of spectrum trading. This will allow more dynamic and efficient use of spectrum. New services can gain access to the market, boosting innovation and enhancing economic activity. The Government will shortly respond to the Independent Review of Spectrum Management published on 6 March 2002 and the draft Bill will be revised as necessary to accommodate that

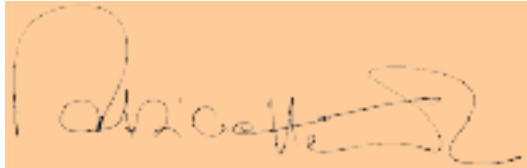
response.

OFCOM will be central to the new policy regime, with a strategic view across the whole communications sector. Advances in technology and changes in audience and customer expectations will demand changes in regulation too. So to cope with the uncertainties of the future we are creating a flexible framework overseen by a tightly focused organisation. The OFCOM board will be small and lean, with the right experience and first-rate skills. It will be designed to be capable of responding swiftly and effectively in a sector where change can be very rapid and in which business relationships are often fluid. The essential elements of OFCOM's internal structure proposed in the draft Bill are designed to ensure that decisions taken by the board are fully informed by research and take into account the widest range of commercial and public interests, including those of Scotland, Wales and Northern Ireland.

OFCOM will have the powers necessary to prevent unfair competition and a corresponding general duty to promote the consumer's interest - strengthened by provision for a Consumers Panel. For the first time the media industry will have a regulator with a precise and powerful role in ensuring fair competition.

Not only has there been an explosion in choice in the media over recent years but the way in which we access the media is constantly changing. From PDA's (personal digital assistants) to 3G Mobile, from internet to interactive television - the information age is with us. Digital television has the potential to transform the TV, how we use it and what it delivers. The Government is committed to digital switchover because of the benefits digital TV brings to consumers through enhanced choice and because switching off the analogue signal will free up valuable radio spectrum for other uses. OFCOM itself will be required to optimise the use of spectrum by establishing and regulating spectrum trading.

As a result of these changes the regulatory regime will be clear, stable, but flexible enough to accommodate change. These will be the right conditions for effective competition, increased investment and high levels of employment. The opportunities for inward investment will be substantially increased while domestic companies will be able to grow and expand. For viewers and listeners there will be wider access, better quality services, more choice and improved value for money. The new communications future is a bright one. The policy framework set out in this draft Communications Bill will ensure that everyone can enjoy it.

A handwritten signature in black ink on a light blue background. The signature is cursive and appears to read 'Patricia Johnson'.

Patricia Johnson.

A guide to this document and the 2.0 draft Communications Bill

2.1 This document

2.1.1 This document sets out the changes that the Communications Bill will introduce. It explains the policy background to the Bill and shows how the Government is taking forward proposals set out in the White Paper 'A New Future for Communications' published in December 2000.

2.1.2 This document is not intended to be a complete guide to the draft Bill. For a full understanding of the draft Bill you should look at the draft Bill itself and the explanatory notes.

2.1.3 Chapter 3 of this document sets out the practical steps for getting the Office of Communications (Ofcom) up and running. Chapters 4, 5, 6, 7, 8 and 9 explain what the Bill will deliver in terms of the new regulatory framework for the communications industry. Chapter 10 invites you to comment on these proposals and the draft Bill.

2.2 The draft Communications Bill

2.2.1 The draft Communications Bill sets out the proposed regulatory regime to be operated by the new communications regulator, Ofcom. The Bill is a major reform of regulation in the communications sector and will provide a regulatory framework that can adapt to the market as it changes.

The key changes introduced in the draft Bill are:

- the transfer of functions from the five existing regulators¹ to Ofcom, the new, converged regulator for a converging industry, allowing, for the first time, for all regulatory decisions affecting the communications sector to be made within a single, over-arching strategic framework;
- the removal of the requirement for licensing of telecommunications systems and the introduction of a new regulatory regime for electronic communications networks, electronic communications services and associated facilities;
- provision to allow spectrum trading which will lead to better use of the available radio spectrum; and
- a new, more coherent, structure for broadcasting regulation that is specifically geared to dealing with the digital

age, making more use of self-regulation where appropriate.

2.2.2 The draft Communications Bill builds on the existing legislation and does not replace all of it. You can see how the draft Bill would change the existing legislation by accessing our updated texts of the Broadcasting and Telecommunications Acts at www.communicationsbill.gov.uk. These are not legal documents but provide a clearer picture of what the legislative framework would look like with the draft Communications Bill in place.

2.3 Other documents

2.3.1 Other documents relating to the draft Bill that you might wish to consider alongside it and details of all the documents referred to in this paper are listed at Annex A.

2.3.2 Much of the detail of the proposed regulatory regime, particularly in relation to electronic networks and services, will be set out in statutory instruments and other documentation and are therefore not included in the draft Bill (See 6.2.4). Of tel will be consulting on much of this in the coming months and details will be posted on their website at www.of tel.gov.uk

2.3.3 Some of the regulatory proposals as they apply to the BBC will be implemented via changes to the BBC Agreement rather than through the Communications Bill. A document setting out how this will work will be published shortly by the Department for Culture, Media and Sport.

2.3.4 The report of the independent review of spectrum management was published on 6 March 2002. The Government plans to publish its response in the summer and the spectrum provisions in the draft Bill do not reflect any changes that might be made as a result of the independent review.

2.3.5 The Enterprise Bill, currently before Parliament, will impact on provisions in the draft Bill relating to competition powers, appeals and consumer protection. Where possible the draft Bill reflects the changes proposed in the Enterprise Bill. Where this has not been possible provisions in the draft Bill will be updated in due course.

2.4 Gaps in the draft Bill

2.4.1 We have published the draft Bill today in order to get the consultation process under way, but it has not been possible to include draft clauses for everything the Bill will cover. Media Ownership was the subject of a joint DCMS/DTI public consultation that closed in January this year and because of this extra phase of consultation, it is the only significant policy not covered by the draft Bill. Further clauses are needed on the remaining must offer/must carry provisions and to make certain changes to: Channel Four powers/regulation; the Welsh Authority powers; the radio licensing regime; Public Teletext service; ITV networking arrangements; networks and services; and to reflect the recent policy decision on Gaelic Broadcasting.

This document sets out clearly what the Government's proposed policy is in these areas and further draft clauses will follow for consultation where practical.

¹The Independent Television Commission, the Broadcasting Standards Commission, the Radio Authority, the Radio Communications Agency and the Office of Telecommunications (Of tel)

3.0 The steps to creating OFCOM

This Chapter explains why the UK needs a converged regulator for the communications and media industries. It makes clear that OFCOM will have no power to regulate content on the Internet. It sets out how regulatory certainty will be maintained in the transitional period before OFCOM is regulating and describes the steps that are already under way to have OFCOM operating in 2003.

3.1 Why do we need a unified regulator?

3.1.1 As technology develops and converges, as markets evolve and as public expectations and attitudes change, it will become increasingly important to take a strategic view across the regulation of the whole communications sector. This will impact on regulatory goals and the mechanisms to achieve them effectively. There will be scope to roll back regulation where it is no longer needed, particularly where competition can take the place of regulatory intervention.

3.1.2 It may be that markets will not evolve as quickly or as radically as some expected at the height of the dot.com boom. But change is happening nevertheless. The billions committed to infrastructure and the 3G auction give a powerful incentive to offer attractive services at affordable prices. Much of the innovation is driven from overseas, spreading quickly through an increasingly global marketplace.

3.1.3 Already, there has to be consultation between the existing five regulators on issues such as the regulation of access to networks or the management of spectrum, the regulation of electronic programme guides, digital switchover and broadband rollout. Only with a unified regulator can policy be effectively integrated for the longer term.

3.1.4 Once fully established, the new regulator will have an in-depth knowledge of all aspects of the communications sector and will be able to take into account all relevant issues, whether related to networks, spectrum, content or competition. Though currently dealt with by separate regulators, these issues are complex and interact with each other:

- competition at the content level interacts with competition at the delivery level (terrestrial, cable, satellite, mobile and fixed telephony);
- services for the user depend on the provision of both content and delivery mechanisms;
- the delivery of public service broadcasting depends on factors such as the regulation of access to networks, electronic programme guides, market share, advertising revenues (which could be diverted into Internet advertising) and media ownership;
- much of the activity depends on the allocation of spectrum.

We believe that bringing these issues together under one regulator will lead to a higher quality of decision-making that is consistent across the sector.

3.1.5 A number of benefits will flow from the creation of OFCOM:

- A coherent, integrated, balanced approach to regulation across the sector. This is primarily about the quality of decision making, though there will also be advantages in terms of administrative efficiency and cost.
- For the communications sector that means a more flexible approach to regulation, aiming to minimise regulatory burdens and regulatory overlap and avoid the risk that the different regulators might take different approaches to similar issues by virtue of their different responsibilities.
- For the public and for businesses throughout the economy, which depend on the sector it means more effective regulation to ensure the widest possible choice of diverse communications services of the highest quality.

3.1.6 Economic objectives and cultural objectives need to be balanced again this is best done by a single regulator charged with the duty to strike the balance.

3.2 The Internet

3.2.1 As a global network the World Wide Web offers tremendous opportunities for society and presents legislators and regulators with some complex challenges.

3.2.2 The normal law of the land, of course, applies online as much as it does offline. But the Communications Bill will not give OFCOM any powers of regulation over content on the Internet (See 8.3.3 for a fuller explanation). Instead, the Government remains committed to self and co-regulatory approaches that have proved to be so successful. OFCOM will work alongside industry in developing systems that continue to safeguard children, citizens and business.

3.3 Regulatory certainty

3.3.1 There are currently five regulatory regimes in the communications sector that are overseen by the Independent Television Commission (ITC), the Broadcasting Standards Commission (BSC), the Office of Telecommunications (OfTel), the Radio Authority and the Radiocommunications Agency within the framework established by the Broadcasting, Telecommunications and Wireless Telegraphy Acts. The first four of these bodies are independent, whilst the Radiocommunications Agency is an executive agency of the Department of Trade and Industry and reports to the Secretary of State.

3.3.2 The current regulators will continue to operate the existing regulatory regimes until the Communications Bill has received Royal Assent and OFCOM has assumed its regulatory functions. To avoid regulatory uncertainty, OFCOM is prevented by the Office of Communications Act 2002 from interfering with the existing regulators in carrying out their current functions.

3.3.3 Each of the existing regulators' individual functions will transfer to OFCOM, be replaced by a new OFCOM function with or without modification or be discontinued. No functions will transfer to the Secretary of State. Most of the Secretary of State's functions in the spectrum area will also transfer to OFCOM. The same will apply to some of the Secretary of State's functions under the Broadcasting and Telecommunications Acts.

3.3.4 The scope of the new regulatory regime will go no wider than the coverage of the existing sectoral regimes. So, many businesses engaged in the communications industry will remain outside the regime. The Government believes that the burden placed on the relatively small number of regulated businesses is justified by the benefits of competition for the generality of business users and by the wider benefits for individual consumers and citizens.

3.4 A new public body

3.4.1 OFCOM will be a completely new public body replacing five existing organisations. Its creation will be a major undertaking. All concerned, including the five chief executives of the existing organisations, are strongly committed to the success of this project and have played an active part in the preparations. There is also a very wide agreement that OFCOM needs to be designed from new, with its form following its functions. It needs to amount to much more than bringing together five bodies with a new name it will need to embody a new organisational vision, have the right internal structure, the right work processes and above all the right people. As an organisation, OFCOM will need to develop a clear, coherent over-arching strategy, and to apply it in a way that fully accommodates the diverse nature of the areas for which it is responsible.

3.4.2 Preparations for the new organisation are already under way, and have taken a further step forward with the Office

of Communications Act 2002. These preparations fully recognise the need to reflect the development of the draft legislation and its subsequent passage through Parliament and the project plans will be flexed accordingly. This approach will put OFCOM in the strongest possible position to take on its regulatory functions quickly after the legislation is completed.

3.5 Paving Legislation and OFCOM Appointments

3.5.1 The Office of Communications Act 2002, which received Royal Assent on 19 March this year, establishes OFCOM with a Board of between three and six members. Ministers will appoint the Chairman and other non-executive members who must make up the majority of the Board. At this stage OFCOM will have the sole function of preparing to take on its regulatory functions. The Board will appoint a Chief Executive (who will also be a Board member) and will be able to appoint the staff necessary for the preparatory work to proceed. OFCOM will have a duty to co-operate with existing regulators during this preparatory stage and the existing regulators also have a duty to facilitate the OFCOM implementation process. In this interim period, OFCOM will be funded by borrowing from the Secretary of State, to be repaid when the new body takes over its full regulatory responsibilities and associated income from licensees and those it authorises.

3.5.2 The Chairman and non-executive members will be appointed on 'Nolan' principles and the process for making these appointments has now begun. It is expected that the Board will have sufficient members for OFCOM to assume its initial statutory duty by Autumn 2002, by which time OFCOM will have become a legal entity able, for example, to sign contracts in its own right and employ staff.

3.5.3 The Government is committed to ensuring diversity and balance on the boards of public bodies, and OFCOM will be no exception. Appointments will be made on the basis of the skills and expertise the Board will require in carrying out its functions. The OFCOM Board will be expected to act as a cohesive body, spanning a rapidly converging market place and following clear principles of collective responsibility.

3.6 Creating OFCOM

3.6.1 Commissioned by the five existing regulators, consultants Towers Perrin produced an OFCOM Scoping Report - published on 12 October 2001. This represented the beginning of the process for the preparation and creation of OFCOM. The report was not a blueprint, but it set out, in broad terms, the work that needed to be done to meet the challenge of the Communications White Paper and indicated one possible model for OFCOM's structure. Decisions will, however, be for the Board of OFCOM to take.

3.6.2 A further consultancy contract was agreed by the Government on 27 March this year. Towers Perrin are the lead contractors, working as part of a consortium including Ernst & Young and Information Services specialists Differentis. The new phase involves substantial detail e.g. on major operational issues such as organisation design and work processes, organisation culture, human resources, location and facilities, information services, finance and communications. The consultants will also be looking critically at the size of OFCOM required to discharge its statutory duties - the existing regulators have a current total of around 1100 staff. In all these areas, the consultants will be working closely with the existing regulators whose expertise and experience are critical to the success of the project. But there also needs to be intensive independent input, bringing in experience from previous major organisational change projects.

3.6.3 The work for this transition project is being carefully graded to fit in with the run-up to the appointment of the new Board. Over the first six months or so, the emphasis is on preparatory work e.g. on the auditing and analysis of existing arrangements, and the identification of options for the Board to consider. A second phase covers the recommendations to be approved by the new Chair and Board, and a third phase covers the issues to be addressed once the initial decisions have been made.

3.6.4 Once OFCOM has a legal status (i.e. when it has a Chair and at least two non-executive members in place), it will take over responsibility for the contract, including the terms and conditions of any extension beyond the existing end-point of 31 December 2002.

3.6.5 The Government and existing regulators are strongly committed to a policy of openness in the process of creating OFCOM. The fullest possible use will be made of opportunities to share thinking with stakeholders and take their views, as the project progresses.

3.7 Arrangements for Staff

3.7.1 The Government remains committed to ensuring that the staff affected by the creation of OFCOM will be treated fairly and consistently and have their rights under their current employer respected.

3.7.2 In January 2000, the Government published a Statement of Practice which requires that, as a matter of policy, public sector bodies should ensure that the principles of the Transfer of Undertakings (Protection of Employment) Regulations are followed to ensure the rights of staff are safeguarded. This policy will be followed for OFCOM. In addition, the guidance set out in "A Fair Deal for Staff Pensions" published in June 1999 will also be followed to ensure that staff are treated fairly. The Department of Trade and Industry recently issued proposals for consultation on the reform of the TUPE Regulations, including arrangements connected with provisions for occupational pensions. The results of the review will be known later in the year, but will not affect these commitments.

3.7.3 The Government is committed to ensuring a smooth transition between the five existing regulators and OFCOM. We will therefore consult the board of OFCOM as soon as it is in place, and the five regulators, on the best way of giving effect to these commitments on rights of staff and pensions, so that the staff who transfer are offered a package of terms and conditions which are comparable to, and no worse than, those which they currently enjoy. Any legislative provisions required will be added to the Bill before Introduction.

3.8 Timeline

Dec 2000 White Paper 'A New Future for Communications' is published

May 2001 The Government's Business Manifesto of May 2001 says "Our aim is to bring OFCOM into operation by 2003."

June 2001 Office of Communications (OFCOM) Bill is introduced in to Parliament

Oct 2001 Towers Perrin Scoping Report is published

Jan 2001 Media ownership consultation closes

Mar 2002 OFCOM Bill receives Royal Assent Second consultancy phase for setting up OFCOM begins

May 2002 Draft Communications Bill is published for consultation

May 2002 Joint pre-legislative scrutiny Committee convenes

July 2002 Chairman of OFCOM is appointed

Aug 2002 Consultation on draft Communications Bill closes

A flexible and

4.0 accountable

structure

This Chapter describes the decision-making and advisory mechanisms that OFCOM will be required to establish under the draft Bill, namely the Content Board and the Consumer Panel. The main Board is established by the OFCOM Act 2002. It describes how OFCOM will be required to conduct its activities taking into account national and regional interests and those of a range of other stakeholders. It also explains the way in which those regulated by OFCOM will be able to appeal against its decisions.

4.1 The Content Board

4.1.1 The draft Bill requires OFCOM to establish and maintain The Content Board. This board will have the principal function of ensuring that the public interest in the nature and quality of television and radio programmes is sufficiently represented within OFCOM's overall structure. Lay members will serve on the Content Board, representing many aspects of the public interest. A non-executive member of the OFCOM Board (but not the Chairman of OFCOM) will act as Chair and the majority of its members will be lay members from outside OFCOM.

4.1.2 The Board's principal roles will include securing a wide range of broadcasting services that satisfies a variety of tastes and interests, ensuring the application of generally accepted standards in broadcasting services and, as far as its functions allow, providing protection from unfair treatment in programmes. In this way the Content Board will ensure that OFCOM continues to receive high level lay input of the kind currently provided by the existing governing bodies, as an aid to its consideration of complex and often high profile content issues.

4.1.3 OFCOM will delegate to the Board those decision-making functions that they want it to perform, and specify the areas in which they require the Board's advice. We expect the Content Board to play a major role.

4.1.4 Areas where the Content Board's advice to OFCOM may be particularly valuable include issues such as: the definition of both negative minimum content standards and accuracy and impartiality standards this could include the approval of codes and OFCOM's programme of research on content issues. The Content Board may also have the function to advise on, for example, 'accepted community standards' or give an assessment of audience expectations about content or issues relating to media literacy.

4.1.5 The Content Board will also be expected to play a role in ensuring that the particular interests of nations and regions are taken into account in all of OFCOM's work in licensing and setting standards for television and radio programme services.

4.1.6 OFCOM will also be able to call on the research carried out by its Consumer Panel (described below) to inform its decisions on content.

4.2 The Consumer Panel

4.2.1 Consumer interests are a major focus of the entire draft Bill. Consumers will stand to gain in terms of access to services, service quality, choice, price and value for money from a dynamic and vigorous market in electronic communications generally. OFCOM will have the powers needed to prevent market abuses and a corresponding general duty to further consumer interests. Its new, integrated remit covering the whole sector will allow it to develop a single, clear strategy that will provide the best possible foundation for innovation and business success.

4.2.2 At the same time, the draft Bill will ensure that consumers are given a clear, authoritative voice in debates on communications policy questions and that effective remedies are available when complaints and disputes arise.

4.2.3 The new consumer voice will come through a Consumer Panel, whose function will be to advise OFCOM, and other bodies where appropriate, on major policy matters arising from the delivery of communications services. Unlike the Content Board, the Panel will be operationally separate from OFCOM and will have a high degree of independence its members will be chosen with the approval of the Secretary of State, and the Panel will be free to decide its own agendas and publish opinions. It will also have its own research resources. OFCOM will have a statutory duty to provide it with information, and will have to give public reasons when it disagrees with the Panel's advice. Although the Panel's primary focus will be on service delivery, it can also be called upon to address content issues at OFCOM's instigation. This could apply, for example, with content issues that have a high consumer dimension, such as rules on misleading advertising.

4.3 Handling consumer complaints and disputes

4.3.1 The draft Bill also provides a completely new deal for individual complaint handling and dispute resolution, in line with the EC Directive on Universal Service and Users' Rights. The Government's preference is to see an industry-led initiative covering this area, and in this context it greatly welcomes recent Oftel-supported moves to develop an independent Telecoms Ombudsman scheme. This could, in time, develop into a scheme covering all aspects of consumer services in the electronic communications sector. The draft Bill establishes a framework for OFCOM to recognise an industry scheme (or schemes) of this kind, with established criteria (e.g. free of charge to the customer and effective in allowing awards to be enforced). As a fallback arrangement, however, the draft Bill provides powers for OFCOM to establish its own scheme, by Order subject to Negative Resolution in Parliament, in the event that the industry fails to do so. (Complaints about broadcasting content are covered in 8.5.2).

4.4 Key Stakeholders

4.4.1 The UK nations and regions

4.4.1.1 Mechanisms for ensuring the interests of the UK nations and regions are represented in the existing regulators have been developed separately over time and lack consistency. The Government wants to ensure that those interests are represented in OFCOM in a more coherent and effective way. The draft Bill therefore includes a range of measures designed to ensure that the needs of the nations and regions are reflected throughout the structures of OFCOM.

4.4.1.2 The Government's firm commitment to protect and enhance the interests of the nations and regions is entrenched throughout OFCOM's structure by the requirement that OFCOM, in carrying out all of their functions, must have regard to the different interests of people in the different parts of the United Kingdom. This responsibility will rest equally on all members of the OFCOM Board. It is vital for the main Board to be small and cohesive if it is to be able to react quickly and flexibly in a rapidly changing environment. It will be expected to operate with a high degree of collective responsibility and concentrate on effectiveness and function rather than representation of particular interests. However, it is fully recognised that there will be a major national and regional dimension to many of the Board's activities and these need to be fully reflected in all of the Board's work.

4.4.1.3 The draft Bill includes other provisions to ensure that the specific interests of each of the nations will be reflected elsewhere within the structure and operations of OFCOM. The Content Board (described in 4.1), will deal with issues

about the content of programmes and other material which is broadcast or transmitted. It will form a distinctive part of OFCOM's internal structure with specific executive and advisory functions delegated to it by the main Board. The Content Board will report direct to the OFCOM Board and will be made up of a substantial lay membership. Many content issues have significant national and regional elements and to fulfil its functions the Content Board will have to develop a deep understanding of national and regional concerns and priorities. To assist it in this task, specific provision is made in the draft Bill for the Content Board's membership to include designated members from Scotland, Wales, Northern Ireland and England.

4.4.1.4 There will also be an important national and regional dimension to the work of the Consumer Panel (see 4.2). The Panel, which will be operationally independent of OFCOM, will provide OFCOM and other relevant bodies with advice on consumer interests in electronic communications services such as access, choice, price and value for money. The draft Bill requires the membership of the Panel to be made up so as to enable it to provide informed advice about the different interests of consumers in different parts of the UK. As with the Content Board, provision has been made in the draft Bill to ensure that the composition of the Panel includes specific membership from Scotland, Wales, Northern Ireland and representing the English regions.

4.4.1.5 In addition, OFCOM will be expected to carry out consumer and audience monitoring research to ascertain the opinions of people in Scotland, Wales and Northern Ireland and will report regularly through specific advisory and consultative machinery to the relevant Secretaries of State. These advisory and consultative arrangements will be broader in their remit than the existing arrangements.

4.4.1.6 Furthermore, of the five existing regulators, only the ITC and Radiocommunications Agency have offices in the different parts of the UK. The Government has given commitments that OFCOM will be expected to establish offices in each nation. This will provide a visible service covering the whole range of OFCOM's functions and an important means of communication within each nation, ensuring that OFCOM is accessible to the communications industry and to customers, viewers and listeners throughout the UK.

4.4.1.7 OFCOM will also be expected to build on the links already established by some of the existing regulators with Scottish, Welsh and Northern Irish institutions. The Government expects OFCOM to consult the relevant Secretary of State and devolved administrations in making appointments of members representing the interests of the devolved nations to its committees and other ad hoc bodies. OFCOM's Annual Report will also need to address Scottish, Welsh and Northern Irish issues. We expect cross-border issues unique to Northern Ireland to be addressed by specific OFCOM arrangements. In addition, OFCOM will be expected to hold regular meetings in different parts of the country and ensure that its consultative procedures embrace specific arrangements for including the relevant administrations.

4.4.2 Citizens

4.4.2.1 The communications sector is unusual in raising many issues of concern not just to consumers as purchasers and users of goods and services but to citizens and society at large. This is reflected in OFCOM's general duties which are explained in Chapter 5.

4.4.2.2 These general duties are backed by a range of powers and duties to maintain minimum content standards on television and radio and, where appropriate, to set and monitor public service remits. (See Annex B for a full explanation of public service remits). Minimum content standards, in particular, will be set and applied on the basis of general criteria that will allow flexibility in the light of changes in technology and markets, and in relation to changes in audience expectations. In carrying out these tasks, the OFCOM Board will be able to draw on the advice and support of the Content Board.

4.4.3 Other regulatory bodies

It will be for OFCOM to establish suitable links with non-statutory regulatory groups such as ICSTIS² or the ASA³ and to consider with them the need for joint approaches, and where necessary, for self and co-regulatory solutions. OFCOM will also need to establish links with other national regulatory and international bodies both in Europe (including the European Commission) and elsewhere.

4.4.4 Business at large

The communications sector is a major provider of services to all companies so an improved regulatory structure for communications can be expected to have real benefits for the economy overall. Businesses recognise that improved

competition in the communications sector, and the removal of regulations that are unnecessary and place a burden on the communications industries, is good news. The establishment of OFCOM, together with the regulatory reforms proposed in this draft Bill should result in net benefits to business at large.

4.5 Accountability and good governance

4.5.1 OFCOM will discharge all its functions in accordance with the legal framework created by the Bill and the existing legislation. OFCOM will operate independently of Government but on some issues of national importance it is essential that Ministers retain the power to direct OFCOM. In particular, the Secretary of State will be able to issue directions to OFCOM in respect of its functions relating to networks and services and to spectrum for the following purposes:

- in the interests of national security;
- in the interests of relations with the government of a country or territory outside the United Kingdom;
- for the purpose of securing compliance with any international obligations of the United Kingdom;
- in the interests of safety of the public or of public health.

4.5.2 The Secretary of State may require OFCOM to represent the UK on relevant international bodies and at relevant international meetings. In addition to this, the UK Government has responsibilities in international fora, in particular in relation to international spectrum negotiations, for the Channel Islands, the Isle of Man and the British Overseas Territories. OFCOM is given the power to agree to requests from the Secretary of State to represent these territories.

4.5.3 Under the Office of Communications Act 2002 OFCOM is required to produce an Annual Report and to send that report to the Secretary of State, who will make it available to each House of Parliament. This report will include an account of OFCOM's proceedings during the year, including Scottish, Welsh and Northern Irish issues and such financial information as the Secretary of State considers appropriate. The annual accounts of OFCOM will be subject to scrutiny by the National Audit Office.

4.5.4 OFCOM is given powers in the draft Bill to make regulations on a number of issues. It is essential that OFCOM should have the flexibility, within the legislative framework set by Parliament, to develop the detail of the regulatory regime in line with changing markets, technologies and public attitudes. Regulations creating criminal offences will require the consent of the Secretary of State and be subject to Parliamentary control.

4.5.5 The Communications White Paper said that OFCOM would be expected to operate in accordance with the best principles of corporate governance and better regulation. This expectation has been built into the provisions of the Office of Communications Act 2002 and the draft Bill. OFCOM is required to have regard both to guidance on the management of public bodies and guidance relating to good corporate governance insofar as it is relevant to OFCOM. In this context, for example, it is expected that the OFCOM Board members should follow the seven principles of public life [Selflessness, Integrity, Objectivity, Accountability, Openness, Honesty, and Leadership] and that OFCOM will maintain a publicly available register of Members' interests.

4.5.6 OFCOM will be expected to conduct its business with openness and transparency wherever possible and consistent with duties to protect the privacy of information provided to it. The Public Records Act applies to OFCOM, as does the Freedom of Information Act. In addition to this, OFCOM is generally required to publish its proposals for regulation in draft for consultation and to take account of representations received. These measures taken together should ensure that OFCOM operates in an open and transparent manner and is responsive to the concerns of both industry and consumers.

4.6 Transparency and appeals

4.6.1 It is important that OFCOM is respected and trusted by those it regulates and, in this context, it will be important that OFCOM is as open and transparent as possible, whilst respecting commercially confidential information. The draft Bill requires OFCOM to consult on the vast majority of new or amended regulations that it plans to introduce. Although clauses are not included in the current draft Bill it will also require OFCOM to publish and consult on an impact assessment of substantial proposed regulations. This should ensure that OFCOM regulates with the needs of the regulated industries in mind as well as those of consumers and citizens.

4.6.2 The appeals mechanisms in the draft Bill have been devised to meet the specific requirements of the EC Framework Directive that, in relation to networks and services and rights of use of spectrum, there must be provision for a full appeal on the merits. The draft Bill therefore sets out the mechanism for appeal against any decision (with specified exceptions) taken by OFCOM under Part 2 (Networks and Services) and Part 3 (Spectrum) of the Bill or under the

Wireless Telegraphy Acts 1949 and 1998. Any appeal in these circumstances will be made to the Competition Appeal Tribunal (CAT), which is being established by the Enterprise Bill. Once that Bill receives Royal Assent the CAT will replace the Competition Commission Appeals Tribunal. It will be possible to appeal against a decision on the grounds of error in fact or error in law, or of the Board's exercise of its discretion in making the disputed decision. In reaching its conclusion the CAT will be able to reject the appeal or refer the decision back to OFCOM with such directions, if any, as it considers necessary. This mirrors a similar approach taken in the Financial Services and Markets Act. We would particularly welcome stakeholders' thoughts on whether we have struck the right balance between assuring the transparency and regulatory certainty that regulated companies require and ensuring the effectiveness of the regulator. We would also welcome stakeholders' input on how we might make the system flexible and efficient and ensure that bureaucratic burdens are minimised.

4.6.3 Because of this upgrading of existing appeal rights in the telecommunications sector, the provision in the Telecommunications Act for proposed licence modifications to be referred to the Competition Commission in the event that the licensee objects will be repealed. Since any decision by OFCOM to amend any condition of entitlement (general or special) can be challenged on its merits, this "reference procedure" will become essentially redundant.

4.6.4 No specific provision is made in the draft Bill for appeals against decisions of OFCOM made under other parts of the draft Bill. We intend to include provisions for a statutory appeal equivalent to Judicial Review when the Bill is introduced.

² The Independent Committee for the Supervision of Standards of Telephone Information Services.

³ Advertising Standards Authority.

OFCOM's

5.0 general duties and powers

In the Communications White Paper the Government set out three broad objectives for OFCOM. This Chapter shows how these objectives have been reflected in the draft Bill and explains how OFCOM will be empowered to roll back regulation. It also describes OFCOM's powers in relation to competition and enforcement.

5.1 General duties

5.1.1 OFCOM's objectives as set out in the White Paper are to make the UK home to the most dynamic and competitive communications and media market in the world; to ensure universal access to a choice of diverse services of the highest quality; and to ensure that citizens and consumers are safeguarded. In the draft Bill these have been translated into OFCOM's general duties and there is the addition of a duty to encourage the optimal use of the electro-magnetic spectrum.

5.1.2 OFCOM will have to apply their general duties in carrying out all of their functions. The draft Bill intentionally does not attempt to set priorities between these general duties. It will be for the Board to look at individual issues and, should there be any conflict between the exercise of the duties, to reach a proper balance between those duties based on the merits of the case. (See also 6.2.3 on the special European duties which apply to OFCOM's functions in respect of networks and services and spectrum management).

5.1.3 OFCOM will also need, in exercising these duties, to have regard to a number of issues, including the vulnerability of children and others who may be in need of special protection, the needs of the elderly and people with disabilities and the different interests of people in different parts of the UK and those living in rural and urban areas.

5.2 Light touch regulation

5.2.1 We intend that OFCOM should set an example of regulatory good practice. As we indicated in the White Paper, OFCOM is required to ensure that regulation is kept to the minimum necessary. This means that OFCOM will be expected to secure public policy objectives with regard to protection of consumers and citizens, but with the minimum of regulation that is necessary to achieve the required result. This 'light touch' approach can already be seen in some of the specific provisions on media ownership; the preference for an industry-led initiative on handling consumer complaints about networks and services; and the introduction of a more consistent and self-regulatory approach to public service broadcasting, for example.

5.2.2 But we need to go further. OFCOM will be subject to a duty to secure light touch regulation, requiring it to carry out regular reviews of its functions to identify any areas where regulation is no longer necessary or appropriate and to publish an annual statement setting out how it plans to meet this requirement. This is in line with the recommendation of the Better Regulation Task Force's (BRTF) that economic regulators should withdraw from competitive markets when regulation is no longer necessary. OFCOM will also have a duty to have regard to the BRTF's principles of transparency, accountability, proportionality, consistency and targeting.

5.2.3 The draft Bill puts OFCOM under an obligation to publish and meet promptness standards for the carrying out of their functions. This should ensure that bureaucratic delays are kept to a minimum. In addition, we will add further clauses to place OFCOM under a statutory obligation to carry out, and consult on, an analysis of the burdens and benefits of any proposals that impose a significant regulatory burden.

5.3 Competition powers

5.3.1 The draft Bill gives OFCOM concurrent powers with the OFT to exercise the powers of the Competition Act 1998, so far as the communications sector is concerned, and concurrent powers to address monopolies using the powers of the Fair Trading Act 1974.

5.3.2 Concurrent jurisdiction means that, in this sector, both OFCOM and the OFT (strictly speaking the Director General of Fair Trading) are able to exercise the powers provided by the Competition Act. However, they will consult together in respect of any new case arising, and agree which should act. Formal arrangements for consultation are set out in regulations made under the Competition Act and these will be applied to OFCOM. In practice, it is expected that the exercise of Competition Act powers in relation to this sector, including investigations of abuse of a dominant position, will normally fall to OFCOM. This will mean that competition issues in broadcasting which are at present dealt with by the OFT will normally fall to OFCOM.

5.3.3 OFCOM will thus have access both to powers that are specific to the sector provided in the draft Bill or in the earlier legislation on wireless telegraphy, broadcasting, etc., which it amends and to the more general powers of the Competition Act and Fair Trading Act. As competition becomes more pervasive in the supply of communications services, it is expected that OFCOM will be able to rely increasingly on these general powers, rather than powers specific to the sector, in addressing concerns about competition. However, many aspects of the sector-specific framework, e.g. universal service provision, will remain necessary and will not disappear or become redundant in the foreseeable future.

5.3.4 The Enterprise Bill now before Parliament will substantially change the fair trading regime, in particular replacing the current monopolies regime by a new concept of 'market investigations'. Once Parliament has considered these proposals and decided what changes to the present fair trading regime are appropriate, revised provisions for the Communications Bill will be brought forward.

5.4 Offences, penalties and fines

5.4.1 The draft Bill removes the criminal offence of running a telecommunications system without a licence.

5.4.2 The proposed regime for networks and services establishes a civil penalty mechanism for enforcement purposes. The amount of the penalty imposed can be anything up to 10 per cent of the turnover of the person's relevant business. The intention behind this civil penalty mechanism is to ensure compliance with the proposed regime for networks and services by creating an appropriate deterrent, in respect of initial, continued and recurring infringements. The civil penalty mechanism for enforcement, in addition to being intended to deter also has the purpose of being punitive. Where a person is in serious and repeated contravention of a general or specific obligation and the giving of enforcement notices or imposition of financial penalties has failed to secure compliance, the Bill provides that a person's entitlement to provide a network or service or make available an associated facility may be suspended or restricted. A person is guilty of a criminal offence if he provides a network or service or makes available an associated facility while his entitlement to do so is suspended or in contravention of any restriction.

5.4.3 The Bill allows OFCOM to impose financial penalties on television

broadcasters who contravene the provisions of their licence. Those penalties will not exceed the greater of £250,000 or 5% of qualifying revenue (£100,000 or 3% for a first offence). In relation to radio licensing the Bill raises the ceiling for financial penalties for contravention of licence conditions from £50,000 to £250,000.

5.4.4 The Bill does not specify whether OFCOM may or may not impose financial penalties on the BBC. This will be covered in the changes to the BBC Agreement that are to be published shortly.

5.4.5 A number of detailed changes are made to the enforcement regime for spectrum management in order to comply with the EC Directives and generally to streamline and harmonise enforcement procedures.

6.0 Networks and services

This chapter sets out the recent developments in European law on the regulation of the communications sector and how these will be implemented through the draft Bill, including changes to the Telecommunications Code and new powers in relation to telephone numbering.

6.1 The EC Directives on electronic communications

6.1.1 On 14th February this year, four new Directives relating to communications were adopted by the European Communities the Framework, Authorisation, Access and Universal Service Directives. Together with a new Directive on Communications Data Protection which is still under negotiation but expected to be adopted later this year, these are the main building blocks of the new EC regulatory framework for communications networks and service providers. The UK was actively engaged in negotiating, and strongly supports, this new framework, which amounts to a comprehensive overhaul of existing European law on the regulation of electronic communications. The Directives have been published in the Official Journal and are available at http://europa.eu.int/eur-lex/en/oj/2002/L_10820020424en.html

6.1.2 The Directives provide a harmonised structure for communications regulation across the EU. The key features of this new regime are:

- The abolition of licensing in favour of a "general authorisation" and certain specific obligations. Except where individual licences or rights of use are needed to make the best use of limited resources (notably radio spectrum and telephone numbers), new providers are free to enter the market without having to apply for a licence. They may however have to notify the national regulatory authority (NRA) of what they are providing, and be required to comply with regulatory obligations developed by the NRA to apply to communications providers both generally and, in certain limited circumstances, specifically;
- Restrictions on the possible subject matter of the regulatory obligations which can be applied. Permissible matters for obligations which can be applied generally include consumer protection, standards and interoperability requirements, environmental and planning requirements, administrative charges, maintenance of the integrity of public networks and coordination with emergency services, etc. Permissible matters for obligations which can be applied specifically include ensuring access and interconnection, ensuring provision of universal service etc;
- A common set of definitions, set out in Commission guidelines, for the communications markets which NRAs are to consider in assessing the state of competition in the provision of communications services;
- Recommended procedures for NRAs to use in market analysis, set out in the Commission guidelines;
- A new definition of significant market power (SMP) which is aligned to the competition law concept of dominance. Providers which are shown by the process of market analysis to have SMP in any relevant market (either singly or jointly) should be subjected to appropriate obligations designed to protect competition. These obligations can include price controls, obligations to offer interconnection at cost-related prices to other

providers, etc. (Other cases in which special obligations can be placed on individual providers must relate to ensuring access, or ensuring the universal availability of basic services.);

- A requirement that where an NRA finds that there is effective competition in a relevant market, it is obliged to remove any previously existing controls of this type;
- A new Commission power to block NRA decisions on market definition or the designation of operators with significant market power, where these would damage the single market or be contrary to Community law;
- A new obligation on the Commission to review the scope of universal service obligations;
- The principle of technology neutrality the new framework is to be applied to all networks and services in the same way unless the means of delivery imposes special constraints;
- A full right of appeal on the merits in respect of decisions which affect communications providers.

6.1.3 Much of this new EC framework is not novel in UK practice. For example, Oftel has for some time had a systematic programme of reviewing the effectiveness of competition in telecoms markets and has removed regulatory restrictions (notably on international services) where these are no longer necessary. The most substantial change for communications providers in the UK is likely to be the removal of licensing for the running of a telecommunications systems. This requires major changes to the framework of the regulation of telecommunications in the UK, including repeal and replacement of a substantial part of the Telecommunications Act 1984.

6.2 Implementation of the EC Directives

6.2.1 The EC Directives require implementation by 25th July 2003. It may not be practical to rely solely on the Communications Bill achieving Royal Assent before that date. It may therefore be necessary to carry out the implementation to some degree through regulations made under the European Communities Act ('ECA'). The Government will make known its intended approach to this issue as soon as possible. There will of course be full consultation on any ECA regulations proposed for this purpose. However the draft Communications Bill as now published already contains almost all the provisions necessary for the transposition into UK law of the four Directives already adopted. One further issue covered by the Directives resolution of disputes between communications providers - will be added to the Bill later (see 6.6. below). The Communications Data Protection Directive, once adopted, is expected to be transposed by ECA regulations modifying the existing regulations on data protection in the field of telecommunications.

6.2.2 The necessary provisions for transposing the Directives are largely contained in Part 2 of the draft Bill, dealing with the regulation of electronic communications networks and services and spectrum. (The Directives do not affect regulation of the content of electronic services). The explanatory notes to the draft Bill identify for each clause which Article of the Directives the clause relates to. Also, the Government will be publishing shortly a separate document that details how the draft Bill implements each Article of the Directives. This document will be available at www.communicationsbill.gov.uk

6.2.3 OFCOM will be the designated national regulatory authority (NRA) and the draft Bill sets out certain duties which the Directives impose on the NRA. These duties derive from Article.8 of the Framework Directive. In part, they are very similar to OFCOM's general duties described in 5.1, but there are also additional requirements on OFCOM to contribute to the development of the internal market, and to promote the interests of citizens of the European Union, in various ways. If there should be any conflict between the European duties and the general duties, OFCOM is to give priority to the European duties because they are required by EC law.

6.2.4 In general, the approach adopted for transposition of the EC requirements through the draft Bill is that, where the Directives impose a specific requirement, it is implemented in the draft Bill; but where the Directives allow some discretion to the NRA or the Member State, the draft Bill provides OFCOM with enabling powers, subject to whatever restrictions or limitations are required by the Directives. For example, Part 2 of the draft Bill does not contain the general obligations, which are to apply to all communications providers, or the specific obligations to be placed on individual providers, e.g. because they have SMP in a relevant market. Part 2 instead details the permitted subject matter of these obligations and enables OFCOM to set such obligations within that permitted scope. A draft of appropriate general obligations (which the draft Bill terms "general conditions") is being prepared by Oftel, with a view to their eventual adoption by OFCOM, and is expected to go out to public consultation shortly. Oftel will also be embarking as soon as possible (once the Commission guidelines have been published) on the necessary market reviews envisaged by the Directives:

- to establish the state of competition in the relevant communications markets;

- to establish whether there are any providers with SMP in any of these markets, and if so;
- which specific obligations it would be appropriate to impose on these providers.

Similarly, Oftel will be consulting in due course on the designation of appropriate providers to ensure the provision of the universal services.

6.3 The new regime for regulation of networks and services

6.3.1 Regulation of telecommunications under the Telecommunications Act 1984 focused on the running of systems and a licence was required for the running of any system. The relevant regulatory requirements were largely set out in the terms of the licences. The draft Bill abolishes the requirement for licensing and the relevant sections of the 1984 Act. In contrast, the new framework in the draft Bill is consistent with the Directive concept that persons wishing to provide electronic networks and services should be free to do so without having to obtain prior permission, subject only to giving notification to the NRA and subject to compliance with applicable obligations. The draft Bill therefore provides basic definitions, consistent with those used in the Directive, of "electronic communications network" (ECN), "electronic communications service" (ECS) and "associated facility" (AF: a facility associated with the provision of an ECN or ECS which enables or supports the provision of that network or service examples are conditional access systems and electronic programme guides).

6.3.2 As such the draft Bill abolishes all licences granted under section 7 of the 1984 Act. It will also abolish certain specific obligations imposed on systemless service providers. The Government, however, understands that there may be numerous agreements and arrangements made and transactions effected in reliance on, by reference to, or in pursuance of such licences or obligations. The most obvious examples of such agreements are wayleave agreements and interconnection agreements. The Government's intention is that the parties to these agreements etc. should be left in the same position despite the abolition of the licences and obligations. We intend to include provisions in the Bill, when it is introduced, to deal with this issue, but in order to ensure that we do this effectively, we would first like to invite anyone with an interest in this issue to identify the types of agreement etc. which they consider might be affected by the abolition of such licences or obligations. If respondents do not want any information that they provide about such agreements to be made available to the public, this should be explicitly specified in their response.

6.3.3 OFCOM will make 'designations' (a designation is a description of a particular kind or kinds of ECN, ECS or AF) and once OFCOM has made a designation, anyone proposing to provide such a network, service or facility has to notify OFCOM before doing so.

6.3.4 At present, Oftel is funded by licence renewal fees; these are no longer possible in the new framework, but the Directives, in effect, allow NRAs to levy appropriate administrative charges for the management of the regulatory regime. The draft Bill gives OFCOM the power to define which kinds of communications providers are to be subject to charges, and to fix the charges to be paid by these providers. The charges are subject to certain restrictions imposed by the Directives: in particular, that they shall be no more than is necessary in aggregate to cover the costs of administering the regulatory regime. The draft Bill does not specify the basis on which charges are to be levied, but Oftel and some other regulators currently charge licence fees as a proportion of the relevant turnover of the company concerned; it is expected that OFCOM will likewise levy administrative charges on a turnover basis.

6.3.5 The draft Bill permits OFCOM to set conditions which are binding on communications providers. Conditions must be either general (applying to all providers of a particular type) or else fall within one of the limited categories of conditions which the Directives allow to be applied to individual providers. These categories are:

- Universal service conditions. These may be imposed on designated providers in order to ensure universal provision of basic services. The universal services which are to be provided throughout the UK are to be set out by the Secretary of State in an Order;
- Access-related conditions. These may be imposed on individual providers of public networks and on persons who make available associated facilities in order to ensure access to their networks, services or facilities;
- Privileged supplier conditions. These may be imposed on communications providers which have special and exclusive rights in other sectors, and require separation of accounts to show that the communications operations are not being improperly subsidised; or
- SMP conditions These may be imposed on communications providers or persons who make available associated facilities, if they are found, after analysis of the relevant communications market, to have a dominant position on that market. These conditions can include such things as access to dominant networks, controls on the pricing of charges for such access, provision of carrier pre-select facilities, retail price controls, and provision of leased

lines.

6.4 Installing cables and masts The Electronic Communications Code

6.4.1 It is necessary to strike a balance between rolling out the physical infrastructure on which all these communications depend, and environmental concerns.

6.4.2 The existing telecommunications code enables the Secretary of State to grant powers to telecommunications operators to enable them to install, on public and private land, apparatus necessary to establish and run their telecommunications systems. Code system operators benefit from certain permitted development rights under the Town and Country Planning regime. The new code, which will refer to electronic communications networks, will not be substantially different. The Secretary of State will set the restrictions and conditions upon which the code is to be applied. OFCOM will apply the code to particular providers of electronic communications networks.

6.5 Telephone numbering

The general conditions that OFCOM may set include conditions regulating the use of telephone numbers. At present, the use of telephone numbers is regulated through the licences, but this does not provide a basis for regulating use by persons who do not run systems, nor for charging for the allocation of numbers. Numbering was not addressed in the Communications White Paper, but the Trade and Industry Select Committee has recommended that the regulator should have explicit powers to do these things, and the Government agrees. The draft Bill therefore provides OFCOM with appropriate powers consistent with the EC framework. Because of the constantly evolving nature of communications services, any definition of "telephone numbers" which was limited to what we currently recognise as such would be liable to go out of date. By way of future proofing, the draft Bill therefore uses a very general definition. As this would result in catching certain kinds of electronic identifier that do not require regulation in the near term, the draft Bill allows the Secretary of State to exclude specific categories from that scope. It is intended that this power will be exercised to exclude e-mail addresses, domain names, etc.

6.6 Dispute resolution

It is intended that the draft Bill will implement the provisions of the Directives in relation to the resolution of disputes between operators through giving appropriate powers and obligations to OFCOM. This is not covered in the present draft, but suitable provisions will be published at a later date.

7.0 Spectrum

This chapter sets out OFCOM's role in ensuring spectrum is used efficiently and for the maximum good.

7.1 Independent review of spectrum management

7.1.1 In March 2001, the Chancellor of the Exchequer and Secretary of State for Trade and Industry commissioned Professor Martin Cave to lead an independent review of radio spectrum management. The review's report was published on 6 March 2002. The Government has welcomed the report and invited comments by 10 May. It plans to respond in the summer.

7.1.2 The Government is considering the report and the draft Bill does not reflect the Governments' response to the independent review. The Government will announce as soon as possible if it intends to revise the draft Bill as a result of its consideration of the review's report or the responses to it.

7.2 Spectrum trading

7.2.1 The Government has a longstanding commitment to the introduction of spectrum trading. This was reaffirmed in the Communications White Paper. Spectrum trading is a potentially powerful means of allowing new services to gain speedy access to spectrum, boosting innovation and competition and enhancing the economic benefits generated from radio spectrum.

7.2.2 Accordingly, the draft Bill gives OFCOM flexible powers to introduce and regulate spectrum trading. The details of how and where spectrum trading will be introduced and the regulation of the spectrum market will be set out in regulations to be made by OFCOM.

7.2.3 The Radiocommunications Agency will shortly publish a consultative document that seeks views on detailed implementation. This document will be available on the Agency's website (<http://www.radio.gov.uk/>)

7.3 Recognised Spectrum Access

7.3.1 Recognised Spectrum Access (RSA) is a new concept that is complementary to licensing. RSA would provide a mechanism for conferring formal recognition for spectrum planning purposes on services, such as satellite downlinks, that are not currently subject to licensing; and, where appropriate, charging such services for spectrum access.

7.3.2 Satellite operators cannot currently be given formal assurance that their use of spectrum is recognised in spectrum planning. RSA would offer enhanced security that operators' use of spectrum is officially recognised on a statutory basis and confirmation that it is endorsed by the UK spectrum management authority in spectrum planning terms.

7.3.3 The full advantages of spectrum trading could not, under the current regime, be realised in spectrum shared between terrestrial and satellite transmitters. The boundary between terrestrial and space spectrum is set by the regulator rather than driven by the market, which makes it more difficult to adjust dynamically in response to market and technical developments. RSA would be tradable and interchangeable with licences.

7.3.4 There is currently no mechanism to charge for the use of the spectrum. This means satellite operators do not face the opportunity cost of the spectrum they use and have little incentive to use spectrum more efficiently. Moreover, it

places terrestrial operators, who pay licence fees, at a competitive disadvantage. RSA would be subject to the existing spectrum pricing regime, including statutory safeguards on the level of fees.

7.3.5 The independent review recommends that spectrum access licensing should be used to clarify the rights and responsibilities of satellite transmissions into the UK; and, where appropriate, that opportunity cost pricing should be applied to such spectrum use. The Government has not reached any firm conclusion on this recommendation but recognises the underlying rationale.

7.3.6 The Radiocommunications Agency is publishing a consultative document on how RSA might be applied in practice to satellite services. This document will be published shortly and will be able to be accessed via the Agency's web site www.radio.gov.uk.

7.3.7 RSA could also have applications outside satellite services. For example, use of spectrum by Government departments, such as the Ministry of Defence, does not require a licence as the Wireless Telegraphy Act, like most statutes, does not bind the Crown. However, the draft Bill provides for the Crown to be granted RSA, which the department in question could then lease to a private sector licensee. Such leasing arrangements were recommended by the independent review.

7.4 Powers of direction

7.4.1 The radio spectrum is a finite and valuable resource of considerable importance to a wide range of users. It is:

- an essential raw material for businesses, including telecommunications networks and broadcasting, that generate over £20bn a year of economic and consumer benefits;
- a key operational resource for defence, national security, emergency services and safety-of-life applications;
- used for a variety of other applications scientific, social and cultural.

7.4.2 The importance of spectrum to a broad range of policies within and transcending the communications sector makes it necessary for Ministers to retain power to make decisions on the distribution of spectrum in the wider national interest.

7.4.3 Accordingly, the draft Bill provides extensive powers of direction in relation to spectrum. These go beyond the basic considerations of national security and international relations and would allow Ministers, subject to approval by Parliament, to direct OFCOM on any aspect of spectrum management. In particular, Ministers could determine how spectrum is allocated between different classes of use, for example broadcasting, mobile telecommunications, private business systems, air traffic control or radio astronomy, or within a class, for example for the provision of additional digital television or sound broadcasting multiplexes. Ministers could also require OFCOM to reserve specific frequencies for specified users or uses, for example spectrum for public service broadcasters to meet their obligations.

7.4.4 This would give Ministers powers to ensure that the spectrum was being used in the interests of all users inside and outside the communications sector, or, more generally, to intervene if they considered that OFCOM were not managing the spectrum in the wider public interest.

7.4.5 The independent review of spectrum management agreed that Ministers should retain powers to make essentially political judgments over the distribution of spectrum and to specify other public policy objectives and criteria that OFCOM should take into account in managing spectrum. However, it recommended against Ministerial powers to direct OFCOM in the specifics of spectrum management tools, such as assignment methods, auction design, administrative incentive pricing and licence exemptions. The draft Bill should not be seen as pre-judging the outcome of the Government's consideration of the recommendation of the independent review on this matter. In finalising the Bill, the Government will consider carefully what the review says on this issue and the comments it receives on the review.

8.0 Broadcasting

This Chapter sets out the new regulatory regime for Broadcasting.

8.1 Introduction

The Communications White Paper set out a range of policies which would help broaden choice of, and access to, modern communications technologies while protecting consumers and the essential qualities of public service broadcasting. Key proposals for TV and radio included: ensuring the universal availability of television; and that public service channels continued to be available to everyone, free at the point of consumption; and introducing a new regulatory framework for public service broadcasting in order to deregulate and create more of a level playing field between different broadcasters, (but taking into account their differing missions and funding sources). In addition, Ministers have made clear that they do not intend OFCOM's regulation of content to extend to the Internet.

8.2 Public service broadcasting (PSB)

The White Paper affirmed the Government's commitment to maintaining the role of public service broadcasting in the digital age. Public service broadcasting, as developed in the UK, ensures the availability of a wide range of high-quality radio and television programmes free at the point of use and encompassing information and education as well as entertainment which reflect the needs and interests of all listeners and viewers. As such it is of profound importance for our democracy and cultural identity. But the White Paper also made clear the Government's view that the way in which public service broadcasting is regulated and delivered must change to take account of developments across the wider communications sector. The draft Bill meets this requirement by establishing a wholly new three-tier broadcasting regulatory structure. The structure comprises an initial tier to guarantee standards across all broadcast services and a further two tiers applicable to public service broadcasters. The draft Bill sets out in detail the extent of OFCOM's ability to regulate.

8.2.1 OFCOM and the BBC

8.2.1.1 It is a key objective of the new structure to apply a consistent scheme of regulation to the BBC and other public service broadcasters, while recognising the distinctive role and constitution of the BBC. The existing core responsibilities of the BBC Governors which include upholding and protecting the BBC's political and editorial independence and calling management to account will be retained but the BBC will in addition be subject to new external requirements monitored and enforced by OFCOM. In broad terms the same balance of self-regulation and external regulation will apply in the case of both the BBC and other broadcasters. The overall effect will be that the BBC will be subject to increased external regulation while other public service broadcasters will face reduced external regulation. Thus the BBC's position will be brought closer to that of other broadcasters. The backstop powers for the BBC will, however, remain with the Secretary of State for Culture, Media and Sport and with Parliament through Charter renewal (next due in 2006).

8.2.1.2 The BBC Governors are responsible for ensuring that the BBC meets all its statutory and other obligations within the overall framework of the Charter and the Agreement with the Secretary of State for Culture, Media and Sport. The BBC's relationship with OFCOM will therefore be established principally by way of amendments to the Agreement, rather than in the legislation itself. The draft Bill includes a general provision for OFCOM to undertake the regulation of the BBC in accordance with the terms of the Agreement. However, with certain very limited exceptions (relating to those matters where the BBC is already under a statutory requirement which the draft Bill preserves), regulatory obligations applying to the BBC will derive from the Agreement as amended. Details of the proposed amendments to the Agreement will be set out in a separate document to be published shortly by the Department for Culture, Media and Sport.

8.2.2 Distribution of public service broadcaster channels (Must Offer/Must Carry)

8.2.2.1 There was a strong commitment in the White Paper to ensuring that public service broadcasters ("PSBs") are available on all the main platforms, both before and after digital switchover. There was also a commitment that they should continue to be available to all those who receive them at present.

8.2.2.2 The White Paper set out proposals to meet those commitments, first by rolling forward the present arrangements whereby the PSBs must be carried on digital cable systems should the regulator deem it appropriate. Those apply to BBC channels, C3, C4, S4C digital, C5 and the public teletext provider. The White Paper also proposed that new channels might be added to that list, but subject to reasonable remuneration for the relevant operator. These provisions, which will be subject to periodical review, appear in the draft Bill.

8.2.2.3 The White Paper also proposed that PSBs should be required to offer their PSB channels to all the main distribution platforms. This may be necessary to ensure universal availability after digital switchover, especially as there may be some areas of the country to which terrestrial digital coverage cannot cost-effectively extend, and where viewers may need to rely on satellite reception.

8.2.2.4 Therefore, we must ensure that, after digital switchover, all the PSB channels have a right to be carried on all the main platforms and a duty to secure carriage, and that viewers have no cost to bear on top of the equipment and of the licence fee. This Bill will therefore contain provisions empowering OFCOM to impose certain obligations, if at the time they appear necessary to achieve the universal availability, free at the point of reception, of public service channels after switchover. These are:

- an obligation on the main packagers and retailers of satellite channels to provide the PSBs to all their subscribers at no additional cost; and
- an obligation on the PSBs to offer their channels to the main packagers and retailers of satellite channels (as proposed in the White Paper), but also to provide (on request) to all those households which can receive the public service channels only by satellite, and do not want to pay a subscription, the smart card enabling their digital equipment to decrypt the signal.

8.2.2.5 As these provisions would not be needed until switchover, and we cannot predict what the broadcasting market will be like at that time, they would be brought into effect by commencement order only when and if necessary. Finally, we are considering whether, consistent with the European Directives, the Bill could contain provisions to ensure that OFCOM will be obliged to consider the special position of public service broadcasters when regulating the price of access to satellite conditional access systems. Draft clauses giving effect to these further provisions will be made available shortly.

8.2.3 The 3 tiers of regulation

8.2.3.1 The White Paper set out our intention to rationalise the system of regulation of broadcasting so that it is more coherent across all broadcasters and relies more on self-regulation. The draft Bill provides for the new three-tier structure, to be regulated by OFCOM.

8.2.3.2 Under the new structure, the first tier consists of basic requirements that will be applied in a consistent manner across practically all television (and in some cases radio) broadcasters.

These requirements cover:

- standards of programme content for television and radio services;
- advertising standards and rules on programme sponsorship for television and radio services;
- compliance with the UK's international obligations, for example under the EC Television Without Frontiers Directive;
- promotion of equal opportunities and training in television and radio employment;
- provision of subtitling, sign language and audio description services on television.

8.2.3.3 The obligations in the second and third tiers apply to the public service broadcasters, i.e. Channel 3, Channel 4 and Channel 5 and the public teletext service. They also apply to the BBC and S4C, though in a way which takes account of their distinctive role and constitution. Taken together these tiers define the broadcaster's individual "public service remit".

8.2.3.4 The second tier consists of specific requirements that can be measured objectively, relating in particular to:

- quotas on independent production;
- quotas on original production;
- quotas on regional programming and production;
- provision of high quality national and international news and current affairs programmes in peak time;
- provision of party political broadcasts;
- schools programming.

8.2.3.5 Unlike the first tier, second tier requirements will be applied flexibly to suit the circumstances of the individual broadcaster concerned and only after consultation with that broadcaster.

8.2.3.6 The third tier constitutes a system of self-regulation for public service broadcasters, covering the qualitative public service obligations that they are expected to fulfil. The key elements of the system will be:

- the formulation of a general public service broadcasting remit derived from the present BBC Agreement;
- a duty for OFCOM to review and report on public service broadcasting and in particular on whether the general remit has been met by the public service broadcasters taken as a whole. Such reviews will take place twelve months after commencement of the Bill and thereafter every three years;
- specific remits for individual public service broadcasters, encompassing both the second and third tier requirements and reflecting a spectrum of obligations across the public service sector;
- an obligation on each broadcaster to publish an annual statement of programme policy and to report annually on performance against that statement. We would expect OFCOM to review licensed broadcasters' position annually in the light of these reports. In preparing their statements broadcasters must take account of any guidance issued by OFCOM and (in the case of licensed broadcasters) must consult OFCOM before producing a statement that involves a material change of policy as compared with previous years;
- enforcement powers for OFCOM in the event of a licensed broadcaster not complying with his specific remit, or not contributing sufficiently to delivery of the general remit. The powers will include a requirement that the broadcaster take specified action to remedy the failure in question (including where appropriate the preparation of a revised statement of programme policy) and in the last resort withdrawal of the broadcaster's right to exercise self-regulation. The Bill provides a backstop power for the Secretary of State in relation to S4C, details of which are set out at paragraph 8.2.8.3 below.

8.2.3.7 The position of the BBC in relation to the new regulatory structure is discussed in section 8.2.1 above.

8.2.4 Digital public service broadcasting licences for Channels 3 and 5

8.2.4.1 The White Paper stated our intention to continue to license individually all terrestrial programme services in order to secure the consumer protection and public service policies set out in the Paper. Current licences depend on specified obligations to broadcast in analogue form, with additional obligations to broadcast those channels simultaneously in digital form. Clearly, new licences need to take account of digital switchover. We indicated that a key question would be whether digital terrestrial licences should be renewable indefinitely and, if not, the criteria for awarding them.

8.2.4.2 We have concluded that to ensure the continuation of digital public service broadcasting through switchover, there would be merit in the early introduction of a digital public service broadcasting licence. The draft Bill gives OFCOM the power to offer existing licence holders the opportunity to exchange their current analogue licences for a new digital public service broadcasting licence, which would require the broadcaster to broadcast digitally and simulcast on analogue the reverse of the current arrangement until switchover. OFCOM will offer terms for the new licences, which are substantially similar to the old licences, but not identical. The three tiers of regulation would apply instead of the detailed prescriptive requirements in the present licences and public service broadcasters would benefit from due prominence on the Electronic Programme Guide (EPG). Additionally, licensees will not be able to charge for the provision of subtitling for deaf people. There would be parallel provisions for the Channel 4 Corporation.

8.2.4.3 The new licences will be valid until 2014. We have decided that there will no longer be an automatic renewal process and licensees will need to apply for a new licence. Similarly, those licensees who choose not to exchange their existing analogue licences will lose their licences at digital switchover and will need to apply for a new digital licence.

8.2.5 Digital public teletext licence

8.2.5.1 The analogue public teletext service is subject to a number of positive content requirements on the licensee in the same way as the Channel 3 and Channel 5 licensees. We propose therefore to make provision in the Bill to give OFCOM the power to offer the public teletext licence holder the opportunity to replace his current analogue licence with a new digital licence with similar terms to the new Channel 3 and 5 digital licences. Those elements of the three tiers requirements that are currently imposed in the public teletext analogue licence will apply to the new digital licence.

8.2.5.2 The White Paper gave our commitment that a public teletext channel will be one of the digital channels that is available on all digital platforms. The extended provisions for PSBs, described at 8.2.2 raise a question about how we could apply similar provisions in relation to the public teletext service.

8.2.5.3 The public teletext service is fundamentally an analogue service created to take advantage of the spare capacity that exists on the C3/C4 analogue broadcast signal. That spare capacity does not exist in a digital environment, but the service has been allocated 3% of the C3/C4 multiplex capacity, on which a rather different service is provided.

8.2.5.4 To apply the must carry/must offer provisions, as now, to the familiar analogue service comes up against the technical difficulty of efficiently translating what is an essentially analogue service to digital platforms; and of course that service will cease to exist after switchover. On the other hand, if the provisions were to be applied to the digital terrestrial service, it could be difficult to offer a service that would be attractive on other platforms.

8.2.5.5 Given the limitations of the digital terrestrial service, we need to consider with the key stakeholders how the must carry/must offer provisions as they have been developed could effectively and equitably apply to public teletext. Our final proposals will be developed in the light of those discussions and responses to consultation on the draft Bill and this Policy document.

8.2.6 ITV Networking

8.2.6.1 We intend to retain the current requirements under the 1990 and 1996 Broadcasting Acts for the Channel 3 companies to enter into networking arrangements.

8.2.6.2 Networking arrangements ensure that regional Channel 3 companies (taken as a whole) can provide a nationwide system which is able to compete effectively with other television programme services provided in the UK. They will also be important in the future regulatory regime in ensuring that regional Channel 3 companies are able to deliver their tier two and three requirements.

8.2.6.3 We propose that OFCOM should assume the ITC's current responsibilities, subject to some minor adjustments, and that the effect of schedule 4 of the 1990 Act, which sets out the procedure for a competition test to be applied to the networking arrangements, should be retained.

8.2.7 Channel 4 powers and structure

8.2.7.1 The White Paper outlined our intention to retain Channel 4's present structure as a statutory corporation, but to clarify the framework for ensuring that its new ventures support its remit and are not unfairly subsidised.

8.2.7.2 We propose that the Channel 4 Corporation should remain free to do such things and enter into such transactions as are in the opinion of the Corporation incidental or conducive to the discharge of its statutory functions. Of course, all the Corporation's activities must continue to support and enhance its core statutory purpose to provide the Channel 4 service itself and to reinforce this point we will remove its freestanding powers in relation to "qualifying companies".

8.2.7.3 In addition, the Channel 4 Corporation will in future be required to agree with OFCOM, and publish, formal arrangements to be followed by the Corporation in approving new ventures. These will give statutory effect to the current requirements agreed with the ITC. They will include a requirement for the Corporation to be satisfied that performance of its core statutory purpose would not be jeopardised by any such ventures and will ensure that there is a clear separation between the core Channel 4 business and other ventures of the Corporation. They will also require that any services, products or rights of the Corporation used by the new ventures are acquired on an arm's length basis reflecting either the cost of provision or a market rate.

8.2.7.4 In order to ensure transparency and accountability, the Corporation will also be required to appoint reporting

accountants, independent of its auditors, to confirm that the arrangements have been followed. The Secretary of State's existing power to issue accounts directions to Channel 4 will be retained. The necessary legislative provisions to effect these changes will be included in the final Bill.

8.2.8 S4C

8.2.8.1 We propose that S4C, like the BBC, will be subject to regulation by OFCOM in relation to negative content requirements and industry-wide quotas and obligations. Like the BBC, S4C will remain self-regulating on matters such as impartiality and the fulfilment of its tier three remit.

8.2.8.2 The draft Bill sets out a high level function for the Welsh Authority, based on its current statutory function. The high level function will be to provide, as a public service for disseminating information, education and entertainment, a television broadcasting service of high quality for reception wholly or mainly in Wales, a substantial proportion of the programmes being in Welsh. The Secretary of State will have the power to make an order, subject to the affirmative resolution procedure, amending S4C's tier three remit, but the Authority's high-level function will be amendable only by primary legislation.

8.2.8.3 We propose to introduce a power for the Secretary of State, at intervals of no less than five years, to review the performance of S4C against its tier three remit, having regard to any relevant views expressed by OFCOM, S4C and the Welsh Assembly. If, having carried out such a review, it appears to the Secretary of State that the Authority has without good reason significantly failed to fulfil its remit, she will have a power to issue a direction to the Authority, requiring it to take such action as she considers necessary to secure the fulfilment of the remit. Before issuing such a direction the Secretary of State would have to consult the Authority on a draft of it, and any such direction would require the approval of both Houses of Parliament.

8.2.8.4 It is intended that S4C should have the power to introduce new public services or turn existing commercial services into public ones, subject to the approval of the Secretary of State. We also propose to put in place for S4C an approvals process for commercial ventures broadly based on that for the BBC, so that S4C will be able to enter into joint ventures and partnerships and set up subsidiary companies, subject to the approval of the Secretary of State. All S4C commercial and additional public service activities will need to be incidental or conducive to the Authority's statutory purpose.

8.2.9 Provision of news by public service broadcasters

8.2.9.1 News services perform a vital function in a democratic society. They provide a platform for open debate, and allow citizens to make informed and responsible decisions. Many consider television news to be particularly trustworthy, and one of the principles of regulation has been to ensure that high quality, impartial news is available to all viewers. This principle will be carried forward by the Communications Bill.

8.2.9.2 The BBC, Channel 3, Channel 4 and Channel 5 will be required to broadcast high quality domestic and international news at intervals throughout the day and in peak viewing hours. News services must be presented with due accuracy and impartiality.

8.2.9.3 The nominated news provider system will be retained for Channel 3. This arrangement requires the licensees to network their news service, and to appoint as provider an organisation that OFCOM nominate as being effectively equipped and adequately financed to provide high quality news services.

8.2.9.4 However effectively equipped and adequately financed the news provider was at the start of the process, the quality of service provided depends to a large extent on the final contract that is signed. There will therefore be a new requirement for Channel 3 licensees: to provide adequate financial support to the news provider to make sure the service is of high quality. This should prevent the price of future news contracts being negotiated down to a point where it affects the standard of coverage.

8.2.9.5 There will be a new power for the Secretary of State to introduce a nominated news provider system for Channel 5's news service if it becomes clear that Channel 5 has gained a significant share of the free-to-air TV audience. As a safeguard, before using the power the Secretary of State will be required to consult OFCOM and the licence holder.

8.2.9.6 A separate power will allow the Secretary of State to revoke the whole nominated news provider system for either ITV or Channel 5, or both, if she is satisfied at some point in the future that a sufficiently wide range of high

quality, easily accessible news services will still exist without it. Again, she must first consult OFCOM and the licence holders.

8.2.9.7 There will continue to be limits on ownership of the nominated news provider. These are outlined in Chapter 9, on media ownership, which also discusses the new flexibility in the nominated news provider system in the context of the deregulation of other ownership rules.

8.3 Other television programme licensing matters

8.3.1 Digital terrestrial television (multiplexes)

8.3.1.1 The Communications White Paper stated that since spectrum is a finite resource, users of spectrum will continue to be licensed as at present. They will continue to have specific obligations in relation to the content they carry and other matters.

8.3.1.2 All multiplex providers will require a Wireless Telegraphy Act licence and OFCOM will decide whether a television multiplex licence is also needed, where the intention is to provide television services. The draft Bill defines a television multiplex service as a service for broadcasting of two or more relevant television services on a digital multiplex or one service with the intention of carrying further services. Relevant television services means any of the following: Channel 3, Channel 4, Channel 5, and S4C in digital form; any digital programme or additional service; and the public teletext service in digital form.

8.3.1.3 The draft Bill contains powers for the Secretary of State to set a minimum percentage of digital capacity that should be available for digital programme services, qualifying services and programme related additional services. Additionally, OFCOM will have the power to impose a condition on licensees requiring a greater proportion of television services in television multiplex licences. The independent review of spectrum management proposed that such limits on the proportion of digital broadcasting multiplex capacity which can be used for non-programme related data services should be relaxed as soon as possible and ultimately eliminated. The Government will review the provisions in the draft Bill in the light of its decisions on the independent review, on which it has invited comments.

8.3.1.4 Multiplex licences awarded under the provisions of Part 1 of the Broadcasting Act 1996 will remain in force and are not affected by these new provisions. Where OFCOM determine that digital capacity is to be reserved for the broadcasting on a digital television multiplex of services provided by one or more public service broadcasters, new licences will be awarded under the provisions of Part 1 of the 1996 Act. The Secretary of State will have an order making power to amend any or all of the provisions setting out the procedures for awarding and the renewal of licences.

8.3.2 Digital local television services

8.3.2.1 The White Paper stated that there is more scope for local television services, but acknowledged that Restricted Service licensees (RSLs) face a problem of spectrum uncertainty. The Government has affirmed that a post switchover plan will be developed to give RSL organisations a clearer indication of long-term prospects for local television services. We need therefore to enable OFCOM to license digital local television services if spectrum is available for this purpose.

8.3.2.2 The draft Bill therefore gives the Secretary of State the power to provide by order for any of the provisions relating to television services under this Act, under Part 1 of the Broadcasting Act 1990 and Part 1 of the Broadcasting Act 1996 to apply to local television services. Local television services are defined as services which are to be included on digital multiplexes; which provide for a particular establishment or event; or are for reception in a particular area or locality and have the following key characteristics:

- they are likely to provide social and economic benefits to the area where they are likely to be received or to persons living or working in the area;
- they are likely to broaden the range of programmes available in the area or locality, and
- they are likely to increase programmes about the area or the number of programmes made in the area.

8.3.3 Licensable content on cable and satellite

8.3.3.1 Terrestrial digital television programming will continue to require a digital programme services licence or a digital additional services licence. Satellite and cable television licensing will be combined under a new type of television content service licence. Such licences will be required for television programming, including certain text services and

electronic programme guides that are intended for reception by members of the general public (this excludes, for example, closed user groups such as stock broking or financial report services e.g. Reuters or internal company programmes). The policy is that the new licence should be required for all television-like services, that is those that are packaged as linear channels and distributed simultaneously or virtually simultaneously to viewers. This new licence will (broadly speaking) be subject to the first tier of regulation, including certain minimum standards as to the content of its programmes, but will not carry positive obligations of a public service nature.

8.3.3.2 The Government has made clear that it is not the intention for the draft Bill to extend regulation into the Internet. It is not a simple matter to give effect to this policy in statutory form – the draft Bill is designed to do so through the way that 'available for reception by members of the general public' is defined. The definition in the draft Bill has the effect that some services that are currently regulated, notably video-on-demand, would not be licensable in future.

8.3.3.3 The draft Bill does, however, grant the Secretary of State the power to amend the definition of what is licensable through secondary legislation to take account of such matters as the expectations of the public about content, and child protection issues, as well as technological change. Ministers are minded to use this power, to bring in video-on-demand when the Communications Bill comes into force, unless they receive industry-wide assurance, by Autumn 2002 that providers of the video-on-demand service would put in place and maintain adequate means of protecting children. We envisage such an assurance would incorporate a binding code whereby all UK video-on-demand providers would be signed up to putting in place, promoting and operating effective child protection measures.

8.3.4 Electronic programme guides

The Communications White Paper outlined our intention that Electronic Programme Guides (EPGs) should be specifically regulated. Under the draft Bill OFCOM will have a duty to draw up a code giving guidance to providers of EPGs. The code will cover such things as the listing and promotion of the public service channels – with public service broadcasters benefiting from due prominence on the EPG – and the facilities for selecting or accessing those channels. The licence to operate an EPG will include provisions for securing that the code is complied with.

8.4 Radio

8.4.1 Licensing

8.4.1.1 The Radio Authority currently licenses independent radio services, and OFCOM will take over this role. This function does not extend to the BBC.

8.4.1.2 The draft Bill abolishes separate cable and satellite licences and replaces them with a single licence for both – to be known as a radio licensable content services licence. This means that a broadcaster will need only one licence (rather than two) for broadcasting by satellite and cable. The draft Bill also contains a power allowing the Secretary of State to remove cable and satellite radio broadcasts from the licensing regime if it appears no longer necessary for them to be regulated.

8.4.1.3 The draft Bill extends the maximum length of analogue radio licences from 8 to 12 years, reflecting the stability of the industry and the time it takes to get a satisfactory return on new licences, especially those covering smaller areas. Holders of all current local and national licences will be able to apply for an extension. The Bill will provide that such an application cannot be submitted earlier than three years before the expiry date of the licence, and no later than the 'relevant date' by which the licence would otherwise need to be re-advertised. Licences will continue to be competed for at the end of their terms. The fast-track re-advertisement procedure will be retained, and extended to all local licences.

8.4.1.4 The current restrictions for national licences are retained so that one is speech-based, one is non-pop and the third is different from the other two. The Bill will provide that there are no other format controls nationally. The draft Bill also provides that broadcasters do not require a broadcast licence to provide a multiplex service unless the relevant Wireless Telegraphy licence stipulates that the multiplex must carry only licensed services.

8.4.1.5 OFCOM will continue to have a duty to include conditions in local licences intended to secure the character of the service as proposed by the licence holder and to ensure that national licences comply with the basic format as advertised. In the case of local licences, OFCOM may agree to a departure from the character of the service if:

- the departure would not substantially alter the character of the service;
- the departure would not narrow the range of programmes available;

- the departure, in the case of local licences, would be conducive to maintaining or promoting fair competition; or
- there is evidence of significant support for the change.

8.4.1.6 The last two bullet points are new factors for OFCOM to consider. The Government accepts the case for some further relaxation to make it easier for licence holders to respond to local audience expectations and demand. In well-developed major markets, OFCOM will therefore be empowered to allow format changes to mainstream stations, to facilitate competition.

8.4.1.7 The draft Bill increases the fines OFCOM can impose on licence holders from £50,000 (the figure set out in 1990 Act) to £250,000.

8.4.1.8 There are a number of other proposals which are currently not in the draft Bill that will be added to the Bill before it is introduced to Parliament. These are:

- a requirement for OFCOM to take into account the applicant's proposals for providing a simulcast service when assessing national analogue licence applications, with an express provision that those proposals would then be included in any licence conditions;
- a new duty on OFCOM to promote and protect the local content and character of local radio;
- the ability for OFCOM to review the onward sale of local licences to reduce the risk that new owners move uniformly towards a middle ground of national taste. This power will be extended to all licences which change hands and OFCOM will be able to make licence changes which in their view will ensure that the character, range and quality of the local service are maintained.

8.4.2 Access radio

8.4.2.1 The draft Bill allows the Secretary of State to introduce by Order a new tier of very local radio to be known as "access radio". The Government set out in the Communications White Paper a number of benefits which it believes could arise from access radio stations:

- very local community based radio can help increase active community involvement, and local educational and social inclusion projects;
- small radio stations can provide a nursery for the next generation of broadcasters providing hands-on training and experience;
- such stations can also satisfy the demand for access to broadcasting resources from specific communities, whether based on locality, ethnic or cultural background or other common interests.

8.4.2.2 The decision to introduce access radio will depend largely on the experience of the Radio Authority's current pilot study of a number of access radio stations. If successful, it is anticipated that future access radio stations will be licensed which:

- demonstrate evidence of social gain and/or public service aims;
- are small-scale neighbourhood schemes, or are designed to serve a community of interest;
- are funded either through non-commercial funding or by a mixture of commercial and non-commercial funding;
- are not-for-profit or non-profit distributing;
- are ring-fenced in terms of ownership and operation from Independent Local Radio, and distinct from Independent Local Radio (ILR) (i.e. ILR licensees are proscribed from equity participation to any extent in an Access Radio licensee);
- provide opportunities to allow access among those within the target group to the operation of the service.

8.4.2.3 The draft Bill also provides for the possible creation of an access radio fund which could support the establishment and operation of access radio stations. The creation of such a fund in practice would depend on whether resources could be made available as well as the outcome of the pilots.

8.5 Standards

8.5.1 Content standards

8.5.1.1 The White Paper affirmed the Governments' commitment to ensure that the growth of multi-channel, multi-media services serves society and the interests of citizens and does not harm them. The draft Bill confirms this by requiring the establishment of a high level set of principles and objectives for the regulation of broadcast content covering

both editorial programming and advertising. These ensure that universal minimum standards are maintained, but that these standards are flexible so as to be able to reflect changes in social attitudes and audience expectation. Importantly, the provisions in the draft Bill also reflect a proper balance of both freedom of expression and the need to provide protection against certain types of broadcast material.

8.5.1.2 OFCOM will regulate content standards of television and radio by way of a statutory code or codes, underpinned by specific provisions in the draft Bill. OFCOM will also work with industry to ensure effective co and self-regulatory approaches to protection for other services, such as the Internet.

8.5.1.3 The draft Bill also provides for OFCOM to have audience research responsibilities on content of both radio and television similar to those enjoyed by the current regulators and also in relation to new functions, for example, media literacy (see 8.6.5).

8.5.2 Content complaints handling

8.5.2.1 As proposed in the White Paper the draft Bill provides that OFCOM will have the duty to consider "fairness complaints" that is when the interests of a complainant themselves may have been infringed in radio or television programmes or in connection with the obtaining of material included in a programme.

8.5.2.2 Following discussions with broadcasters and regulators, we have decided to retain provision that the regulator may directly consider complaints from the public about broadcast content ("standards complaints"), rather than, as proposed in the White Paper, have to address their complaint first to the broadcaster. While many comments or complaints are best addressed to the broadcaster, and the broadcaster should be directly accountable to its audience for maintaining standards, it is important that people should also feel able to complain to the regulator, especially about breaches of standards which appear serious and which might be detrimental to the public at large. It is equally important that the regulator is able to deal with the complaint promptly.

8.5.2.3 OFCOM's ability to consider complaints directly extends not just to complaints about editorial programming but also to advertising complaints, which may require immediate action, for example in relation to misleading claims.

8.5.3 Videos

8.5.3.1 The White Paper sought views on whether to include the pre-classification system operated by the British Board of Film Classification ('BBFC') for videos, DVDs and computer games in OFCOM's regulatory structure. Most of those who responded to the consultation on this point emphasised the distinction between a pre-classification system, as there is for videos etc, and broadcasting regulation, which intervenes only after the event: they considered this distinction important and one that would remain relevant for the foreseeable future. The benefits of a single body focused on this particular industry were also noted. We agree that the video classification system, currently operated by the BBFC, should remain outside OFCOM.

8.5.3.2 We also considered whether there would be benefit in a formal link between OFCOM and the BBFC's role, for example through establishing common standards or mandating co-operation on research. We concluded that the better solution would be to encourage the increasing informal co-operation between broadcasting regulators and the BBFC.

8.5.4 Advertising

8.5.4.1 We expect standards to be applied to broadcast advertisements that are consistent with the standards for other forms of content and which ensure that audiences are effectively protected from serious detriment. We also need to be confident that commercial promotions do not in any way affect the integrity of programmes whether through product placement, inappropriate sponsorship or any kind of blurring of the boundaries between ads and editorial content.

8.5.4.2 OFCOM will therefore be able to apply consistent overarching content standards to all forms of broadcasting including advertising and it is to be given principal responsibility for regulating broadcast advertising. Within this context, there may nevertheless be the opportunity for a greater degree of industry co-regulation, based on the development of industry practices that conform to and contribute to the advertising standards that are laid down by OFCOM. Progress has been made with the standards application and pre-vetting work of the two industry run advertising clearance centres, BACC for TV and RACC for radio.

8.5.4.3 We are keen to see further developments building on this and drawing upon the experience of the Advertising

Standards Authority in running a self-regulatory system. The formal delegation of OFCOM's powers to set advertising standards is not envisaged partly because of limitations imposed under relevant EC directives, but this will not impede the further development of industry co-regulation. The White Paper set out a challenge to the advertising industry and to broadcasters to set out proposals for more effective co-regulatory arrangements. We have yet to see specific proposals. Although this eventuality is not covered expressly in the wording of the Bill, the draft legislation allows OFCOM wide flexibility in the methods it uses for meeting its stated objectives. These methods would include further industry co-regulation in the event that suitable proposals come forward.

8.6 General

8.6.1 TV set licensing

8.6.1.1 The draft Bill separates provisions relating to the administration and enforcement of television licences from provisions relating to other wireless telegraphy licences. It also rationalises the structure of the existing television licensing arrangements and introduces a degree of flexibility to enable the licensing system to accommodate future changes in broadcasting technology.

8.6.1.2 The draft Bill provides for television receivers, television dealers and television sets to be defined by an order made by the Secretary of State. It will remain an offence to install or use a television receiver without the necessary licence, or to have a television receiver in one's possession with the intention of contravening the licensing requirements or in the knowledge that another person intends to do so. But television dealers will be exempt from the licensing requirements for business purposes and the Secretary of State will have the power to make regulations exempting categories of persons, types of equipment and types of use from the licensing requirements.

8.6.1.3 Regulations may prescribe fees, including concessions, and instalment schemes. The BBC, as Licensing Authority, will be able to attach conditions to licences, subject to the Secretary of State's over-riding power of direction.

8.6.2 Gaelic broadcasting

8.6.2.1 The White Paper said that we would give careful consideration to the recommendations of the Gaelic Broadcasting Task Force (the Milne Committee) report on the provision of broadcasting in the Gaelic language. We are committed to ensuring that public service broadcasting continues to meet the needs of different communities and cultural interests, and Gaelic broadcasting has an important part to play. We will make an announcement shortly about the overall strategic direction for a modernised Gaelic Broadcasting Service.

8.6.2.2 There is general concern that the current arrangements for Gaelic broadcasting are not as effective as they could be in delivering a service that meets the legitimate expectations of Gaelic speakers. We therefore propose to use the Bill to make a number of reforms to the current framework. We will build upon the existing basic structure of the Gaelic Broadcasting Committee, established as a statutory corporation and subject to oversight by OFCOM. We will strengthen the role of the new Committee, in particular by giving it powers to develop a programming strategy in collaboration with the broadcasters and other interests, in addition to its current funding role. We will also enhance the current accountability arrangements, specifically by giving the Secretary of State for Scotland a power to approve appointments to the Committee proposed by OFCOM. We expect a broader range of interests to be reflected in the membership. The necessary legislative provisions are not in the draft Bill, but will be included in the Bill when it is introduced in to Parliament.

8.6.3 Provision of listing information

We propose to retain section 176 of the Broadcasting Act 1990 which requires broadcasters to provide listing information⁴ to publishers. We will explore further whether the current provision needs to be updated to take account of developments in technology. We do not intend to increase regulation by extending the provisions to cover programme content information.

8.6.4 Independent production

The Communications White Paper made clear our commitment to retaining public service broadcasters' independent productions obligations. The independent productions quota has helped maintain the diversity of British television, supported the development of creative and technical skills and helped create a thriving and innovative production industry. The White Paper also recognised that the changing landscape of the broadcasting industry is creating new

challenges for broadcasters and producers alike and signalled our intention to consider whether any adjustments should be made to the quota, within the parameters of the EC Television Without Frontiers Directive. We have already announced that we want to make a change to allow producers more than 25% owned by broadcasters, which do not aim any of their services at the UK, to qualify as independent and we are considering a number of other changes. Any changes will be made by secondary legislation and will not form part of this Bill.

8.6.5 Media Literacy

8.6.5.1 The Communications White Paper also outlined our commitment to media literacy. Under the draft Bill OFCOM will be given the function to help people develop a better understanding of the different types of media service, both licensable and non-licensable and in particular the Internet. This has the aim of enabling people to make more informed choices about what they and their children see and hear and, importantly, to think critically about viewing.

8.6.5.2 OFCOM will also have a function to promote a better public understanding of the systems that regulate access to media content, these include filtering and rating systems and other technological devices such as PIN based systems to control viewing. OFCOM will promote the use of such systems and encourage the development of better versions. OFCOM will also work with bodies such as the Internet Watch Foundation both in the UK and at an EU level to strengthen ways of identifying suitable and unsuitable content on the Internet with the aim of giving parents greater control over what their children watch.

8.6.5.3 To promote media literacy OFCOM may carry out a range of activities such as providing (or encouraging others to provide) information about the nature of material which people are accessing and information on the types of tools which people use to manage access to such material. OFCOM may also conduct research into media literacy. Together with the Department for Education and Skills, schools and other interested parties OFCOM may participate in developing media literacy through course materials for use in formal education.

8.6.6 Sporting and other events of national interest

The UK list of protected sporting and other events of national interest ("listed events") is currently split into two categories "Group A" and "Group B". Full live coverage of Group A events is protected. In the case of Group B events, secondary coverage only (a combination of delayed coverage, edited highlights and live radio commentary) is protected, reflecting the scheduling problems caused either by the length or breadth of the event. The Bill makes formal provision for the two categories of listed event, together with a number of amendments to the 1996 Act to ensure the smooth operation of the two categories.

⁴ The provision by broadcasters of advance information about their programme to publishers. This includes information about the titles of programmes and the time of broadcast.

9.0 Media ownership

9.1 Consultation on media ownership rules

9.1.1 In November 2001 the Government published the paper, Consultation on Media Ownership Rules. That document, a summary of responses and full transcripts of the major responses are all available on the DCMS website (see Annex A for details).

9.1.2 The consultation paper set out the Government's principles in this policy area, which can be summarised as follows:

9.1.3 Media ownership rules exist to retain the balance of different media viewpoints that make democracy work, but they must also promote the most competitive market possible for the benefit of both industry and consumers.

9.1.4 The existing rules are outdated:

- they are not flexible enough to respond to the rapid change we have seen in media markets;
- they appear inconsistent and directed at particular media interests.

9.1.5 Communications markets are fast moving, with high levels of technological innovation. The future is uncertain and the need for ownership rules may be reduced. In the light of this the Government is determined to be as deregulatory as possible, and to ensure that the policy framework is reviewed at appropriate intervals so that it can adapt to change.

9.1.6 However, for the time being legislation must address the present situation, where most people engage with the media in their traditional forms, and media ownership rules remain the best way of doing this. Competition law alone is not sufficient. It can address issues of concentration, efficiency and choice, but it cannot guarantee that a significant number of different media voices will continue to be heard, and it cannot address concerns over editorial freedom or community voice.

9.1.7 The key aims of the Bill will be:

- to retain a diversity of content from a plurality of sources;
- to promote competition;
- to be flexible in allowing legislation to adapt to changing market conditions;
- to provide as much predictability as we can for business.

9.1.8 The consultation paper discussed the difficult balance the Government has to strike in this area, to uphold the interests of citizens as well as those of business. The responses proved once again that there is no consensus on how that balance should be struck. Suggestions straddled a wide range of political and economic viewpoints, from those who insisted that competition law alone can protect democracy to those who wanted the existing rules tightened to restrain the influence of large media companies.

9.2 The Government's approach

9.2.1 The Bill will deregulate to a significant extent, but will place a few basic limits on the market. Proposals are based on three core beliefs:

- that there should be no disqualification on any particular group being able to hold a broadcasting licence, unless there are compelling reasons to expect serious adverse effects;

- that within individual media markets (TV, radio and newspapers) deregulation can promote healthy competition, as long as minimum guarantees of plurality remain;
- that there needs to be a safeguard against the joint ownership of significant newspaper assets and mass audience, universal access public service television services, and that this is where specific rules must be retained.

9.2.2 Competition law will continue to address issues of concentration, efficiency and choice, to make markets work as efficiently as possible, and to encourage new entry. The regulatory framework provided by the rest of the Bill will maintain the diversity, quality and impartiality of broadcasting content.

9.2.3 In the future new technologies may increase choice and competition in communications markets to the point where there is no longer any need for ownership rules to guarantee plurality of media voices. Almost all the rules that we retain will therefore be subject to regular review, providing flexibility in the longer term as well as certainty for the foreseeable future.

9.3. General disqualifications

9.3.1 The existing prohibitions on the non-EEA⁵ ownership of broadcasting licences will be removed. These rules are inconsistent and difficult to apply. The Government wants to encourage inward investment from non-EEA sources, to allow the UK to benefit rapidly from new ideas and technological developments, aiding efficiency and productivity. Content regulation will maintain requirements for high quality, original programming.

9.3.2 The prohibition on the ownership of broadcasting licences by advertising agencies will also be removed the new competition regime will ensure fair competition in the advertising market without the need for such rules. Local authorities will now be able to own broadcasting licences as long as they use them exclusively to carry out the functions of a local authority, enabling them to provide information services to the communities they represent. The prohibition on the ownership of any licence by a political party will be retained, since we are not satisfied that a political organisation could run a broadcasting company with the necessary impartiality.

9.3.3 The Government has considered the many representations in connection with the restrictions on religious broadcasting. Where there is sufficient spectrum availability, restrictions on religious bodies holding licences will be removed. The draft Bill will therefore be amended to allow OFCOM to award to religious bodies TV licences for digital programme services, digital additional service licences and restricted service licences. This is in addition to the undertaking in the Communications White Paper to allow religious bodies to hold digital local sound programme licences. Religious bodies can already hold local analogue radio licences and satellite and cable TV and radio licences. There will continue to be restrictions on national analogue radio and national digital sound programme licences, analogue TV licences and analogue additional services licences, and local and national radio and TV multiplex licences.

9.4 Cross-media ownership

9.4.1 The Government proposes to deregulate. UK companies have to be allowed to grow, to find new opportunities to reduce costs and attract new investment, if they are to bring better products to consumers. However, there will continue to be rules preventing the most influential media in any community being controlled by too narrow a range of interests.

9.4.2 Cross-media regulation will be reduced to three core rules, to regulate the three forms of media voice: national, regional and local:

i A rule limiting joint-ownership of national newspapers and Channel 3:

- (a) no one controlling more than 20% of the national newspaper market may hold any licence for Channel 3;
- (b) no one controlling more than 20% of the national newspaper market may hold more than a 20% stake in any Channel 3 service;
- (c) a company may not own more than a 20% share in such a service if more than 20% of its stock is in turn owned by a national newspaper proprietor with more than 20% of the market.

ii A parallel, regional rule: no one owning a regional Channel 3 licence may own more than 20% of the local/regional newspaper market in the same region.

iii There will also be a scheme to uphold the plurality of ownership that exists in local media. This should ensure that at least 3 local commercial radio operators, and at least 3 local or regional commercial media voices (in TV, radio and newspapers) exist in most local communities.

The first two rules already exist, the third will be part of the new local radio ownership scheme (itself a significant simplification and deregulation of existing restrictions) described below.

9.4.3 National newspapers are the most editorially influential mass medium. The deregulation proposed will allow newspaper proprietors to buy into national and local radio markets, and into Channel 5, creating many new opportunities for investment and growth. However, in the Government's judgement, joint ownership of a substantial share of the national newspaper market and a substantial part of Channel 3, the only commercial public service broadcaster that currently has universal access to a mass audience, would represent an unacceptable concentration of influence in the current circumstances.

9.4.4 The rule preventing joint ownership of a regional ITV licence and more than 20% of the local/regional newspaper market in the same region runs parallel to the national '20% rule'. Regional TV and regional/local newspapers are the two most important media, in size and scope, at regional or city level. This rule will prevent any one company becoming the most influential voice in both.

9.4.5 The new rules remove uncertainty and provide a clear and simple framework that protects plurality where it is important to do so, while deregulating elsewhere. All other rules on cross-media ownership will be removed. As a consequence some new forms of cross-holding will be allowed:

- Joint-ownership of national TV and national radio licences.
- Joint ownership of a regional Channel 3 licence and a local radio licence in the same area (as long as there are two or more other radio stations that reach more than 50% of the adult population in the radio station's area).
- Ownership of more than 20% of the national newspaper market and Channel 5.
- Ownership of more than 20% of the national newspaper market and national and/or local radio licences.

9.4.6 In addition, the complicated rules on cross-ownership of local newspapers and local radio services will be simplified and relaxed, to allow joint-ownership as long as there are two or more other radio stations that reach more than 50% of the adult population in the radio station's area; and the newspaper owner stays within the limit established by the local radio ownership scheme (see below for details).

9.4.7 There are currently a set of rules that together stipulate the application of a loosely defined public interest test to any acquisition of any broadcasting licence by any newspaper owner. These rules, and the uncertainty and costs they create, are disliked both by newspaper proprietors and by regulators. They will be removed the rules that remain constitute a sufficient check on the power of newspaper proprietors for the public interest to be satisfied.

9.5 Television ownership

9.5.1 The Bill will revoke the two rules that prevent the formation of a single ITV company the ban on joint ownership of the two London Channel 3 licences and the rule that imposes a limit of 15% on any company's share of the total TV audience. Any consequent consolidation in the TV industry will benefit consumers and companies alike. The competition authorities are best placed to consider the effects on the advertising market, and they may well prevent the formation of a single ITV company for the time being on these grounds. ITV will continue to consist of regional licences with targets for UK regional production and programming, ensuring there is no dilution of such content.

9.5.2 The rule preventing joint ownership of a national Channel 3 licence and the Channel 5 licence will also be removed. The existence of the BBC and Channel 4, in addition to the commercial channels, will still ensure the existence of at least 3 separately controlled free-to-air public service TV broadcasters, in addition to the expanding range of digital channels.

9.5.3 As described in section 8.2.9, on public service news provision, the nominated news provider system will be retained for ITV, and there will be a new requirement for Channel 3 licensees to provide adequate financial support to the news provider to make sure the service is of high quality. This should prevent the price of future ITV news contracts being negotiated down to a point where it affects the standard of coverage.

9.5.4 To allow more strategic and dynamic management of the news provider, the limit on its ownership will be raised from 20% to 40%, potentially reducing the number of shareholders from 5 to 3. In addition, Channel 3 licensees will not be allowed to control more than a 40% share, either in total or in combination. This will make sure the service is independent of the licensees, and unaffected by any of their commercial concerns, but will not force any of the existing shareholders to disinvest. If more than one Channel 3 licensee continues to be a shareholder, there will be 4 major shareholders rather than 3, but since two of them will have broadly similar interests this should not hamper management or investment decisions to any significant degree.

9.5.5 At present Channel 5's viewing figures are much lower than ITV's. However, with the added investment that ownership by an ITV company, a large newspaper company or a non-European company might bring under the new ownership rules, there is no guarantee that they will remain so. If the balance in the free-to-air market shifts, the Government needs to be able to respond, to ensure that the population continue to receive independent news of high quality. There will therefore be a new power for the Secretary of State to introduce a nominated news provider system, with ownership limits, for Channel 5 if it becomes clear that Channel 5 has gained a significant share of the free-to-air TV audience. As a safeguard, before using the power the Secretary of State will be required to consult OFCOM and the licence holder.

9.5.6 In future, the growth of new technologies and services should expand the range of news sources, and free-to-air TV news may no longer be the source people turn to first for impartial reporting. A separate power will therefore allow the Secretary of State to revoke the whole nominated news provider system for either ITV or Channel 5, or both, if she is satisfied that a sufficiently wide range of high quality, easily accessible news services will still exist without it. Again, she must first consult OFCOM and the licence holders.

9.6 Radio ownership

9.6.1.1 The rule preventing anyone owning more than one national analogue radio service will be removed. There are three such stations, one of which is required to play non-pop music and one of which must be predominantly speech-based. They will continue to provide diversity, and competition to BBC services, in this form, regardless of ownership.

9.6.1.2 The existing radio points system, that limits the extent of UK-wide ownership of licences, will be abolished. The competition authorities, taking advice from OFCOM as necessary, will determine the appropriate limits on the accumulation of radio interests on a UK-wide basis.

9.6.1.3 In radio, unlike TV, plurality is important at a very local level, where a variety of local stations of different sizes flourish under many different owners. The Government is determined to maintain a range of radio voices in every area. We welcome the initiative of the Radio Authority and the Commercial Radio Companies Association, who have agreed a set of proposals that they believe can deliver dynamic growth and investment whilst upholding the aim of a plurality of ownership. The policy set out below broadly follows their recommendations.

9.6.2 Independent local radio (ILR) ownership

9.6.2.1 For Independent Local Radio (as defined by the 1990 Act) the Secretary of State will introduce by Order, in consultation with OFCOM, a scheme to ensure that in every area with a well-developed choice of commercial radio services (typically 5 or more stations) there will be at least 3 separate owners of local radio services in addition to the BBC.

9.6.2.2 In respect of cross-media ownership, the scheme will ensure that no commercial TV or newspaper company with a significant voice in a local area will be able to own a radio station unless there are at least two other stations in competition. Where such forms of cross-holding exist there will be at least 3 separate commercial owners of local/regional media (radio, TV and newspapers) in addition to the BBC.

9.6.2.3 The scheme will be applied on point of acquisition of a station, and will place limits, consistent with the principle of 3 commercial owners, on the ownership of stations in any relevant coverage area by:

- (a) anyone who controls two other stations each of which have a coverage overlap of more than 50% with the station in question;
- (b) any owner of a national newspaper;

(c) any person who holds a regional Channel 3 licence whose coverage area is to a significant extent the same as that of the radio station;

(d) any person who runs a local newspaper with more than a 50% share of circulation in the coverage area of the station.

9.6.2.4 In addition, none of the parties referred to in (b) (c) or (d) will be able to buy any radio station if there are fewer than two other stations that have a coverage overlap of more than 50% with the station in question. A coverage overlap of more than 50% is defined as any situation where the measured coverage area of one service contains 50% or more of the adult population of the measured coverage area of another.

9.6.2.5 Having tested the scheme in a range of existing localities, the Radio Authority and the Commercial Radio Companies Association are satisfied that it should deliver the principle of three commercial owners to most areas. It is also deregulatory in the sense that it will be wave band neutral.

9.6.3 Digital radio ownership rules

9.6.3.1 The Secretary of State will also introduce (again in consultation with OFCOM) a parallel scheme to ensure that in any locality there will be at least 3 separate owners of local digital sound programme services.

9.6.3.2 In addition, no one will be able to control more than one local digital multiplex in areas where they overlap (most areas will have at most two local multiplexes to act as the gatekeeper for digital services for the foreseeable future). Overlap for multiplexes is to be defined as where the primary protected area of a multiplex covers more than 50% of the adult population in the primary protected area of another multiplex.

9.6.4 Grandfather clause

All the above radio ownership rules will apply only to new acquisitions where existing holdings exceed the new limits (there will be a very small number of instances) there will be no insistence on disinvestment.

9.7 Newspaper ownership

9.7.1 The plurality of views and opinion in the Press continues to be a vital public interest and the Government remains committed to the protection of the special interests that can arise in relation to the transfer of newspaper titles. But the current system for regulating newspaper transfers is too inflexible and imposes unnecessary burdens both on business and on the authorities. The Bill will replace it with a streamlined and less burdensome regime that focuses regulatory action on those newspaper transfers that appear to raise competition or plurality concerns. The new regime will also be aligned to the new system for non-newspaper mergers that will be introduced by the Enterprise Bill.

9.7.2 De minimis provisions will remove the smallest local newspapers from regulation altogether. The new regime will be applicable to all transfers that satisfy the jurisdictional criteria for mergers in the Enterprise Bill. However, the new regime also will apply regardless of the identity or existing business interests of the persons acquiring the newspaper if the newspaper that is acquired has a 25% share of a market in a substantial part of the United Kingdom.

9.7.3 There will be no requirement for the Secretary of State's prior consent to newspaper transfers and the current criminal sanctions against purporting to transfer a title without consent or breaching a condition of consent will be removed. Instead, as is already the case under the mainstream merger regime, businesses will be able to complete acquisitions but at the risk that the competition authorities might subsequently take action. In order to give businesses the opportunity to reduce any uncertainty this gives rise to, they will be able to notify their deals for a decision within a set deadline in advance of the transfer.

9.7.4 Newspaper transfers will be treated so far as possible in a manner consistent with other mergers considered by the competition authorities. However, the Enterprise Bill provides for such mergers to be scrutinised by reference to a competition test: will the transfer be expected to lead to a substantial lessening of competition? Those newspaper transfers that potentially raise plurality concerns will require wider regulatory scrutiny in order to protect the additional public interest involved in such transfers. In relation to these transfers, therefore, the Secretary of State will retain the power to refer transfers for wider investigation by the Competition Commission by an extension of the provisions in the Enterprise Bill dealing with "exceptional public interest" ("EPI") cases. This will be directed to those cases that involve the public interest in accurate presentation of the news, free expression of opinion and plurality of views in the Press -

"plurality" for short.

9.7.5 Where the OFT considers that a newspaper transfer raises the plurality EPI, it will advise the Secretary of State accordingly. The Secretary of State will then be able to refer the transfer to the Competition Commission for examination of the EPI together with any competition issues that are identified by the OFT. She will also be able to direct the OFT to seek undertakings in lieu of a reference. Before making any decision she will seek the advice of OFCOM. If the Secretary of State decides that the EPI concerns identified do not warrant a reference, she will remit further consideration of the competition aspects of the transfer to the OFT. The Secretary of State will also have powers to intervene on her own initiative to require a case to be treated as an EPI case where plurality appears to her to be relevant to a newspaper transfer.

9.7.6 Following a reference by the Secretary of State, the Competition Commission will investigate the EPI aspects and, where appropriate, the competition aspects of a newspaper transfer. Where the EPI provisions are invoked in relation to local newspapers the Competition Commission will be expected to carry out effective tests of local opinion, for example by means of Citizens' Juries.

9.7.7 The Commission will make recommendations as to any remedies it deems appropriate to meet competition or plurality concerns. The final decision on any action to take with respect to issues raised by an EPI newspaper transfer will rest with the Secretary of State. However, the Secretary of State will not be able to dispute the findings of the OFT or the Competition Commission on competition, and she will seek the advice of OFCOM on the Competition Commission's recommendations on the EPI aspects of the transfer. She will be entitled to disregard the competition authorities' proposed solutions to competition problems, but only where the plurality issues justify this course of action. The Secretary of State will decide overall on the basis of a public interest test that will take account of both plurality and competition.

9.8 Review of ownership rules

OFCOM will be given a duty to review all the media ownership rules (except that on the ownership of broadcasting licences by political organisations) no less frequently than every 3 years. OFCOM will make recommendations to the Secretary of State, who will then be able to amend rules by secondary legislation. This power should allow the legislation to be adapted to respond to rapidly changing market conditions, but will provide stability and certainty for businesses in the immediate future. The Government does not envisage there being a case for OFCOM to review the rules very much before the initial 3-year period has elapsed there would have to be a very clear rationale behind any earlier review.

9.9 Control of media companies

The Government proposes to retain the existing definition of the circumstances in which a person controls a body corporate for the purposes of media ownership rules (see the Broadcasting Act 1990, Schedule 2, Part I, 1. (3)). Further consideration will be given to this definition, however, to explore whether it needs to be updated to make sure it applies to all the means by which a company may influence the output of a media company.

9.10 Content regulation

9.10.1 The regulatory framework provided by the rest of the Bill will ensure that any increased concentration of ownership does not dilute the quality, diversity or impartiality of broadcast content. Regulators will be able to act in response to the changing market that consolidation will bring.

9.10.2 ITV will still consist of regional licences, with requirements for UK regional production and programming, as well as independent production and original production. OFCOM will have the power to vary these licences whenever they change hands, to maintain their regional character.

9.10.3 Under the new regulatory regime for public service broadcasters, Channel 5 will also have requirements for independent production and original production. There will be provision for OFCOM to vary the terms of the Channel 5 licence to alter the scale of these requirements. The Secretary of State will also be able to alter the public service remit of the service. If the Channel 5 licence changes hands, OFCOM will be able to vary the licence to maintain the existing character of the service.

9.10.4 There will be a power (described above) to introduce a nominated news provider system for Channel 5, if it becomes clear that Channel 5 has gained a significant share of the audience for free-to-air news, comparable to ITV's

share.

9.10.5 OFCOM will have a new duty to protect and promote the local content of local radio services, and they will now be able to vary the licences for such services on a change of control, to maintain their local character.

9.10.6 OFCOM already have the power to investigate the news/current affairs programming of any local radio service where they have cause to suspect that news is being presented without due accuracy or impartiality, or that undue prominence is given to views or opinions of particular persons or bodies in matters of political or industrial controversy. This power may become more important in the light of the likely consolidation in local radio markets, and OFCOM will need to use it to pay particular attention to matters of impartiality.

10 To conclude

The Government welcomes comments on the draft Bill. It recognises that a large and complex piece of legislation will benefit from close scrutiny before introduction into Parliament.

It hopes that this document will assist all those undertaking such scrutiny to understand the policy aims of the Bill and will help them to frame their responses to the consultation. The consultation closes on the 2 August.

We would prefer to receive responses to this consultation by email, if possible, in MS Word or rich text format. Responses should be sent to: communicationsbill@dti.gsi.gov.uk

Hard copies can be sent to:

Fiona Murray

DTI/DCMS Joint Communications Bill Team

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London

SW1W 9SS

Please contact Fiona Murray, DTI/DCMS Joint Communications Bill Team on 020 7215 4127 if you have any enquiries relating to this consultation.

Annex A

11 Relevant documents

(1) The Bill and how it works

The Draft Communications Bill Cm 5508-I

The Draft Communications Bill Explanatory Notes Cm 5508-II

Draft Regulatory Impact Assessment

All of the above are available from The Stationery Office on 08457 023 474 or email book.orders@theso.co.uk

They can also be found at www.communicationsbill.gov.uk

(2) Existing Legislation

Updated versions of the existing legislation, showing how it would be amended by the draft Communications Bill can be found at www.communicationsbill.gov.uk These are not legal documents but provide a guide to the changes the Bill would make.

Broadcasting Act 1990

The Stationery Office Limited, ISBN 0105442909

<http://www.legislation.hmso.gov.uk/acts/acts1990/Ukpga19900042en1.htm>

Broadcasting Act 1996

ISBN 0 10 545596 2.

<http://www.legislation.hmso.gov.uk/acts/acts1996/1996055.htm>

Wireless Telegraphy Act 1949

Wireless Telegraphy Act 1967

Marine, etc, Broadcasting (Offences) Act 1967

Wireless Telegraphy Act 1998

ISBN 0 10 540698 8

<http://www.legislation.hmso.gov.uk/acts/acts1998/1998006.htm>

Telecommunications Act 1984

Office of Communications Act 2002

ISBN 0 10 541102 7

<http://www.legislation.hmso.gov.uk/acts/acts2002/20020011.htm>

(3) Historical background to policy developments

White Paper, 'A New Future for Communications' ISBN 0-10-150102-1

Available from The Stationery Office as above.

Responses to the white paper consultation and a summary document prepared by David Graham Associates are also available on the website.

Texts of the EC Directives on Networks and services

http://europa.eu.int/eur-lex/en/oj/2002/l_10820020424en.html

The consultation paper on media ownership and replies can be found at http://www.culture.gov.uk/creative/tv_media.html

(4) Other key documents

Towers Perrin OFCOM Scoping Project Report

http://www.oftel.gov.uk/publications/about_oftel/2001/towe1001.pdf

An independent review by Professor Martin Cave for the Department of Trade and Industry and HM Treasury

<http://www.radio.gov.uk/spectrum-review/newsite/welcome.htm>

Amendments to the BBC Agreement (to be published shortly) will be available from <http://www.culture.gov.uk>

Annex B

12 Public service broadcasting remits

The General Public Service Broadcasting Remit

The General Public Service Broadcasting Remit is defined as the provision of a properly balanced service with a view to the maintenance of high general standards in all respects (and in particular in respect of their content, quality and editorial integrity) and offering a wide range of subject matter (having regard both to the programmes as a whole and also to the days of the week on which, and the times of the day at which, the programmes are shown) meeting the needs and interests of different audiences, and having regard to the specific provisions set out below:

The provisions referred to above are:

- a) provided as a public service for disseminating information, education and entertainment
- b) stimulate, support and reflect, in drama, comedy, music and the visual and performing arts, the diversity of cultural activity in the United Kingdom
- c) contain comprehensive and authoritative coverage of news and current affairs in the United Kingdom and throughout the world to support fair and informed debate at local, regional and national levels
- d) provide wide-ranging coverage of sporting and other leisure interests
- e) contain programmes of an educational nature (including specialist factual, religious and social issues programmes)
- f) include a high standard of original programmes for children and young people
- g) contain programmes which reflect the lives and concerns of both United Kingdom audiences and more local communities
- h) contain a reasonable proportion and range of programmes for United Kingdom audiences made outside London and the South East.

Specific Public Service Broadcasting Remits

In addition to the General public service broadcasting remit, each public service broadcaster ie Channels 3, 4, & 5,

together with the BBC and S4C will have a detailed remit listing the specific second and third tier commitments. Taken together the remits will establish a hierarchy of public service broadcaster obligations ranging from the BBC at the top to Channel 5 at the bottom. The obligations will apply as follows:

All Public Service Broadcasters

- Free to air and universally available services
- 25% independent production quota
- Original production quota
- Party political broadcasts
- News and current affairs in peak time

In addition, specific requirements as follows:

The BBC

- Regional programming quota
- Regional production quota
- Programmes for schools
- High quality of programmes meeting meet the full public service broadcasting remit as set out in the Agreement

Channel 3

- Regional programming quota
- Regional production quota
- A range of high quality and diverse programming

Channel 4

- Regional production quota
- Programmes for schools
- High quality of programmes providing a broad range of high quality diverse programming which in particular demonstrates innovation and reflects cultural diversity

S4C

- A broad range of high quality diverse programming, with a substantial proportion of programmes in Welsh

Channel 5

- A range of high quality and diverse programming.

Annex C

13 Other major communications developments

The Communications Bill reflects only a part of what Government is doing to promote the development of our communications infrastructure and markets. This annex serves as a brief guide to other areas of Government activity in this sector and provides useful links and contact details to enable you to find out what is being done on these issues.

Broadband

The Broadband market is now developing quickly:

- ADSL prices have fallen to below £30pcm, with Cable modems around £25pcm;
- coverage is expanding, with BT announcing the enabling of 100 further exchanges allowing 40 resellers of wholesale ADSL to reach new customers; and
- take-up is accelerating, with BT reporting 20,000 new customers per week.

The Government has a detailed broadband strategy in place and will report on progress on a regular basis. Both Government and Industry advocated a holistic approach there is no 'magic bullet' to deliver broadband rollout in the UK. Rather a 'virtuous circle' needs to be stimulated in which demand and supply grow in parallel. Much of the action is for industry, but there is also a key role for Government.

There are four main strands to the strategy:

- Intensifying competition in broadband infrastructure and service markets;
- Driving up demand for broadband, through tax breaks for teleworking, a collaborative cross-industry marketing campaign, and the £66 million UK online for business programme;
- Stimulating production of new broadband content and applications through R&D Tax credit, business support schemes, and embedding broadband in the delivery of key public services;
- Facilitating broadband roll-out in rural and remote areas, by facilitating satellite broadband deployment, and more effective procurement of the public sector's broadband requirements.

This comprehensive strategy does not require any legislation in order to achieve its objectives. As a result we are not looking to the Bill to help deliver our strategy.

The Secretary of State for Trade & Industry and the e-Envoy provide a monthly report on progress to the Prime Minister which can be found at www.e-envoy.gov.uk.

DTT and Digital Switchover

In December 2001 the revised Digital Television Action Plan was posted on the Government's Digital Television website. The Action plan deals with our twin aims of achieving the most dynamic and competitive market for Digital TV in the G7, and meeting the criteria for switchover to digital television. The plan provides a framework for the success of Digital Television as a whole in the UK, across all delivery platforms. For more information please visit <http://www.digitaltelevision.gov.uk>.

Mobile

75% of adults now own a mobile phone and the market is reaching saturation point. Further growth is expected through an increased take-up of data services via GPRS* and ultimately 3G**, which will start to be available later this year.

The proposed regulations are technology neutral and apply equally to fixed and mobile telecommunications. There are no substantive technical reasons to treat mobile operators/services differently from other telecommunications operators/services covered by the Bill.

The Competition Commission is currently investigating whether to uphold an Ofcom determination that the prices charged by all four UK mobile operators to terminate calls on their networks should be capped, following a public review of the mobile market. The case was forwarded to the Competition Commission because the operators opposed the decision. Details of the inquiry can be found via the following link and the outcome is expected later this year:

<http://www.competition-commission.org.uk/inquiries/mobile.htm>

* GPRS General Packet Radio Service, an enhancement of the current GSM standard for digital mobile phones that is optimised for data transfer.

** 3G The next generation of mobile phones that will offer a greater variety of interactive services on the move such as video clips, on-line gambling and music.

