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# *The Office of Communications Bill [HL]*

**Bill 73 of 2001-02**

The present Bill provides for the establishment of an Office of Communications, Ofcom, allowing it time to prepare for regulatory duties a future Communications Bill will impose on it. The latter is expected in draft in Spring 2002.

Debate on the establishment of Ofcom cannot readily be isolated from the functions it might subsequently be given, and this paper begins with an overview of government policy embodied in the communications white paper.

The functions of the five regulators Ofcom would eventually replace are discussed in the second section of this paper. Finally, the structure of Ofcom is discussed in the context of its role as a regulator of economics, content and spectrum in a converging communications world.

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## Summary of main points

The *Office of Communications Bill* [HL], Bill 73 2001-02 paves the way for the establishment of Ofcom. This will assume regulatory responsibilities across the broadcasting and telecommunications sectors if Parliament approves a separate Communications Bill, expected in draft in Spring 2002.

Establishing Ofcom is a central plank of government communications policy, elucidated in the December 2000 white paper *A New Future for Communications*. Policy continues to develop, most recently in the context of media ownership; this is subject to a consultation which ends on 25 January 2002.

It is planned that Ofcom will replace five existing regulators: the Office of Telecommunications (Ofcom), Independent Television Commission, Broadcasting Standards Commission, Radio Authority and Radiocommunications Agency.

The case for Ofcom may turn on whether, in a pluralistic age of converging communications technologies, the current diversity of regulators is worse than one.



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## I Communications white paper

On 12 December 2000, the Government published *A New Future for Communications* (Cm 5010), the joint work of two departments: Trade and Industry and Culture, Media and Sport. The white paper, and supporting documents, including submissions from interested parties,<sup>1</sup> are available online.<sup>2</sup> In a statement accompanying publication, the then Culture Secretary Chris Smith talked of the convergence in communications technologies that was driving many of the proposals:

We are living at a time of revolution in the ways in which we communicate. The worlds of telephony, broadcasting, mobile communications and the internet are changing and converging with astonishing speed. Meanwhile, our current regulatory framework was designed for a different age. We need to update the framework of regulation, and put in place a system that recognises the current fast-changing picture and can cope with the inevitability of change in years to come. The White Paper prepares us for that future, and will set up modern regulation for a modern world.<sup>3</sup>

The most obvious recognition of convergence came with the widely anticipated proposal to create a single communications regulator, Ofcom; this will replace the five existing regulators dealing with economics (Of tel), content (Independent Television Commission, Broadcasting Standards Commission, Radio Authority) and radio spectrum allocations (Radiocommunications Agency).<sup>4</sup> That Ofcom will report jointly to the departments of Trade and Industry and Culture, Media and Sport was described in a *Broadcast* editorial as a "fudge";<sup>5</sup> though there had been some speculation about the creation of a new government Department of Communications. This had already been suggested by the Culture, Media and Sport Select Committee in their report, *The Multi-Media Revolution*.<sup>6</sup>

Mr Smith identified three main objectives underpinning the policies:

...first, to ensure universal access to a choice of diverse services of the highest quality; secondly, to make the United Kingdom home to the most dynamic and competitive communications and media market in the world; and thirdly, to ensure that the interests of citizens and consumers are safeguarded.<sup>7</sup>

He went on to summarise the essential proposals; in addition to regulation, these cover access, choice, content and competition. The existing public service television channels, BBC1, BBC2, ITV, Channel 4/S4C and Channel 5, would continue to be free at the point

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<sup>1</sup> [http://www.culture.gov.uk/creative/dti-dcms\\_comms-reform\\_consultation.html](http://www.culture.gov.uk/creative/dti-dcms_comms-reform_consultation.html)

<sup>2</sup> <http://www.communicationswhitepaper.gov.uk/>

<sup>3</sup> HC Deb 12 December 2000 c 481

<sup>4</sup> "Ofcom named as watchdog", *Broadcast*, 15 December 2000 p 2

<sup>5</sup> *Broadcast* 15 December 2000 p 3

<sup>6</sup> HC 520 1997-98, 21 May 1998

<sup>7</sup> HC Deb 12 December 2000 c 482

of delivery; the white paper calls for them to be available on all platforms: satellite and cable as well as via conventional terrestrial broadcasts. Channel 4 would remain in the public sector. Other communications services, such as universal internet access (by 2005), should be available at an affordable price, secured at least in part by the promotion of competition. Mr Smith also alluded to the importance of effecting the switchover from analogue to digital terrestrial broadcasts; the extra capacity and flexibility of the latter allow for a greater volume of content, as well as permitting hitherto passive viewers to interact with their TV. On regulation, Mr Smith said:

We propose a new three-tier approach to the regulation of broadcasting, to provide a more level playing field between different broadcasters depending on the extent of their public service remit.

In the first tier, all broadcasters will be subject to basic rules on minimum content standards, impartiality in news, provisions on the protection of minors and access for people with disabilities. We will require Ofcom to give due weight to the need for improvements in such access for people with disabilities. We also intend that Ofcom should act as a final backstop one-stop shop for complaints for all broadcasters.

The second and third tiers will apply to public service broadcasters. In the second, regulated by Ofcom, those obligations that are readily measurable will be included: independent and original programme production quotas; requirements for regional productions and programming; and the availability of news and current affairs in peak time. We shall amend the BBC's agreement to include such a formal requirement for the first time.

In the third tier--where the general public service provision of high-quality varied schedules will rest--we propose to rely primarily on transparent self-regulation, but with backstop powers in place in the event of failure. Each broadcaster within this tier will be required to make a statement of programme policy updated each year, and to report on subsequent success. Each broadcaster will of course have a distinctive remit, and the backstop power will rest with Ofcom in the case of the commercial broadcasters, and with the Secretary of State and Parliament in relation to the BBC.<sup>8</sup>

The BBC felt "unscathed" by the white paper, the governors retaining their existing responsibilities, for example in respect of ensuring impartiality. However, Ofcom could get involved where viewers wished to take their complaints further.<sup>9</sup> Inevitably, proposals on regulation are likely to attract critical comment. Thus Peter Preston, writing in the *Guardian*:

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<sup>8</sup> HC Deb 12 December 2000 c 482-3

<sup>9</sup> "Governors retain current remit", *Broadcast*, 15 December 2000



Be glumly clear. What we have here, unless we are extraordinarily vigilant, isn't an enabling mechanism for greater freedom. Precisely the reverse. Our new breed of regulators doesn't come fresh and innocent into the world. These men and women have their governmental marching orders...

...Now one agency - and one set of appointments - fixes almost everything in an area that isn't about gas or electricity but ideas, culture and the many shades of truth. Is it possible for such a construct to be "modern and intelligent"? Place long odds on the answer being "no". The broadcasters and net merchants look at the business equations and overlook where their freedoms lie: the newspaper editorialists, through the spectrum, seek a neat and tidy solution. Neither approach fits the bill.

The glory of the digital and net revolution is that, in the purest terms, it is a freedom of expression that Jack Straw will never recognise. Such freedom, of its nature, is messy, bad alongside good, tawdry alongside triumphant. Can it, at heart, ever be regulated? Only messily in turn.<sup>10</sup>

Further criticism came from Peter Ainsworth, replying to the white paper statement for the Opposition:

A pledge to reform the regulation of media and broadcasting was contained in the Labour party manifesto for the current Parliament; it is another pledge that will not be kept. Will the Secretary of State confirm that the planned legislative changes that he has announced today stand no chance of taking effect until 2002 at the earliest? The media and communications industries are moving fast; the Government are moving painfully slowly. Industry often complains that the Government try to do too much, but here we have an unusual example of the Government getting in the way by doing too little.

Progress toward today's announcement has been helped neither by an undignified turf war between the Department for Culture, Media and Sport and the Department of Trade and Industry nor by the confusion and incompetence that is the hallmark of Labour in office.<sup>11</sup>

He cited as one example of the latter the removal of communications regulation from the *Utilities Bill*; now the *Utilities Act 2000*, this covers only the electricity and gas sectors. Mr Ainsworth did, however, welcome a number of the white paper's proposals, including the establishment of a single regulator "capable of taking a balanced view across converging media".<sup>12</sup>

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<sup>10</sup> "We must keep a close eye on Chris Smith's big brother", *Guardian*, 18 December 2000

<sup>11</sup> HC Deb 12 December 2000 c 484

<sup>12</sup> HC Deb 12 December 2000 c 485

For the Liberal Democrats, Norman Baker welcomed "a sensible and robust set of proposals".<sup>13</sup> However, he sought an "assurance that the probable formation of one ITV will not in any way reduce regional programming and regional production". The white paper expresses support for regional programming and the provision of community broadcasting, such as radio services for minority groups. Much comment on this has been provided by the Community Media Association.<sup>14</sup> Chris Smith's statement had included a number of comments, relevant in this regard:

In the commercial sector, our view is that increased competition allows us to depend more on Competition Act 1998 powers rather than those specific to the sector, in order to secure diversity of ownership and competition in the relevant markets, such as advertising. We propose to replace the rule preventing anyone from holding two or more licences which attract 15 per cent. or more of the total TV audience share, and we propose to revoke the rule prohibiting single ownership of the two London ITV licences. We will consider changes to the points system for regulating radio ownership. We will also seek to boost the role of local community broadcasting in the digital environment, exploring the suggestion of an access fund for community radio, under the aegis of Ofcom.<sup>15</sup>

## **II Existing regulators**

The *Office of Communications Bill 2001-02* would establish a single unified media regulator, Ofcom. Until they are wound up by further legislation, in the form of a Communications Bill, the existing regulators will be required to work with Ofcom. This section briefly discusses the present functions of the Office of Telecommunications (Of tel), the Radiocommunications Agency, the Radio Authority, the Independent Television Commission and the Broadcasting Standards Commission. Of tel provides a convenient case study for a more detailed consideration of how regulators and industry interact.

### **A. Office of Telecommunications (Of tel)**

British Telecom (BT) was the first of the major UK utilities to be privatised and its regulatory system has provided a model for other industries. Major features include: the independent Director General, appointed by the Secretary of State, but not answerable to him; the licence whose terms are enforced by the regulator; the formula for regulating prices (but not profits). The regulatory agency headed by the Director General is the Office of Telecommunications (Of tel).

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<sup>13</sup> HC Deb 12 December 2000 c 488

<sup>14</sup> <http://www.commedia.org.uk/index2.htm>

<sup>15</sup> HC Deb 12 December 2000 c 483

The Office of Telecommunications (OfTel) is the regulator for the UK telecommunications industry. OfTel was set up under the *Telecommunications Act 1984*, and officially created on 1 August 1984. Under the Act the Director General has a number of duties, including the following:

- Promoting the interests of consumers.
- Maintaining and promoting effective competition.
- Making sure that telecommunications services are provided in the UK to meet all reasonable demands, including:
  - emergency services;
  - public call boxes;
  - directory information; and
  - services in rural areas.

In the early years, OfTel was mainly associated with the control of telephone charges. It was given the power to regulate the price of a bundle of telecommunication services by the RPI-X formula, by which price rises would be allowed at the rate of increase of the Retail Price Index, minus X, a figure decided by the regulator every five years. The point of that arrangement was to leave BT or any other regulated operator an incentive to increase efficiency. Profit regulation offers no such incentive.

In addition, OfTel tried to encourage the growth of competition in the telecommunications sector. BT was privatised whole, and has retained its domination of the fixed line residential market to this day. A new company called Mercury was established to offer a little competition. It was never likely that Mercury would make an impact in the mass residential market. However, BT had had enormous problems in providing enough lines for commercial purposes, particularly in the City of London. Firms facing a long wait for new lines were keen to try a new supplier. In the event, Mercury did make progress in the commercial market, but it never seriously impinged on BT's market. BT, however, frequently complained that it faced unfair competition because its competitors did not have the same social obligations.

As soon as BT was partially privatised, the Government took no part in its policy making, never using the huge minority shareholding to win votes in the Boardroom. The early years saw some competition between BT and the Director General. An early attempt to ensure that BT purchased only the electronic exchange system developed in the UK to Post Office specifications was defeated, because that was not a licence obligation. Public call boxes were preserved, at enormous cost, because that was in the licence. On the other hand, the Director General did manage to insist on terms by which Mercury could be connected to the BT network. BT also found its domination of the market a disadvantage in that any moves to diversify into other areas of IT, including a proposed link-up with IBM, were automatically vetoed on competition grounds.

When mobile phones were developed and franchises were awarded for them, a subsidiary of Racal called Vodafone was the great success, later floating free and completely

outgrowing its original parent. BT was involved in the market, with BT Cellnet, but never captured a large market share. It is often criticised for missing this commercial opportunity, but it is hard to believe that it would ever have been allowed to dominate the mobile market in combination with its domination of fixed line telephones.

At the end of September 2001 BT Cellnet had just under 11 million subscribers. This was 25% of the total number in the UK and ranked it second behind Orange (12.2 million). It also carried 21% of mobile call minutes in the second quarter of 2001/02. This was slightly more than One-2-One (19%) but well below the levels for Vodafone (31%) and Orange (29%).<sup>16</sup>

According to the Management Plan 2001/02 Oftel will be:

working with fellow regulators from the Independent Television Commission, the Radiocommunications Agency, the Radio Authority, and the Broadcasting Standards Commission, to ensure that the new regulatory communications authority (OFCOM) in the UK, announced in the Government's Communications White Paper in December 2000, is consumer focused and built on solid foundations.<sup>17</sup>

## **1. Will regulation be replaced by competition?**

In the early years of privatisation it was believed that regulation was a temporary stage that would become unnecessary once competition had increased. In telecommunications, greater competition meant a reduced market share for BT. The idea of looser regulation is an important aspect of likely changes, but events have not quite turned out in the way that was expected, for several reasons. First, BT still retains a very major share of the core domestic market and its possession of the fixed network remains important. Second, the effectiveness of competition has proved to depend strongly on the continued activity of the regulator in rulings about the terms on which competitors can gain access to the BT network. Third, technological change has transformed the industry so that new markets are increasingly important.

Oftel considered whether or not to renew the system of price control for BT residential customers after it came up for renewal in 2001. In the event, Oftel announced in February 2001 that it would renew its control from August 2001 for one year only, and review its position after that.<sup>18</sup> One example of the way that regulatory activity increased competition was the Oftel decision that enabled BT customers changing to rival operators to retain their telephone numbers. A recent example, of great importance in the year 2001, relates to the opening of BT telephone exchanges to rival operators for supplying ADSL services for fast access to the internet. Critics of Oftel argue that its failure to

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<sup>16</sup> *Market information: Mobile update January 2002*, Oftel

<sup>17</sup> Oftel Management Plan 2001/02 [http://www.oftel.gov.uk/publications/about\\_oftel/2001/mgtp0301.pdf](http://www.oftel.gov.uk/publications/about_oftel/2001/mgtp0301.pdf)

<sup>18</sup> Oftel Press Notice 09/01, *Oftel confirms price control for BT residential customers*, 1 February 2001

apply pressure to BT has delayed the provision of high-speed internet access in the UK. Even if Oftel's price control function is considered unnecessary because of market pressure, Oftel or its replacement will retain major regulatory functions.

In January 2000 Oftel had announced a "new strategy for regulation":

At the heart of the strategy is a rolling back of formal regulation where competition is effective and already protects consumers. There will be more self-regulation by the industry and co-regulation where some control is still needed, with a stronger emphasis on preventing anti-competitive practices.<sup>19</sup>

The *Independent* dismissed the announcement as "woolly", pointing to the continued dominance which BT exerts on the industry.<sup>20</sup>

Widespread criticism of BT's slowness in opening up its exchanges to its competitors' ADSL lines has spread from BT to Oftel, whether fairly or not. Oftel has been severely criticised for failing to force BT to act sooner, and people have speculated that the Regulator should be replaced when Oftel's functions are merged into those of a Communications Regulator.

The possibility of further regulatory powers was being raised before publication of the communications white paper:

Although David Edmonds, head of Oftel, has defended the regulator's record of bringing pressure to bear on BT in the unbundling process, Oftel officials admit that more severe punitive action under current laws would have been complicated and time-consuming. If BT had been seen to have obstructed competition, Oftel would probably have needed to refer the issue to the Competition Commission. Whitehall officials are, therefore, considering giving the next generation regulator powers to take direct action as part of the reform process to be included in the forthcoming telecommunications white paper.<sup>21</sup>

Writing in the September 1999 issue of *Utilities Journal*, Oftel's Director General (David Edmonds) outlined Oftel's overall approach:

For the foreseeable future, communications markets will continue to be defined by rapid change. In response, the EU needs a regulatory framework that can adapt to these changes and not act as a brake on innovation. OFTEL believes that this requires principles and high-level objectives agreed at a European level, which are then implemented at a national level in a transparent and objective way best adapted to take account of national circumstances. Where regulation is applied, it must be both proportionate and effective, and so promote the interests of

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<sup>19</sup> Oftel Press Release 02/00, *Oftel announces new strategy for regulation*, 18 January 2000

<sup>20</sup> "Regulatory capture", *Independent*, 19 January 2000

<sup>21</sup> "Oftel may get more powers", *Financial Times*, 9 October 2000

European consumers. It should also be possible to regulate speedily where market problems occur, and to withdraw from regulation equally speedily where it is no longer needed. Over time, as competition increases, we should rely more on competition law and move away from sectoral regulation.

## 2. The removal of telecommunications from the *Utilities Bill* in 2000

In January 2000, the Government introduced a *Utilities Bill*, aimed at providing a common regulatory framework for several utilities. However, in March 2000, the Government announced that the telecoms provisions would be taken out of the Bill, and dealt with in a general telecommunications and broadcasting white paper later that year.<sup>22</sup>

This change in the Government's approach appears to have been triggered by a letter to the then Secretaries of State for Trade and Industry (Stephen Byers) and Culture (Chris Smith), sent by 25 telecoms groups on 22 February. The telecoms groups (which included One-2-One, Orange and Vodafone Airtouch, but not BT) argued against treating the communications industry in the same way as energy and water, on the grounds that the *Utilities Bill* would stifle a dynamic industry. According to a report in the *Financial Times*, the letter from the telecoms companies stated:

"The utilities bill will create a climate of conservatism in the supply of new services rather than stimulate innovation. It will throw our industry into regulatory uncertainty with the guarantee of repeated further upheaval to come."<sup>23</sup>

The contents and intent of the *Utilities Bill* can be traced back to a government review that began on 30 June 1997. From the outset, it was known that its coverage would take in electricity, gas, telecommunications and water (the latter was also removed from the Bill and incorporated into a *Water Bill*). A series of consultations benefited from a wide range of respondents, including some telecommunications companies.

Responding to the removal of telecommunications from the Bill, Oftel's Director General (David Edmonds) sought to assure consumers that their interests would continue to be protected by the existing regulatory structure.<sup>24</sup>

The original proposals in the *Utilities Bill* as they related to telecommunications were discussed in library research paper 00/7:

New regulatory arrangements in Part II of the *Utilities Bill* mirror those for gas and electricity. **Clause 84** establishes the Telecommunications Authority, having the same working arrangements as its Gas and Electricity counterpart. Consumer interests would now be represented by a Telecommunications Consumer Council, replacing the ACTs described above [**clause 85**].

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<sup>22</sup> DTI press notice P/2000/140, *Telecoms reform in communications white paper*, 2 March 2000

<sup>23</sup> "Telecoms companies attack their inclusion in utilities bill", *Financial Times*, 24 February 2000 p3

Schedule 7 provides for the abolition of the section 54(4) advisory bodies for matters affecting small businesses and for matters affecting persons who are disabled or of pensionable age. The regulatory authority will retain the section 54(3) power to establish such advisory bodies as it thinks fit.<sup>25</sup>

As with gas and electricity, the telecommunications regulatory authority (with the Secretary of State) will have a primary duty to protect the interests of consumers. Similarly, it shall have regard to the interests of the disabled or chronically sick, and individuals of pensionable age, on low incomes, or those residing in rural areas. This is a wider remit than that specified in section 3 of the *Telecommunications Act 1984*, contributing to a broad uniformity in the new approach to the gas, energy and telecommunications utilities.

The Secretary of State and the Authority also have a range of other objectives, recognising the international nature of telecommunications services - be they international calls or EC directives. The importance of the latter is underlined by **clause 91** which makes clear the international implications, as well as national security concerns, associated with telecommunications. This is not to diminish the significance of gas and electricity directives which have come into force in recent years, but the impact of these has been relatively limited due to the advanced nature of energy market liberalisation in the UK.

As with electricity and gas, the Secretary of State will be able to issue the Telecommunications Authority with guidance on how it might contribute towards the attainment of social and environmental policies. One particular issue could conceivably relate to the erection of telecommunications masts which have excited concerns both about visual intrusion and the impact of radiofrequency radiation on health. Though there is no firm evidence, and even less reason to believe that everyday exposure represents a significant health risk, genuine public concern is a valid planning consideration.<sup>26</sup> **Clause 90** might thus provide the Secretary of State with a means of encouraging the kind of prudent avoidance policy adopted in other countries, particularly if it can be done so without overly compromising duties to encourage telecommunications development.

**Clauses 97-98** provide for additional enforcement powers for the Telecommunications Authority, including the imposition of fines. The main difference with the energy sector is that, from the initiation of enforcement action, the Authority will have less time to impose a financial penalty - 2 months in the case where a provisional enforcement order has been confirmed (one month less than the energy sectors). This difference is a consequence of requirements imposed by EC Directive 97/13 ('the Licensing Directive').<sup>27</sup> Furthermore, penalties would be levied in respect of breaches of licence conditions or standards of performance. They would not apply to conditions relating to the application of the telecommunications code (schedule 2 of the

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<sup>24</sup> Oftel press notice 11/00, *Oftel pledges to continue serving interests of consumers*, 2 March 2000

<sup>25</sup> DTI, Explanatory Notes to the Utilities Bill, Bill 49-EN

<sup>26</sup> House of Commons Library Standard Note, *Telecommunications masts - planning and health*, 19 January 2000

<sup>27</sup> DTI, Explanatory Notes to the Utilities Bill, Bill 49-EN

*Telecommunications Act 1984*). This sets out powers which can be used by companies to enable them to install and maintain apparatus.<sup>28</sup>

**Clause 99** requires price-regulated licensed telecommunications companies (e.g. BT) to publish the links, if any, between service standards and directors' pay.

**Clause 100** requires the Authority to give notice of the reasons for decisions on licensing and other some enforcement matters. Commercial confidentiality will have to be respected, and the clause would furthermore "not apply in relation to ... a decision made by the Authority in the interests of national security."

**Clause 102** provides for financial penalties against mobile telephone service providers. The explanatory notes elaborate:

This clause applies the provisions on financial penalties to systemless service providers in the telecommunications sector in respect of obligations imposed by the Telecommunications (Open Network Provision) (Voice Telephony) Regulations 1998. A "systemless service provider" means a person who provides publicly available telecommunications services, but does not run a telecommunications system within the meaning of Section 4 of the 1984 Act. Systemless service providers provide retail services to customers by reselling the network services of network operators (eg mobile service providers who resell mobile network operators' airtime to retail customers).<sup>29</sup>

### 3. Oftel and convergence

A consequence of technological change is that traditional distinctions between telephones, computers and televisions are breaking down. Access to telephone lines is crucial for internet users. We can already watch films on a computer and access the internet on a digital television. Mobile telephones are beginning to provide many of these services. Regulatory issues cover the whole broad sector.

Oftel's approach to self- and co-regulation is contained in an Oftel publication, available on its website:

S1 Oftel's goal is to achieve the best deal for the consumer in terms of quality, choice and value for money of telecoms services. Effective competition is the main means by which the goal can be delivered. Where effective competition is achieved, the need for sector specific regulation will in many cases be eliminated, in others significantly reduced.

S2 Where effective competition has not been achieved, or there are other requirements for consumer protection, Oftel will seek to intervene, to the

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<sup>28</sup> <http://www.oftel.gov.uk/about/manage97.htm>

<sup>29</sup> DTI, Explanatory Notes to the Utilities Bill, Bill 49-EN



minimum extent necessary, in instances where the benefits of such regulation exceed the costs. The form of regulation can be one or more of the following:

formal regulation by Oftel as the sector specific regulator;

co-regulation involving Oftel and stakeholders;

self -regulation by stakeholders largely without Oftel involvement.

S3 Oftel seeks to ensure that regulation is appropriate to the level of competition and the need to protect consumers. Where effective competition develops, a reduction in formal and sector-specific regulation should be expected. Self and co-regulation may play a part in this reduction, although this will not happen in all cases. Where a market is declared effectively competitive, self- or co-regulatory activities might be continue to be necessary to provide some specific protection for consumers. Self- and co-regulation also enables new regulation to be introduced in a way that is more consistent with Oftel's appropriate regulation strategy

S4 Oftel will not make an indiscriminate shift or apply a deliberate bias towards less formal regulation as an end in itself. Oftel will use a cost-benefit analysis for individual issues to ask why, and then what, regulation should exist. This process will apply irrespective of whether the level of regulation is expected to rise or fall.

S5 The role of self- and co-regulation is to make it easier to regulate at the minimum level necessary to achieve Oftel's objectives. Oftel can better achieve this over time by both enhancing its decision-making processes and improving the effectiveness of self and co-regulatory mechanisms.

S6 Oftel will continue to promote a better common understanding of the circumstances and ways in which self- and co-regulation are best pursued. It may be useful, following discussions with stakeholders, to develop some brief guidance on the appropriate method of regulation for the circumstances; the role for Oftel staff; and assessing the effectiveness of initiatives. Experience will also be shared, to better understand the circumstances where self and co-regulation are most likely to succeed. Early experience suggests that consumer information initiatives and areas where stakeholders have a greater co-incidence of interests in co-operating are most suitable for self- and co-regulatory measures.

S7 As for mechanisms to promote effective self- and co-regulation, Oftel is not seeking to create inflexible structures that inhibit market developments or prevent creative responses to individual regulatory challenges. However, Oftel does see merit in linking together various initiatives and improving communication among stakeholders. Oftel would like to work with stakeholders to develop models of working arrangements for self- and co-regulation, as this should improve the efficiency of such initiatives. Oftel also intends to discuss with stakeholders the

idea of developing a dedicated web site facility (perhaps initially based on the Oftel web site) to host the outputs of self and co-regulatory activities and provide an appropriate outlet for further self- or co-regulatory initiatives.<sup>30</sup>

## **B. Radiocommunications Agency**

The Radiocommunications Agency (RA) was established as an executive agency of the Department of Trade and Industry on 2 April 1990. Before then, its functions were performed by the Department's Radiocommunications Division. An RA leaflet,<sup>31</sup> available on the internet,<sup>32</sup> summarises the agency's role in the following terms:

The role of the Radiocommunications Agency is to regulate the use of the civil radio spectrum in the national interest.

### **This includes:**

negotiating and planning the UK's use of the spectrum, with the rest of the world where necessary;

agreeing equipment standards with industry

licensing users so as to enable them to co-exist with each other

investigating interference and enforcing the relevant legislation

researching ways of increasing the usability of the available spectrum.

### **In doing this we aim to:**

maximise the number of good quality channels available for civil use

investigate and do our best to resolve causes of interference to authorised radio services

consult widely with customers and be easily accessible for enquiries and discussion.

publish standards of service, to deliver these standards and to review them over time

provide services efficiently and cost-effectively.

Section 1 of the *Wireless Telegraphy Act 1949* requires that the installation and use of radio transmission equipment be licensed. However, many low power devices such as metal detectors, radio controls for model aircraft and some radio microphones are exempt.<sup>33</sup> Section 2 of the 1949 Act empowers the Secretary of State to make regulations

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<sup>30</sup> The benefits of self and co-regulation to consumers and industry. Oftel July 2001.  
[http://www.oftel.gov.uk/publications/about\\_oftel/2001/self0701.htm](http://www.oftel.gov.uk/publications/about_oftel/2001/self0701.htm)

<sup>31</sup> *Managing the Radio Spectrum* RA 235, March 1996

<sup>32</sup> [http://www.radio.gov.uk/publication/ra\\_info/ra235/ra235.htm](http://www.radio.gov.uk/publication/ra_info/ra235/ra235.htm)

<sup>5</sup> Wireless Telegraphy (Short Range Devices) (Exemption) Regulations SI 1993/1591

specifying the licence fees payable.<sup>34</sup> In their 1996 leaflet *Managing the Radio Spectrum*, the RA stated:

The Agency is committed to improving the quality of service which it provides to all of its customers. Our annual performance targets reflect the priorities of our customers. We aim to keep licence fees as low as possible, without sacrificing the quality of our spectrum management service, by constantly improving our efficiency. Since being established as a "Next Steps" executive agency in April 1990, average fee increases have been kept well below inflation, despite increasing demands on the spectrum and the extra work that entails.

The Directive on licensing in telecommunications (97/13/EC), adopted on 10 April 1997, includes a provision that only administrative costs should be imposed by member states. However, an exception is made for scarce resources, and spectrum would come under this. This point is underlined by the *Wireless Telegraphy Act 1998* which allowed for auctions of radio spectrum, administered by the Radiocommunications Agency.

The first such auction, for use by third generation mobile phone operators, resulted in a £22.5 bn windfall for the Treasury. A subsequent auction, this time for companies planning to offer high speed internet access using wireless rather than cabling technologies, of great benefit to rural areas, was less successful. On 6 September 2000 the DTI announced the applicants for the broadband fixed wireless auction in October.<sup>35</sup> The result was announced on 20 November.<sup>36</sup> It raised £38.2 million for 16 licences. There were no successful bidders for the remaining 26 licences, which are expected to be offered again for issue at a later date. The result meant that 60% of the UK's population would have access to a new source of high speed internet, to compete with fibre, cable, DSL phone lines and satellite. However, commentators concentrated on the 26 unsold spectrum licences.<sup>37</sup>

### C. Radio Authority

In a detailed memorandum submitted to the Culture, Media and Sport Committee, the Radio Authority begins by introducing its role:

The Radio Authority was set up by the Broadcasting Act 1990 to license and regulate independent radio. There are currently in issue 250 independent local radio (ILR) licences, three independent national radio (INR) licences, one national digital multiplex licence and 16 local digital multiplex licences carrying between them 160 digital sound programmes services. The Authority has around 90 long-term RSL (LRSL) licences in issue to schools, colleges, hospitals and other institutions with a transient population, and awards some 400 short-term restricted service licences (RSLs) each year. The Authority's engineering staff

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<sup>6</sup> *The Wireless Telegraphy (Licence Charges)(Amendment) Regulations* SI 1997/100

<sup>35</sup> DTI Press Release P/2000/603, *Hewitt names applicants for 28 GHz BFWA Auction*, 6 September 2000

<sup>36</sup> DTI Press Release P/200/776, *Hewitt announces 28 GHz Broadband Licence Winners*, 20 November 2000

<sup>37</sup> House of Commons Library Standard Note, *Radio Spectrum Auctions*, 18 October 2001

undertakes frequency planning, commissioning and technical regulation for these services. Taken together, the Authority is responsible for some 40,000 hours of programming and advertising output each week, which is co-regulated with the industry according to a series of statutory Codes.<sup>38</sup>

The Authority's website<sup>39</sup> contains further information, including a series of fact sheets covering:

- 1 The Radio Authority - what it is, what it does
- 2 How is commercial radio regulated
- 3 The Radio Authority: its licences and licensing procedures
- 4 Digital Radio
- 5 Careers In Broadcasting
- 6 The Radio Authority's future licensing plans

In its programming regulation role, the Authority enjoys a number of sanctions: it can require licensees to broadcast apologies and corrections, it can fine them and shorten or revoke their licence. Its role as a radio standards watchdog means that there is some functional overlap with the Broadcasting Standards Commission. This led to the two regulators agreeing a memorandum of understanding in 2000:

An agreed Memorandum of Understanding between the two bodies sets out how complaints will be dealt with. It seeks to avoid, wherever possible, double jeopardy for both complainants and licencees, and to share information about complaints relating to matters of standards. Each body will formally take account of the adjudications of the other in its decisions.

The Chairman of the Broadcasting Standards Commission, Rt Hon The Lord Holme of Cheltenham CBE [the current chairman is Lord Dubs of Battersea], said: "This new arrangement extends the level of co-operation between our two bodies and represents a practical step forward in advance of comprehensive regulatory change. It will provide those wishing to complain with a clearer route to do so, and gives listeners and radio companies confidence that they will get consistent judgements about standards."

Richard Hooper, Chair of the Radio Authority, said: "In advance of any new Communications legislation, this arrangement aims to eliminate duplication of work and will avoid overlapping activity that can confuse both listeners and licensees. It demonstrates how statutory bodies can co-operate in ways that are cost-efficient and best serve the public and the industries which they regulate."...

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<sup>38</sup> Culture, Media and Sport Committee, *The Communications White Paper*, 7 March 2001, HC 161-II 2000-01 p 91

<sup>39</sup> <http://www.radioauthority.org.uk>

...Complaints about fairness and privacy will continue to be dealt with by the Commission. Matters relating to standards which have licensing implications will continue to be dealt with by the Radio Authority. Other complaints which fall within the jurisdiction of both bodies will be dealt with by whichever first receives the complaint, but the Authority and the Commission will keep each other informed throughout the consideration of the complaint and of the potential outcome. Each body will take formal account of the adjudications of the other in its decisions.<sup>40</sup>

## D. Broadcasting Standards Commission

The Commission, established by the *Broadcasting Act 1996*, replaced the Broadcasting Complaints Commission and the Broadcasting Standards Council. The BSC summarises its work thus:

As an independent organisation, the Broadcasting Standards Commission considers the portrayal of violence, sexual conduct and matters of taste and decency in television and radio programmes and advertisements. It also provides redress for people who believe they have been unfairly treated or subjected to an unwarranted infringement of privacy.

Complaints about standards and fairness

To consider and adjudicate on complaints the Commission has the power to:

- require recordings of broadcast material;
- call for written statements;
- hold hearings about the detail of what has been broadcast.

All the Commission's decisions are reported in this regular bulletin. An on-line version is available on [www.bsc.org.uk](http://www.bsc.org.uk)

The Commission can also require broadcasters to publish summaries of its decisions either on-air or in a newspaper or magazine and report on any action they might have taken as a result.

The Commission's aims and objectives are set out in further detail in a funding agreement, covering April 1999 to March 2002, with the Department of Culture, Media and Sport. For 2001-02, grant-in-aid stands at £1,971,000. The BSC received 5,289 complaints in 2000/01, an increase of around 150 on the previous year. The large majority, 4,920, were about content (427 of which were regarding Anne Robinson's comments about the Welsh in *Room 101*) and 360 were about fairness and privacy.<sup>41</sup>

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<sup>40</sup> Radio Authority and Broadcasting Standards Commission News Release J10/00, *Broadcasting Standards Commission and Radio Authority agree on 'joined up regulation'*, 6 June 2000

<sup>41</sup> BSC Annual Review 2000/01

While the Commission has been styled an "enemy of the ignorant",<sup>42</sup> it has been criticised in part due to overlapping functions with the Radio Authority and the Independent Television Commission. The chairman, Lord Dubs, points to ongoing co-operation with these other bodies, as well as the overall importance of the BSC's research effort.<sup>43</sup> An editorial in *Broadcast* was unsympathetic, highlighting for criticism a number of specific research findings.

Of course, the BSC will argue that this is spurious nonsense - quoting at random from its findings and ignoring the in-depth nature of its many reports and conclusions. Rubbish. It's always been a layer of regulation too far, over and above broadcasters' own codes of conduct and the many codes of the Independent Television Commission. It will not be missed.<sup>44</sup>

## **E. Independent Television Commission**

The ITC's website<sup>45</sup> provides a good source of information, including a range of fact sheets. Its programme code was most recently revised in February 2001 to include the following changes:

- Calling for greater sensitivity to the content of daytime programmes during school holidays and clarifying rules on consideration to children participating in programmes.
- New rules on recording of telephone calls by programme makers and journalists have been added to the existing provisions on secret filming and recording. Written confirmation about the purpose and conduct of interviews is now required when allegations of criminality or serious wrongdoing are put to an interviewee. This is to ensure informed consent from participants in programmes which are not primarily journalistic in character, such as talk shows.
- A new reference to internet addresses is introduced to ensure that no undue prominence is given to commercial internet sites, whether to a licensee or third parties.

Under its powers, derived from the Broadcasting Acts of 1990 and 1996, the Commission:

- issues licences that allow commercial television companies to broadcast in and from the UK – whether the services are received by conventional aerials, cable or satellite; and whether delivered by analogue or digital means. These

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<sup>42</sup> "Transition man", *Broadcast*, 20 July 2001 p 19

<sup>43</sup> *ibid.*

<sup>44</sup> "BSC's demise is well deserved", *Broadcast*, 15 June 2001

<sup>45</sup> <http://www.itc.org.uk/>

licences vary according to the type of service, but they all set out conditions on matters such as standards of programmes and advertising;

- regulates these services by monitoring broadcasters' performance against the requirements of the ITC's published licences and codes and guidelines on programme content, advertising and sponsorship and technical performance. There is a range of penalties for failure to comply with them;
- has a duty to ensure that a wide range of television services is available throughout the UK and that, taken as a whole, these are of a high quality and appeal to a range of tastes and interests;
- has a duty to ensure fair and effective competition in the provision of these services;
- investigates complaints and regularly publishes its findings.<sup>46</sup>

Publications include *Programme Complaints and Findings Report* and *Television Advertising Complaints Report*. It most recently attracted press attention when deciding not to uphold a complaint from 129 viewers, offended at humorous commercials portraying Geordies as obese couch potatoes.<sup>47</sup>

### III Combining the regulators: Ofcom

As noted at the beginning of this paper, a central feature of *A New Future for Communications*<sup>48</sup> was the proposal to establish a single Office of Communications (Ofcom). This, at least implicitly, emphasises convergence of media platforms over diversity of content and the manner of delivery. Maintenance of diversity of services and plurality of services is covered at depth in the white paper, as are the powers likely to be given Ofcom. While the latter are naturally relevant to any debate on the establishment of Ofcom, this section will focus fairly narrowly on the case for Ofcom. This is in keeping with the *Office of Communications Bill 2001-02*.

#### A. The white paper on Ofcom

Ofcom's place in the overall regulatory regime is put in these terms in the white paper:

1.3.8 In summary, the new regulatory framework will consist of:

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<sup>46</sup> <http://www.itc.org.uk/>

<sup>47</sup> "'Geordies are fat' advert is approved", *Times*, 7 January 2002

<sup>48</sup> Cm 5010, December 2000

the present Competition Act, governing matters relating to anti-competitive activity, and the monopoly provisions of the Fair Trading Act, applied concurrently by the Office of Fair Trading and the new regulator;

a new, independent, statutory, regulatory body (OFCOM) responsible for economic regulation of communications, content regulation and spectrum management;

an open and participatory approach supported by research and a consumer panel to advise OFCOM, enhanced by mechanisms like citizens' juries to address content issues; and

co-regulatory or self-regulatory initiatives, developed with OFCOM to deal with issues (such as offensive content on the Internet) where such approaches, backed up as necessary by statutory powers, offer the best means of achieving regulatory objectives.

1.3.9 In line with the 'Principles of Good Regulation' approach of the Better Regulation Task Force, regulation will be effective but kept to the minimum necessary for ensuring that the interests of citizens and consumers are fully safeguarded. OFCOM will therefore have a duty to keep markets or sectors under review and roll back regulation promptly when regulation becomes unnecessary.

Chapter 8 of the white paper is on the new organisational framework, the main proposals being as follows:

- We shall create a new unified regulator (OFCOM) responsible for the communications sector. The regulator will be independent, will act at arm's length from the Government but will work closely with the DTI, DCMS and other relevant departments, including on European and other international negotiations.
- The regulator will incorporate the Radiocommunications Agency's responsibilities for managing radio spectrum.
- OFCOM will have a new set of regulatory objectives.
- OFCOM will be a corporate body governed by a Chairman, a Chief Executive and other executive and non-executive members. Its work on content issues should take into account a wide variety of interests and reach consensual judgements. It will resolve any conflicts between its content-related objectives and its other objectives in a clear and transparent way.
- We will expect OFCOM to develop good links with the relevant policy committees and executives of the devolved assemblies and with representatives of the English regions.
- OFCOM will be responsible for the regulation of electronic communication networks and services, including telecommunication systems and other



activities currently regulated by Oftel, and will also be responsible for the licensing of broadcasting services. It will reduce the regulatory burden upon communications operators by using general authorisations rather than individual licences wherever possible.

- We will enhance the regulatory powers available to OFCOM.
- OFCOM will ensure that regulation is effective. To achieve this aim it will develop and maintain the necessary regulatory rules, in full consultation with industry and representatives of citizens and consumers, within a broad framework of guiding principles established in statute. We will ensure there are transparent and effective appeals processes.
- OFCOM will have a duty to keep markets or sectors under review and roll back regulation promptly where increasing competition renders it unnecessary. It will encourage co-regulation and self-regulation where these will best achieve the regulatory objectives.

The white paper goes on to state that Ofcom will combine the existing functions of the Broadcasting Standards Commission, Independent Television Commission, Oftel, the Radio Authority, and the Radiocommunications Agency. The roles of these five existing regulators were discussed in the preceding section, and the generally favourable reaction in the one before. Ofcom might also, according to the white paper, assume the video classification function of the British Board of Film Classification. This might be in recognition of the blurring distinction in respect of broadcasting and video-on-demand. That the latter involves watching a video, perhaps of a recent news bulletin, sent from a central computer to a television set, down a telephone line, provides a good example of convergence.

Ofcom's central regulatory objectives are proposed to be:

- protecting the interests of consumers in terms of choice, price, quality of service and value for money, in particular through promoting open and competitive markets;
- maintaining high quality of content, a wide range of programming, and plurality of public expression;
- protecting the interests of citizens by maintaining accepted community standards in content, balancing freedom of speech against the need to protect against potentially offensive or harmful material, and ensuring appropriate protection of fairness and privacy.

The white paper proposes that these objectives will be enforceable by Ofcom using powers analogous to those of Oftel and the ITC, enhanced by *Competition Act* - type powers concurrent with the Office of Fair Trading. A draft Communications Bill, expected in Spring 2002, will likely provide clarifying detail.

## B. Summary of responses

When the white paper was published in December 2000, comments were invited from interested parties. The closing date for this particular part of the consultation process was 12 February 2001. In March 2001 David Graham & Associates prepared an executive summary of some 250 responses, a figure which excludes over 6,000 letters and emails supporting Christian broadcasting.

Overall, the general thrust of the White Paper was received warmly by almost all respondents, with the overwhelming majority expressing support for the establishment of OFCOM.<sup>49</sup>

Though the *Long-form summary of responses* and many of the responses are available online,<sup>50</sup> extracting from the executive summary is sufficient to give a flavour of the diversity of concerns:

51. Amid widespread support, there was a general feeling that OFCOM will serve to simplify the complicated web of regulators and remove elements of regulatory overlap and double jeopardy. AOL believed that the independence of OFCOM from the Government would be vital. Carlton Communications cautioned that OFCOM's powers would need to be carefully constrained to ensure that the benefits of a single regulator were not outweighed by the concentration of authority within one regulatory body, and the Campaign for Press and Broadcasting Freedom felt that a single regulator might lead to unchallenged industry control. The Church Of England worried that the breadth of perspective and checks and balances present when a number of bodies exercise different remits would be lost through the creation of a single body.

52. Energis questioned whether it would be appropriate for OFCOM to manage economic regulation and social policy in addition to content regulation. ISPA felt that politically sensitive issues like content regulation might overshadow competition issues, and the Musicians' Union argued the case for two distinct regulators, one for delivery and one for content.

53. Specific suggestions and observations relating to OFCOM included:

- The ITC believed OFCOM should be given guidance on the face of the [main Communications] Bill on the relative priorities to be attached to its high level duties and how conflicts between them should be resolved.
- OFCOM will need to be properly resourced — Centrica highlighted the difficulties presented by the high level of staff turnover at OFTEL.

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<sup>49</sup> David Graham & Associates, *Responses to the Communications White Paper: Executive Summary*, March 2001

<sup>50</sup> [http://www.communicationswhitepaper.gov.uk/pdf/index\\_responses\\_a-c.html](http://www.communicationswhitepaper.gov.uk/pdf/index_responses_a-c.html)

- Concert called for the availability of annual public accounts, and Carlton Communications argued that OFCOM should be subject to review by the Public Accounts Committee.
- Energis felt that costs should not fall only to large operators.
- OFCOM should be set deregulatory targets to ensure the lighter touch policy is carried through.
- OFCOM should have an explicit commitment to ensuring proper provision to meet the needs of people with disabilities, the elderly, those on low incomes and people living in rural areas. Fiona Branson noted, with specific reference to people with disabilities, that this commitment should encompass their needs as “content producers” as well as consumers.
- The Communications Workers Union suggested the governing body of OFCOM should have a two-tier structure comprising an “inner cabinet” of 3–5 meeting monthly and a larger commission of perhaps 15–20 meeting quarterly.
- The NUJ believed that equal opportunities should be one of the central objectives.
- Reuters argued that efficiency and innovation should be given the status of full objectives.
- The Communications Management Association suggested that OFCOM should have a statutory duty to promote competition, while Centrica suggested a duty to secure open and competitive markets.
- CARE felt that OFCOM should have a regulatory duty to ensure that content reflects standards of good taste and decency.
- Numerous respondents believed membership of OFCOM and advisory panels should reflect the cultural diversity of nations, regions and communities. Several respondents argued that OFCOM should maintain local offices in the nations and regions of the UK and regulatory functions should be devolved to such offices as far as possible.
- The Community Media Association suggested that OFCOM should have a properly staffed Community Media division.
- The Chairmen of the Advisory Committees on Telecommunications suggested that OFCOM should be given powers to require the disclosure of information to consumers to facilitate, for example, the provision of comparable tariff information and mobile telephone geographical coverage.
- Michael Parkins argued that technological research should be given a higher profile in the structure of OFCOM than currently indicated.

- OFCOM should ensure that the ITC library is maintained and extended to encompass all converging electronic media.

Other points raised in relation to Ofcom reflected a concern that the interests of radio, a key community player, be given due prominence alongside telecommunications and television. Furthermore, the strengths of existing regulators, such as the Radiocommunications Agency, ought to be recognised by the formation of appropriate divisions within Ofcom. Some respondents had difficulty reconciling a desire for "light touch" regulation with the proposal for extended powers to fine for licence breaches. On Ofcom's organisational structure and relations with government, the following paragraphs attempt to summarise a range of opinions:

54. Numerous organisations put forward their own suggestions for the organisational structure. On staffing and structure, most comments placed emphasis on the need for skill and experience on the board. Several respondents comment on the need for adequate resources to secure high calibre staff. BT noted that the appointment process should be open, transparent and practicable, while FEU called for OFCOM to have a separate department to work on radio. The Operators' Group felt that the proposed corporate structure was too unwieldy to take effective decisions on economic regulation cases.

55. Microsoft was concerned that OFCOM will have to report to two different Government departments, each with a different agenda. Several respondents suggested the formation of a single communications department, or of an interdepartmental body, to whom OFCOM should report. Cable and Wireless believed that, unless all divisions of OFCOM report to one group of decision-makers, OFCOM might move at too slow a pace to reflect the market. Others argued strongly for the two departments to be retained to ensure a proper balance between economic and content issues.

### **C. Select Committee report**

On 15 March 2001, the Culture, Media and Sport Committee published its report, *The Communications White Paper*.<sup>51</sup> The report addressed the white paper as a whole, including media ownership questions, the subject of an ongoing consultation.<sup>52</sup>

On the organisational framework, the Committee recalled its 1998 recommendation for a new Department of Communications, reiterating:

...Setting aside the practical difficulties that we foresee in one public body being responsible to two Government Departments, we are concerned that there remain

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<sup>51</sup> Culture, Media and Sport Committee, *The Communications White Paper*, 7 March 2001, HC 161 2000-01

<sup>52</sup> [http://www.culture.gov.uk/creative/tv\\_media.html](http://www.culture.gov.uk/creative/tv_media.html) (includes links to the media ownership review and responses received so far)

areas where the White Paper lacks an integrated vision precisely because of the current departmental divisions of responsibility...

**...We recommend that the Prime Minister establish a separate Department of Communications with its own Secretary of State and assuming the relevant responsibilities currently within the Department for Culture, Media and Sport (relating to broadcasting and the media), the Department of Trade and Industry (relating to telecommunications and the Internet), the Cabinet Office (relating to the electronic delivery of Government services) and the Home Office (relating to the regulation of videos) at the earliest possible opportunity.**

These changes did not occur, as some had anticipated, after the most recent General Election. Departmental responsibilities remained largely unaffected in these respects, though censorship and video classification did migrate from the Home Office to the DCMS.

On the structure of the new regulator, Ofcom, the Committee cited reservations expressed in the communications green paper (Cm 4022, July 1998) about the unwieldiness, and lack of transparency and accountability of a single body. This said, the Committee had "no doubt that the advantages of a single regulator far outweigh the disadvantages".<sup>53</sup>

The Committee drew attention to the differing dynamics of competition and content regulation: the former was best carried out by a "small core of professionals" while the latter benefited from broader involvement. Their subsequent conclusion and recommendation is reproduced below, followed by the Government's response<sup>54</sup> in November 2001:

**(xxxvi) We consider it vital, not least on grounds of public accountability, that the internal structure of the new regulator is set out in the legislation giving effect to the proposals in the White Paper rather than being left to the governing body of the new regulator to determine. In particular, we recommend that the legislation establish a mechanism to provide for greater lay involvement in content regulation than in competition regulation and create a distinct body within the new regulator responsible for radio (paragraph 136).**

The Government is creating in OFCOM a convergent regulator to deal with fast-changing markets. It will operate within a clear framework of duties and powers agreed by Parliament, underpinned by a framework of general duties. But OFCOM as an organisation will need substantial flexibility in the way in which it

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<sup>53</sup> Culture, Media and Sport Committee, *The Communications White Paper*, 7 March 2001, HC 161-I 2000-01, para 133

<sup>54</sup> *The Communications White Paper: Government Response to the Second Report from the Culture, Media and Sport Select Committee Session 2000-2001* Cm 5316, November 2001

implements these statutory functions, if it is to be well placed to respond to rapid changes in the market and in the public interest issues which arise from these.

These are strong arguments for leaving the details of the internal structure of OFCOM to its Board, and avoiding unnecessary rigidity. This general approach has been widely adopted in the development of regulatory arrangements for other sectors. The Government accepts, nonetheless, that there are powerful arguments for greater lay involvement in content as opposed to competition regulation and notes the particular concerns of the industry that the distinct needs of radio continue to be met as effectively as by the Radio Authority. We shall reflect on the Committee's views and other responses to the consultation on the White Paper in finalising our proposals for OFCOM.

The Committee noted that the white paper made "absolutely no reference" to Ofcom's accountability to Parliament. They also considered consumer input and openness in Ofcom's deliberations. Here are the Committee's recommendations (in bold), and the government response, on these specific points:

**(xxxviii) We welcome and support the proposal to establish a consumer panel. We recommend that the panel be empowered to examine and to seek to represent the interests of all consumers and potential consumers and not be narrowly confined to issues of service delivery for customers with a financial relationship to service providers (paragraph 138).**

The draft Communications Bill which we shall publish next year will set out in more detail the proposed remit and functions of the Consumer Panel.

**(xxxix) We recommend that a specific duty be imposed on the new regulator to ensure that its governing body and its sub-commissions or committees meet in public unless the governing body is satisfied that, in the case of any particular issue under consideration, the interests of public disclosure are outweighed by the need for commercial confidentiality. With such a need to weigh these factors in the balance, we would not expect all meetings concerning commercial activities to be held in private. We further recommend that legislative provision be made to ensure that, where any decision is reached by vote, the voting records are published and to require that all meetings with broadcasters to discuss their annual reports on delivery of programme statements are held in public (paragraph 139).**

The White Paper made clear that the Government will expect OFCOM to follow better regulation principles including the need for transparency and openness. OFCOM will have to consider a significant amount of commercially confidential matter and needs to be able to engage in free and open debate, but the Committee is right that the wide power of the new body will require checks and balances to ensure openness and accountability to the communications sector and the public more generally.

## **D. The second reading debate in the House of Lords, 15 October 2001**

The speech in the second reading debate in the House of Lords by Baroness Blackstone said that the debate on the Ofcom Bill was not the place to raise issues of detailed communications policy:

Instead, publication of the draft Communications Bill in the spring should provide ample opportunity for Parliament to debate the new regulatory regime. Pre-legislative scrutiny would normally be undertaken by the appropriate Select Committees in another place. The possibility of a Joint Committee of both Houses has also been raised, and nearer the time we shall consider whether to invite Parliament to adopt that approach. Either method would allow us to take account of Parliament's views before finalising the communications Bill prior to its introduction when parliamentary time is available.

The Ofcom Bill which is before you today is a paving measure which will enable us to make progress on the essential practical work which is necessary to set up Ofcom. Folding three statutory organisations, one non-ministerial government department and an agency into a new statutory body is extremely complex. We have to bring together five separate groups of professional expertise based across 20 or more offices around the country, with differing pay systems, pension schemes and organisational cultures, without disrupting this important industry and while maintaining effective protection for consumers.

The Ofcom Bill will allow the preparatory work to begin so that the new regulator will be in a position to take on its regulatory functions quickly once the regime which will be set out in the main communications Bill has been fully discussed and comes into force.

The measures set out in the Ofcom Bill are straightforward. They will establish Ofcom as a statutory corporation. The new regulator will be governed by a corporate board made up of executive and non-executive members (referred to in the Bill as staff and non-staff members) who will be able to bring a range of knowledge and expertise to the organisation. Appointment of the chairman and other non-staff members will be made jointly by the Secretary of State for Culture, Media and Sport and the Secretary of State for Trade and Industry. The Bill proposes that, initially, as Ofcom will have no regulatory functions, there should be a small board of between three and six members, including the chairman and the chief executive. However, the Bill also provides the Secretary of State with the power to change the size of the board. It is envisaged that that power might be used at a later stage to widen the range of expertise available to the board once Ofcom takes on its regulatory functions...

Ofcom will only be able to undertake the necessary preparatory work successfully with the full co-operation of the existing regulators. The Bill, therefore, contains provisions to ensure that Ofcom has a duty to co-operate effectively with the existing regulators during the transitional period. Similarly, the Bill places an additional duty on the existing regulators to do everything necessary for Ofcom to make its preparations.

In order to avoid regulatory uncertainty occurring during the transitional period, provision is made in the Bill preventing Ofcom interfering with the carrying out by any of the existing regulators of their current functions. It therefore remains clear that during the transition period the current regulators will continue to carry on with their day to day duties until Ofcom assumes its regulatory role.

Clause 4 of the Bill allows the Secretary of State to wind up Ofcom. In practice the Government do not anticipate that measure being required. It is included purely as a safeguard to provide assurance that should any unforeseen circumstances prevent progress in bringing forward the policies contained in the communications Bill, the Government will be able to take the necessary steps to dissolve Ofcom should the need arise. After 2003, the Secretary of State will have a duty to act if no progress is in prospect.

The Bill contains provisions to give Ofcom the power to establish committees. Ofcom will have the flexibility to determine its own internal working arrangements and establish committees which are advisory in nature or ones which will have decision-making functions delegated to them. Ofcom will be able to appoint non-board members to be included in the committees to enable them to benefit from particular expertise or the representation of particular interests. The White Paper made specific reference to the new consumer panel which would represent the concerns of consumers to Ofcom. Further details of how that panel would be constituted will be set out in the main communications Bill.

In summarising the main purpose of the Ofcom Bill, perhaps I may stress again that it is the intention to provide Ofcom with just the single function of preparation. Ofcom will have no regulatory functions until Parliament has had the opportunity to consider precisely what those functions should be. Nothing in the Ofcom Bill prejudices those substantive issues.<sup>55</sup>

However, Baroness Anelay of St.Johns, for the Opposition, made some criticisms:

I turn now to the question of the regulators covered by the Bill. The clearest way in which the Bill may be seen as defective--by "defective", I mean pre-empting what may be Parliament's will in the communications Bill--is the omission of the BBC governors' regulatory remit from the remit of Ofcom during this preparatory phase. It is surely illogical to establish what the Government call a single converged regulator and then to exclude from its remit services which represent a major part of broadcast television and radio. As the National Consumer Council points out:

"Excluding the BBC from the full remit of OFCOM limits the potential benefits to consumers of a much improved regulatory system".

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<sup>55</sup> HL Deb 15 October 2001 cc 351-2



It is important to have a significant debate on the nature and structure of the BBC's regulation. It is important to have that debate now simply because the way in which the Government have introduced this paving Bill makes it vital that we should have such a debate. If Parliament decides that the BBC governors' regulatory role should be transferred to Ofcom, we need to prepare for that in the Bill.

Clause 2(1) gives Ofcom the function to do just about anything it considers appropriate for implementing or modifying proposals covering regulation, but it is limited by subsection (2) to working only with the Secretary of State and existing regulators--and, of course, the definition of "existing regulator" at Clause 5 excludes the BBC. If the BBC is left out of the loop, it will surely be too late when we come to the communications Bill to bring BBC regulation fully within Ofcom, if that is Parliament's wish. Ofcom will have worked throughout the transitional period without building up its relationship with the BBC governors in the proper manner...

Finally, the Government will have a duty in Committee to prove that the provisions of the Bill will enable Ofcom to do a job which has not yet even been defined in a draft Bill, let alone in statute, and to exercise powers which have not yet been debated, let alone agreed by Parliament. The Government must satisfy the House that nothing in the Bill will pre-empt or prejudice our debates on proposals in the communications Bill. This is a paving Bill which may, if we are not careful, trip up both the Government and the industry. I am sure that the Minister and the Government are perfectly capable of looking after themselves, but we have a duty of care to both the industry and consumers. I look forward to trying to fulfil that duty of care in later stages of the Bill.<sup>56</sup>

Many speakers complained about the partial exclusion of the BBC from the remit of Ofcom and the retention of the role of BBC Governors. Lord Dubs, Lord Bragg, Lord Baker of Dorking, Lord Gordon of Strathblane, Lord Lipsey, Lord Pilkington of Oxenford, Viscount Astor, Lord Eatwell and Baroness Miller of Hendon all argued for inclusion.

Lord Dubs argued that inclusion was in the interests of the BBC so that any future regulatory dispute would be between the BBC and Ofcom rather than between the BBC and the Secretary of State (c 400). Lord Bragg noted with disapproval the recent comment of a senior BBC executive that: "The BBC will get what it wants. The BBC always does." (c 405). Lord Gordon hoped that the BBC would be a benchmark for quality throughout the system, but very much part of the system (c 415). Lord Lipsey argued for inclusion so that the BBC would be more accountable:

Once upon a time when the good and the great ruled our land unchallenged, the accountability of the BBC might adequately have been protected by the board of

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<sup>56</sup> HL Deb 15 October 2001 cc 357-8

governors, and the board of governors alone. I do not believe that that is acceptable today. Nor actually does it preserve the independence of the BBC because in practice a paradox arises. The only outfit outside the BBC which has any powers over it is the Secretary of State, an elected politician. He or she determines its charter, the level of its licence fee, what new channels it may launch and who chairs it. There is no accountability other than to a politician. I do not see why the BBC is so adamant that Ofcom should be kept at bay as a way of preserving its independence while apparently accepting that a party politician should have so much power over what it does. Therefore, it seems to me that the case for a role for Ofcom vis-a-vis the BBC is a powerful and indeed irresistible one.

Lord Pilkington noted that the Canadian communications regulator had public service broadcasting as part of his remit (c 429). Viscount Astor argued that the BBC's charter and agreement should be left to run its remaining five years, but that further regulation by Ofcom should be considered before its renewal. Lord Eatwell argued that if Ofcom did not regulate the BBC, the integrity and independence of the corporation would be placed in serious jeopardy (c 445):

History has shown that it is not possible for the BBC board of governors to avoid being sucked into the management as well as the regulation of the BBC. That point has been made by many noble Lords. That is why the governors do not have the power to determine which services should be provided by the BBC and why the Secretary of State determines the content of such new services.

However, in the long run surely it is not right that the Secretary of State should be the arbiter of the content of radio services. We do not want state radio in this country, yet that is exactly the slippery slope down which the absence of independent regulation is pushing the BBC. The creation of Ofcom by the Bill provides the Government and the BBC with a means of escaping from that dilemma.

Baroness Miller considered it unfair that Ofcom would have the power to fine recalcitrant commercial broadcasters if they failed to fulfil their obligations, but the BBC Governors would not fine the BBC (c 462).

On the other hand, there were also arguments against the complete inclusion of the BBC within the remit of Ofcom. Lord Corbett of Castle Vale noted that the commercial sector and the BBC were regulated in different ways to common standards. He was not persuaded of the need to change that. Lord Borrie praised the BBC and doubted that Ofcom would improve it (cc 419-20):

I suppose that we shall need to await the debates on the BBC's Royal Charter to learn the fate of the board of governors... I hold no brief for the corporation. I shall reserve judgment about the role of Ofcom until I see what is proposed. However, the strength of the BBC World Service, the intelligence of BBC news correspondents, the welcome development of BBC Online all stem from an excellent public service purpose of the BBC, and not from the strictures of any

regulator. Indeed, a regulator such as Ofcom may be able to prevent bad programmes, but I doubt that it will ever be able to call forth good programmes. Nor will Ofcom be the answer to the menace of competitive television scheduling between BBC1 and ITV...

Lord Holme of Cheltenham discussed public service broadcasting (c 423):

What I am obviously asking is, what is public service broadcasting? I do not think it is enough for public service broadcasting to be whatever the BBC's management want to do... I think it is an inadequate definition of public service broadcasting...it is absolutely crucial that we have clarity about what is meant by public service broadcasting.

Lord Currie of Marylebone defended the Government proposals (c 431):

There is great merit in an organisation such as the BBC which has a positive mission to pursue its role in public sector broadcasting, updated, to be sure, for the 21st century. I believe that British broadcasting generally has been the better for that positive influence over the decades that the BBC has exerted in carrying out its mission. We would be unwise to tamper with that too fundamentally. The BBC's mission needs to be defended. The Government's position of partially bringing it within the regulatory oversight of Ofcom, leaving the positive mission for the BBC, is a good one.

Lord Thompson commented more broadly on the future relationship between Ofcom and the BBC (c 440):

It would be good for the BBC to have its separation of licence revenue and commercial revenue scrutinised for transparency by Ofcom as an independent watchdog.

However, there is a difference between Ofcom and the BBC that is central to this question. Ofcom is a regulatory body with the traditional role of the old Victorian headmaster; namely, to find out what the boys are doing and forbid it, whereas the BBC governors have a different role. If they are doing the heart of their job properly--that is a question that we must all continue to be vigilant about--they are public trustees with the positive duty to promote high quality public service patterns of programming.

Baroness Young of Old Scone argued for preserving the special status of the BBC (cc 442-3):

An example of that is the Government's recent decision to support the BBC's launch of new digital channels for children. The commercial broadcasters got themselves into a stew about that...They said that a range of children's channels are viewed actively by children in this country.

However, the issue rested on the fact that, although there was a range of children's channels, there was no channel of the type proposed by the BBC... They [parents] wanted a channel with original content, one that was UK-based and one that was very much free from advertising. The Government recognised that and approved the BBC's children's channels because they were different. It was not a matter of competition but of distinctiveness. I believe that that would be a virtually impossible decision for an Ofcom to take, charged with regulating across all the providers, including the BBC.

Baroness Jay of Paddington argued that the general and specific oversight of the BBC by the new requirements of Ofcom, combined with the backup powers of the Secretary of State and the existing statutory and charter obligations, creates a fairly exacting framework of external regulation for the Corporation (c 454). Lord McNally praised the position of the BBC (cc 457-8):

As the noble Baroness, Lady Howe, reminded us, society has a right to insist that the forthcoming legislation underpins both the cultural and democratic strengths of our country. The BBC is the iron pole around which the public service commitment can be built. It is no use commercial interests complaining that the BBC distorts the market...the whole idea of having the BBC is that it distorts the market in favour of quality. If it does not distort the market in that direction, it does not have a reason for existing.

Finally Lord McIntosh of Haringey, summing up for the Government, argued that the Bill did not determine the relation between the BBC and Ofcom (c 469):

Finally, I should like to say something about the BBC and Ofcom. I have heard both sides of the argument. I believe that in expressing their views too many have sought to show that there is something in the Bill which predetermines the relationship between the BBC and Ofcom. There is not. All of these matters are for the main Bill which will be fully consulted upon when it is published in draft in the spring. This Bill is about the structure of Ofcom before it takes on its regulatory powers. It is of no structural importance to Ofcom whether it does or does not regulate the BBC. The Bill deals with the structure of Ofcom at this preparatory stage.

## **E. Ofcom scoping project**

Against the backdrop of the debate on the Bill, planning has proceeded apace to develop a more detailed structure for Ofcom, and to identify practical steps towards this. At the focus is a steering group representing the five existing regulators. The Regulators' Steering Group commissioned Towers Perrin to prepare a report to inform the transition to Ofcom. The terms of reference were to:

- Assess the existing work processes in the five organisations that are coming together to make up the new Office of Communications (OFCOM)

- Identify the extent to which work processes will stop, start or continue differently in the new regulator
- Establish the design criteria that will need to be satisfied in setting up the new body's structure and working arrangements
- Put forward a workable high-level template for OFCOM's structure
- Identify the key issues for the new organisation's human resource infrastructure
- Design a transition plan to get OFCOM up and running by the Government's target date of end 2003

Towers Perrin reported on 9 October 2001.<sup>57</sup> Starting from the Communications White Paper proposals in relation to Ofcom's regulatory objectives, Towers Perrin recommended that Ofcom's functions be grouped into five main areas:

- Networks/Services and Spectrum Planning
- Networks/Services Compliance
- Communications Strategy and Policy
- Audience Interests
- Spectrum Customer Services

The report also recommends a Radio Group, "to ensure the integration of broadcast radio regulation across the five main operating units." The proposed structure is clearly not a simple bolting together of the five existing regulators, though whether it acknowledges convergence as fully as it might could be a source of discussion. Furthermore, there appears to be some overlap in the role of the five operating units, though this could enhance co-operation.

Spectrum Customer Services and Network/Services and Spectrum Planning would, among other things, share out responsibilities currently exercised by the Radiocommunications Agency. Audience Interests might be seen as a home for a significant part of the duties of the Independent Television Commission, the Broadcasting Standards Commission and the Radio Authority. Economic and competition policy would be an important activity of Networks/Services Compliance.

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<sup>57</sup> Towers Perrin, *Towers Perrin report to Regulator's Steering Group: OFCOM scoping project*, 9 October 2001, deposited paper 01/1512

According to Towers Perrin, their proposed organisation design has several key advantages, encouraging "an outcome orientation" and "creating a coherent framework for trade-offs between economic, content and spectrum considerations".

*Broadcast* was less impressed by the report:

It was purely technical, focusing overwhelmingly on the possible harmonisation of the watchdogs' pension schemes rather than philosophical questions of how Ofcom should structure itself to intervene or otherwise in the operation of a mixed broadcast economy. Those already running the various broadcast regulators will say Towers Perrin was only asked to comment on purely technical issues of structure and operation. But that still leaves the more far-reaching issue of how and when to regulate entirely untouched.<sup>58</sup>

All the same, the Towers Perrin report forms a basis for discussion<sup>59</sup> and planning for the eventuality that Parliament approves the establishment of Ofcom.

## **F. Office of Communications Bill [HL], Bill 73 of 2001-02**

The Office of Communications Bill is very short, confining itself to the establishment of the Office of Communications (Ofcom) and leaving for further legislation all details of the scope and nature of its activities. The Bill, as passed by the House of Lords, has seven clauses and one schedule. The following brief comments complement the Explanatory Notes.

**Clause 1** establishes Ofcom as a statutory corporation with not more than six and not less than three members, to be appointed jointly by the two relevant Secretaries of State. Although that may appear routine, it would produce a very different structure from that of existing regulators like the telecommunications regulator Oftel. The legal powers and duties are imposed on the Director General of Telecommunications, who has an office called Oftel to assist him in his duties. An office with several members raises possibilities of different ways of working. One option would be for each member to represent a different industry. Another option would be for them all to be involved in the whole sector, with decisions possibly taken by majority vote.

**Clause 2** states the single function of Ofcom, which is to prepare to assume functions at a later stage.

**Clause 3** is a clause that was not in the original Bill. It enjoins Ofcom to have regard to such general guidance concerning the management of the affairs of public bodies such as Ofcom considers appropriate. Subject to that guidance, Ofcom should also have regard to

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<sup>58</sup> "We need to define Ofcom's role", *Broadcast*, 30 November 2001 p 13

<sup>59</sup> see, for example, the work of the European Information Society Group (EURIM)  
<http://www.eurim.org/>

relevant guidance on principles of good corporate governance. The clause does not appear to limit Ofcom very much since it only has to follow the general guidance on public bodies as it considers appropriate. It seems to be a general injunction as to how Ofcom should be run, with the emphasis on being like a public body rather than a corporation.

**Clause 4** covers the functions of existing regulators. A duty would be imposed on them to comply with directions by the Secretary of state to prepare schemes for the transfer of their property, rights and liabilities to Ofcom.

**Clause 5** provides for the winding up of Ofcom if the proposals are abandoned. The Secretary of State would be given the *power* to provide by order for the winding up and dissolution of Ofcom. If that happens after the end of 2003, the Secretary of State would have a *duty* to lay before Parliament the draft of such an order as soon as possible. The original Bill applied the negative procedure to the Secretary of State's power to make an order for Ofcom to be wound up. This was amended to the affirmative procedure following a report from the Delegated Powers and Regulatory Reform Committee. The change would increase the amount of parliamentary scrutiny.<sup>60</sup>

**Clause 6** covers interpretation with **Clause 7** covering commencement and extent. The Bill will come into force on a day appointed by the Secretary of State by order. The Act covers the UK, extending to Northern Ireland.

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<sup>60</sup> HL Deb 6 November 2001 c 144

## **IV Further reading**

Culture, Media and Sport Committee, *The Communications White Paper*, 7 March 2001, HC 161 2000-01

*The Communications White Paper: Government Response to the Second Report from the Culture, Media and Sport Select Committee Session 2000-2001* Cm 5316, November 2001

Better Regulation Task Force, *Economic Regulators*, July 2001  
<http://www.cabinet-office.gov.uk/regulation/taskforce/reports.htm>

Towers Perrin report to Regulators' Steering Group, *Ofcom scoping project*, 9 October 2001 (deposited paper 01/1512)

Parliamentary Office of Science and Technology, *E is for Everything? Public policy and converging digital communications*, December 2001, Summary of POST Report Number 170

Parliamentary Office of Science and Technology, *Regulating internet content*, POSTnote 159, June 2001