

Submission on the Draft Communications Bill

by the

Satellite and Cable Broadcasters' Group

July 2002

This submission is a distillation of the views of the members of the Satellite and Cable Broadcasters' Group named in the Annex. While this paper represents a broad consensus about most issues, individual companies may have expanded on certain points in their own supplementary submissions.

1. Introduction

1.1 The Satellite and Cable Broadcasters' Group comprises the major satellite and cable broadcasters licensed in the UK by the ITC, and currently represents more than 100 channels. It acts as a forum for members to discuss issues of a legislative, regulatory and public affairs nature. Our members together broadcast hundreds of thousands of hours of programming each year, employ tens of thousands of people throughout Europe, and invest hundreds of millions in the British audio-visual industries.

1.2 SCBG members have long been at the cutting edge of innovative new services in the UK, continually pushing the development of the range of new media, interactive and digital offerings for consumers. Many of the most popular and profitable television formats started life in the multichannel world before being taken up by public service broadcasters. Our members are major stakeholders in digital broadcasting who have driven the take-up of digital services and are principal contributors to the new broadcasting landscape.

1.3 It is important to recognise the scale of the satellite and cable sector as it has developed in recent years. In a survey of SCBG members our members reported that in 2001:

- Broadcasting would exceed 300,000 hours for the first time
- More than 56,000 hours of original programming would be produced
- Some 97,000 hours of broadcast programming would be subtitled voluntarily

The ITC's figures show that in 1999-2000 total revenues for the whole satellite and cable sector at more than £2.3 billion exceeded ITV, Channel 4 and Channel 5 put together albeit spread across a large number of companies holding several hundred licences.

1.4 Despite the considerable growth and success of the sector, it remains the case that individual satellite and cable broadcasters are very different from the traditional terrestrial broadcasters, and it is vital that the Government continues to take this into account in framing the new regulatory structure. In particular, we do not enjoy the privilege of access to scarce terrestrial spectrum or "must carry" status and the advertising revenues that these command, nor do we have a guaranteed licence fee income. Rather, the sector is characterised by much smaller audiences (usually less than 1%, and often a fraction of this), limited revenue streams and profits (if any), and a much greater degree of uncertainty. Channels go out of business all the time, Artsworld being one of the most recent

examples. Companies and individual channels are extremely sensitive to changes in the regulatory and commercial environment.

- 1.5 The ability of our sector to innovate and prosper exists because the Government has recognised, up to now, the particular nature of our services, and the damage that onerous regulatory requirements would cause them. When Government and Parliament consider the legislative and regulatory framework the focus should, therefore, not just be on the traditional terrestrial broadcasters but on the need to promote a diverse and distinctive range of service providers. Regrettably, the draft Bill seeks in places to impose additional requirements on cable and satellite channels which have not, up to now, existed.
- 1.6 Many of our member companies broadcast not only to domestic audiences but to continental Europe and beyond. They are significant international businesses that have established themselves here in response to the UK's favourable regulatory environment, as well as the skills base of the UK audiovisual industry, and in turn are making significant investment in UK television production.
- 1.7 The Government states "it is essential that the UK reinforces its position as one of the most attractive places for communications companies to do business" (Introduction to the policy paper). It is particularly important that the UK provides an attractive environment for international companies to invest in and do business from, enabling the UK to further its position as a centre of broadcasting excellence and influence across Europe and globally. If this objective is to be met then this Bill and OFCOM must ensure that the promised light-touch, deregulatory approach is delivered and that our industry is allowed to prosper and thrive.

2 OFCOM

- 2.1 The SCBG welcomes the establishment of OFCOM as the replacement to the current regulators and the general duties of OFCOM as set out in the Bill. OFCOM has the potential to bring considerable benefits to broadcasters in providing a single point of reference and through the avoidance of double jeopardy. However, it is important that the new regulator does not simply replicate the activities of the five existing bodies. It will be particularly important to ensure that the activities of the Radiocommunications Agency, with its much larger budget and staff numbers, do not distort the economic and content regulation role of OFCOM.
- 2.2 In the "General duties of OFCOM" we believe that there should be additional duties for the regulator: to secure, as far as practicable, that the regulatory framework encourages the development and growth of communications industries; promote sustainable competition; and encourage investment and innovation. This is more than a matter of promoting competition, it is a recognition that the UK is home to a great number of successful businesses who have benefited from the Government's encouragement of new services. We believe this best achieved through the lightest touch/co-regulatory approach.
- 2.3 The UK is a world leader in digital television and has fostered much of the innovation that has taken place in the multichannel environment. Many international companies see the UK as the place where the future of television is being written. If the UK wants to retain this lead then the Government and OFCOM must do all they can not to regulate this innovation out of existence.

- 2.4 We welcome the commitment to a more light touch and co-regulatory approach that recognises that mature businesses must be able to operate free from onerous day-to-day interventions from regulatory authorities. However, we are concerned that some aspects of OFCOM's functions, for example in relation to employment or media literacy, could easily become onerous obligations on license holders. The tiering approach to content regulation is welcome but must also be applied consistently between the privileged public service broadcasters and the satellite and cable sector, particularly where any new obligations are being considered.
- 2.5 We would wish to see OFCOM explicitly recognise that it intends, where possible under EU law, to progressively withdraw from regulation where this is judged to be outmoded or inappropriate. In our view it would be helpful for adherence to the principles of better regulation – as set out in the White Paper "A New Future for Communications" – to be incorporated into the duties of OFCOM rather than being demoted to only having to be taken into account where OFCOM feels they are relevant. Our view is that a light touch co-regulatory approach will require, in the future, more effective co-operation and consultation between OFCOM and industry to identify jointly inappropriate or unjustified regulation.
- 2.6 We are concerned that because of its size and complexity OFCOM may quickly become a slow-moving and unwieldy body. We believe that as part of its requirement to be deregulatory and to progressively withdraw from regulation, its licensing and funding mechanisms should be developed in such a way that they consistently drive down the costs of regulation.
- 2.7 We understand the Government's objective in establishing a consumer panel and its role in providing a consumer viewpoint to OFCOM. But we have a concern that the underlying assumption that the consumer voice is currently unheard or misunderstood while the industry viewpoint often prevails. It is often the case that regulators do not fully recognise the economic consequences of regulation and therefore OFCOM will need as much dialogue with industry as with consumers. This may require the establishment of formal industry advisory bodies – which must include representation from the satellite and cable sector – or other mechanisms to review OFCOM's regulatory proposals with a view to assessing the potential for unintended effects. Equally we believe that the consumer panel would benefit from understanding industry's concerns before it makes its views known to OFCOM. It is also important for there to be a clear separation in the powers and duties of the consumer panel and content board and for clear criteria to be laid down for membership of both bodies.
- 2.8 It is our strongly held view that the regulation of the BBC – including the approval of new services, enforcement of the fair trading guidelines and determining whether it is achieving its public service objectives – should fall within the remit of OFCOM. It seems to us anomalous, particularly in matters relating to competition, product placement, undue prominence, and programme standards that the dominant player in the UK media market should in any way fall outside the remit of OFCOM. OFCOM must have the ability to monitor on an annual basis the commercial and market impact of the BBC's activities to ensure that excessive market distortion does not occur. It is not adequate to argue that "backstop" powers lie with the Secretary of State and Parliament through Charter renewal when these powers can in reality only be exercised every ten years. The role of the Governors of the BBC should be refocused to deal with internal management and value for money rather than on regulatory functions.

- 2.9 We welcome the commitment for OFCOM to be open and transparent in its dealings with the public and industry. Within the usual constraints relating to commercial confidentiality OFCOM board papers, minutes and even meetings should be open to the public. This would parallel the successful approach taken by the Food Standards Agency in holding all its meetings in public. This degree of transparency should also be applied to the Content Board, the Consumer Panel and the BBC Governors (unless the changes to the BBC position detailed in 2.7 come into force).
- 2.10 It will be important for OFCOM to establish effective working relationships with other non-statutory regulators such as ICSTIS and the ASA. For example, we remain concerned that in some areas such as the use of premium rate telephony there will continue to be parallel codes operating between OFCOM and others. OFCOM will not be judged to be effective if in some areas "double jeopardy" continues to operate. There are also aspects of intellectual property protection in which it will be essential for effective working relationships to be established between OFCOM and the Patent Office.
- 2.11 While we welcome the proposal that OFCOM should have a duty to promote media literacy we do not think that Clause 10 of the draft Bill is designed to achieve that end. Our reading of this section is that OFCOM is being given significant new powers to develop rating and filtering technologies the introduction of which could ultimately have substantial costs to broadcasters. While it is important that consumers are informed about such technologies no formal powers for their introduction should be put in place without significant further debate.

3. Access issues

- 3.1 We are concerned that the current privileges and proposed extension of the privileges granted through "must carry", "must offer" and "due prominence" on cable and satellite platforms continue to distort an effective market.
- 3.2 When these issues were last debated by Parliament, multi-channel television was still in its relative infancy and the argument was accepted by many that the public service channels could lose out to new entrants. Experience has shown that this was not the case and that existing channels – and in particular the BBC – can more than hold their own.
- 3.3 Before any additional privileges are granted to the public service broadcasters – who have consistently argued that they require "top billing" – there is a need to re-examine whether there is any need either for "must carry" or "due prominence" rules.

Must-carry

- 3.4 We firmly support the existing regulation, by OFTEL, of conditional access and EPG services, which ensures access for all broadcasters to these services on fair, reasonable and non-discriminatory terms. These regulations alone continue to ensure that all broadcasters, including the public service broadcasters, are able to broadcast to UK viewers by digital satellite.
- 3.5 Given the sufficiency of existing regulation, it unclear why the Government has seen fit to introduce new clauses into the Bill which create a new definition of "satellite packager" and "must-carry" obligations on such packagers. Public service broadcasters already have access to the satellite platform (they are all

currently broadcasting from it), so this additional regulatory process will serve only to add another layer of bureaucracy, without making any difference to the existing situation. It is neither targeted nor proportionate. We are also concerned that the "must carry" provisions in the draft Bill are applied in a discriminatory manner in relation to the cable platform. The draft Bill does not adequately address terms for defining future "must carry" obligations and associated compensation for "must carry as provided in the EU Universal Service Directive. We believe all platforms must be treated in a fair, reasonable and non-discriminatory manner.

- 3.6 The introductory note to the new "must carry" clauses indicates that consideration is being given to the introduction of further clauses to ensure that OFCOM will be obliged to consider the special position of public service broadcasters when regulating the price of access to satellite conditional access services. The SCBG opposes such a move, and believes that public service broadcasters, like all other broadcasters, should pay a fair market rate for these services. Favourable payment conditions for PSBs will simply serve to distort the commercial market further. We support the view of OFTEL in its recent publication on the pricing of conditional access and related issues that there are no special reasons why public service broadcasters should be treated differently to any other broadcasters – *"public service broadcasters should pay a commercially negotiated rate for conditional access services...this is the basis on which they would expect to pay for any other service which they need to purchase, including regulated service."*

Prominence

- 3.7 Clause 209 introduces a requirement on OFCOM to create a code of practice on EPGs, ensuring prominence for public service channels. The SCBG questions why this requirement should be placed on the face of the Bill, when other existing regulations, and OFCOM duties, will allow OFCOM to create such a code if it so sees fit. The existing mechanisms for the regulation of EPGs have worked well up to now (i.e. the ITC's Code, OFTEL guidance and the joint working group on EPGs).
- 3.8 We also note with concern that the definition of public service broadcaster has been widened to include "any service or television programmes provided by the BBC in digital form." The current ITC Code includes only BBC1 and BBC2. We see no reason why, if public service broadcasters move into established commercial areas such as children's broadcasting, that their new channels should have prominence over existing channels that have invested considerable effort and resources into establishing their position in the market. Further detailed consultation is required before the Government proceeds with this policy, on which no broadcasters have been formally consulted. Indeed, where any regulatory intervention is made that favours public service broadcasters, then this must be accompanied by effective consultation as well as a full economic and regulatory impact assessment.
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4. Spectrum management

- 4.1 We are fundamentally opposed to the introduction of charging for the use by satellite and cable broadcasters of internationally allocated spectrum. We welcome the further consultation now being conducted by the Radiocommunications Agency but believe that even on a "voluntary" basis the taxation of spectrum is ill-judged.
- 4.2 The introduction of "Recognised Spectrum Access" (RSA) will be an additional layer of licensing, an additional tax and an additional regulatory burden on broadcasters.
- 4.3 Satellite broadcasting is among the most economically efficient use of spectrum and there is no evidence to suggest that a charging regime is likely to lead to any efficiency gains. In fact such a charging regime may have the reverse of the desired effect and rather than promoting efficiency it will act as a deterrent to innovation in a world where the growth of diversity in content is often coupled with a growth in bandwidth usage. For example, innovative services such as Sky Sports active, QVC Active or the more recent interactive services from the BBC require far more bandwidth than linear television services.
- 4.4 It is important to recognise that the spectrum used by satellite broadcasters in the UK is allocated under international agreements administered by the International Telecommunications Union (ITU) and are not within the control of the Radiocommunications Agency. It is therefore difficult to understand how OFCOM will be expected to operate the RSA system and it is by no means clear who will be expected to pay for spectrum access.
- 4.5 The argument that RSA would provide enhanced security for satellite operators by protecting their spectrum space would not appear to apply to direct-to-home satellite broadcasting and broadcast to cable head-ends for subsequent distribution to cable networks. SCBG members have operated for many years with no significant interference problems and we do not anticipate any such problems in the future.
- 4.6 We are also concerned that this could encourage similar regimes to be introduced across the European Union. The EU Television Without Frontiers Directive allows UK based companies to broadcast without constraint across the European Union. The introduction of RSA regimes in other countries might be used as a method of preventing such broadcasts or pricing companies out of the market. The implications of this for those of our members broadcasting across several territories are as far reaching as they are unwelcome. The alternative scenario would be for broadcasters currently established in the UK to relocate to EU countries which had not introduced charging with the result that many UK television services would cease to be regulated by OFCOM.

5. Access for deaf and visually impaired viewers and listeners

- 5.1 Satellite and cable broadcasters, unlike the traditional public service broadcasters, receive no public subsidy either in the form of licence fee income or access to scarce terrestrial spectrum. It is for this reason that we believe it is fundamentally wrong to impose the requirements developed for DTT to the satellite and cable sector.

- 5.2 However, this lack of statutory requirements has not prevented satellite and cable channels from voluntarily providing access services across many channels. An SCBG survey in 2001 showed that member companies were broadcasting voluntarily more than 97,000 hours of subtitled programmes a year.
- 5.3 We believe that the best approach to this issue is for the current voluntary arrangements to continue with those companies most able to afford the additional investment free to provide an increasing number of subtitled programmes. It is not clear why the Government is choosing to intervene in this particular sector of the media when others such as newspapers, magazines and the Internet will be free from any such requirements. If the Government wishes to accelerate the growth in this provision it would be appropriate for any new public service obligations to be given financial support through the establishment of a Government "access fund" for satellite and cable broadcasters to provide these services. In addition the fund could support the establishment of a database of subtitled material so that no broadcaster purchasing new broadcast rights need pay for a programme to be re-subtitled.
- 5.4 We believe that in drawing up the code relating to provision for the deaf and visually impaired OFCOM must have regard to the particular characteristics of the satellite and cable sector. It will be important for OFCOM to consult with and to take note of the sector's concerns rather than base the code on the demands of those lobbying for increased provision. To this end we would also support the Government sponsoring discussions between disability groups and the satellite and cable sector so that each side can better understand each other's concerns.
- 5.5 The proposed Code will set targets to be met by a "relevant date." We would urge the Government to make clear that OFCOM will not be able to impose a date retrospective to Royal Assent.
- 5.6 The sector has made huge investments in the development of digital television; in many cases with low levels of return or even liquidation. With the advent of digital television and the growth in the number of channels many companies have found audience shares and revenues decreasing leaving little scope for additional expenditure on services. It is often argued that the cost of subtitling (at between £200 and £1,000 per hour) is low in comparison to production costs. This may be true in comparison to the costs of original drama production for terrestrial channels but in the case of many satellite and cable channels it would represent a considerable increase in programming budgets.
- 5.7 We would be very concerned if OFCOM were to introduce new requirements without regard to the ability of all broadcasters to meet these obligations.
- 5.8 The Explanatory Notes on the Bill and the Regulatory Impact Assessment both refer to OFCOM having regard to "the likely benefit" and the "cost and difficulty" of providing subtitling, sign language and audio description. However, the Bill itself does not contain any criteria for exemptions beyond stating that in drawing up the code OFCOM should consider what programmes should be included.
- 5.9 Furthermore, we believe that the code should include provision for channels to make applications for exemptions from these requirements and that OFCOM be obliged to give such applications due consideration. The code should also include a defined transparent process by which exemptions will be considered including a clear list of the factors that will be taken into account. The criteria for exemption set out in Section 203 (6) should be broadened to include:

- The ability of the broadcaster to meet the costs of providing the service. This should make reference to the average costs of programme acquisition to the channel and the availability of previously subtitled material.
 - The technical difficulties of providing the service, for example in Chinese language format.
 - Audience reach, i.e. cost to the channel per viewer.
 - Any legal, contractual or intellectual property issues that might prevent such a service being offered.
 - The appropriateness of the provision of subtitling, audio description or signing where the volume of graphic and text information or presenter description already included in the service may result in viewer confusion, for example in TV shopping services such as QVC and multiformat news channels such as Bloomberg.
 - The non-linear content, i.e. interactivity, of the service.
 - In considering the criteria OFCOM should consider its overriding duty not to impose unnecessary burdens on the industry.
- 5.10 With regard to the “cost and difficulty” criteria it is important that OFCOM is given the flexibility to deal with technological difficulties. So far the technological solutions for improving access have been based on the DTT platform and it is not clear that all of these can simply be transposed to other platforms. In addition a lesson should be learned from Digital Terrestrial Television where requirements to broadcast audio description were met by broadcasters, at considerable expense, despite the lack of suitable receivers for the visually impaired.
- 5.11 We believe that the Regulatory Impact Assessment (“RIA”) underestimates the number of channels that would be affected by these requirements. The RIA estimates that satellite and cable channels will broadcast approximately 325,000 hours next year. This equates to only 37 24-hour channels while we know that the ITC licences nearly 600 services. We would therefore urge the Government to undertake a further RIA before pursuing this proposal.
- 5.12 Another flaw in the RIA concerns the risk assessment of these proposals. At present there is a shortage of skilled subtitlers, signers and audio describers particularly those capable of dealing with live services. There is also a considerable lead time for training. The RIA gives no indication of whether the proposed level of service is actually deliverable or whether licensees would quickly find themselves in breach of the legislative requirements.
- 5.13 We can only assume from these figures that the Government intends that international channels – i.e. those licensed in and broadcasting from the UK but aimed mainly at overseas audiences – will be exempted from these requirements. There is little doubt that without exemption for international services many companies will examine their rationale for continuing establishment in the UK. We strongly believe that these requirements should not apply to such international services and that given that there will be many such channels who will seek exemption, for the sake of administrative simplicity, the criteria for exemption should be included in the Bill.

6. Regulation

- 6.1 We have already stated our belief that it will be important for OFCOM and, in particular, the Content Board to be light touch and deregulatory in its approach. We welcome the tiering approach and the commitment to the introduction of a degree of co-regulation which is explicit in the policy paper but unfortunately not reflected in the Bill itself.
- 6.2 We are concerned that the draft Bill continues to prescribe detailed regulation above that required under EU broadcasting law and that OFCOM's discretion and ability to withdraw from regulation will be fettered from the outset.
- 6.3 OFCOM will inherit the existing Codes of the BSC and the ITC. Until those Codes are reviewed and revised the situation of double jeopardy will continue to operate. This issue could be partially resolved through an explicit commitment in the Bill that OFCOM will introduce its new Standards Code within a set period of time.
- 6.4 We remain concerned that OFCOM retains the role of "judge, jury and executioner" in all aspects of content regulation. There is, as yet, no indication of how an independent appeal mechanism will operate. It is essential that regulated industries have access to an impartial independent appeals process, particularly where penalties can reach up to 5% of qualifying revenues.
- 6.5 We do not believe that it is appropriate for OFCOM to have prescriptive powers in relation to equal opportunities or training, as provided by clause 224. All companies already have duties in relation to equality which are laid down in employment legislation. There appears to be no justification for the communications industry to be treated any differently from any other sector of the economy. Likewise we see no justification for OFCOM to have powers to prescribe levels of training in any industry. These requirements are contrary to OFCOM's "duty to secure light touch regulation."
- 6.6 We have already stated our view that the regulation of the BBC should fall within the remit of OFCOM. We strongly believe that this should include fairness and privacy matters, the approval of new services and the ongoing review of existing services.
- 6.7 We have been concerned that public service broadcasters with specific remits to provide distinctive services are continuing to move into markets occupied by commercial broadcasters. We welcome the requirement that OFCOM will need to be satisfied that new ventures by Channel 4 must not jeopardise its core statutory purpose and must operate at arm's length. We believe that where any broadcaster is granted privileged access to the airwaves in return for public service obligations then it must be ensured that their associated operations are not allowed to distort the market. The recent demise of Artsworld has highlighted the risks faced by commercial broadcasters from publicly funded competitors.

7. International Obligations

- 7.1 As a consequence of Clause 222 of the draft Bill the monitoring of the obligations of satellite and cable broadcasters under the EU Television Without Frontiers Directive will pass from DCMS to OFCOM. Since the introduction of these requirements our members have built up an effective understanding and working relationships with the DCMS. It will be extremely important that OFCOM applies a

similar flexible and “light touch” in this area and does not over apply the terms of the Directive.

8. Ownership

- 8.1 We do not wish to make any detailed comments on the ownership aspects of the Bill although individual members may be expanding on the issue in their own submissions. We do, however, welcome the Government’s explicit recognition that the UK has an important global role in the communications industry and that international companies and investment have an important role to play in its future, as they have in the past, in creating a diverse, high quality multi-channel environment.

9. New licensing arrangements

- 9.1 Clauses 154 to 162 set the licensing framework for cable and satellite services, through the television licensable content service (TLCS) licence. The SCBG is concerned that certain definitions provided in these clauses are vague and ill-defined, and will prove difficult to apply to current and existing interactive services.
- 9.2 The meaning of licensable content service licence, for example, would appear under 154(2) to exclude many interactive services which are currently provided under a specific licence. This is because they are neither television programmes, EPGs nor ancillary services.
- 9.3 Furthermore, the definition of ‘two-way’ service (clause 155(4)) could, we believe, catch certain types of interactive services and exclude them from the licensing regime. It will, at the very least, mean a much more complicated licensing process with time-consuming discussions about what is and is not covered by the licence. Further consideration of these clauses is urgently required, in parallel with a detailed explanation from the Government about what exactly it is seeking to achieve.

10. Conclusion

- 10.1 The approach set out in the Draft Communications Bill promises significant improvements in the regulatory structure and environment for broadcasting in the United Kingdom. However, there are a number of areas in the draft legislation in which the Government has failed to “let go” of its control over the industry. We continue to be more closely regulated than many other sectors of the economy and we believe that even more should be done to reduce regulatory burdens and to allow the communications industry to flourish to the benefit of everyone: consumers, industry and Government. Unless OFCOM delivers real reform and a concomitant reduction in the level of regulation applied to the industry there is a very real danger that one of UK plc’s real success stories will fail to keep pace with its international competitors.

ANNEX – SCBG Respondents

The Chinese Channel

CNBC Europe

Discovery Networks Europe

Disney Channel UK

Flextech Television/Telewest Communications

Landmark Travel Channel

MTV Networks Europe

Music Choice

National Geographic Channel

Nickelodeon UK

Paramount Comedy Channel

QVC International

Turner Broadcasting System Europe

Universal Studios Networks UK Limited