

Submission to the Joint Committee on the Draft Communications Bill

by the

Satellite and Cable Broadcasters' Group

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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 (SCBG) 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. 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.
- 1.2 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. When Government and Parliament consider the legislative and regulatory framework the focus should not just be on the traditional terrestrial broadcasters but on the need to promote a diverse and distinctive range of service providers.
- 1.3 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 to benefit from the UK's regulatory environment and the skills base of the UK audiovisual industry.
- 1.4 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 policy paper]". 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.
- 2.2 In the "General duties of OFCOM" we believe that an additional duty should be for the regulator to secure, as far as practicable, that the regulatory framework encourages the development and growth of communications industries. 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 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.
- 2.4 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. We welcome the duty to secure light touch regulation. 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 jointly identify inappropriate or unjustified regulation.
- 2.5 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.
- 2.6 We understand the Government's objective in establishing a consumer panel and its role in providing a consumer viewpoint to OFCOM. Our concern is 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 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.
- 2.7 It is our strongly held view that the regulation of the BBC – including 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 and undue prominence, and programme standards that the dominant player in the UK media market should in any way fall outside the remit of OFCOM. 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.
- 2.8 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.
- 2.9 It will be important for OFCOM to establish effective working relationships with other non-statutory regulators such as ICSTIS and the ASA. 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.

- 2.10 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 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 the must carry or due prominence rules.
- 3.4 We firmly believe that access should be offered on the accepted principles of Fair, Reasonable and Non-Discriminatory Basis. 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. We see no reason why if public service broadcasters move into established 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.
- 3.5 This issue is particularly important in those circumstances where new public service channels are offered free of charge to platforms and as a result the services offered by commercial providers are “demoted” or removed from the channel line up because of their financial cost to the platform operator.

4. Spectrum management

- 4.1 We are very concerned at the implications of the introduction of “Recognised Spectrum Access” (RSA) which will be an additional layer of licensing, an additional tax and an additional regulatory burden on broadcasters.
- 4.2 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.
- 4.3 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.

- 4.4 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.
- 4.5 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.

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. However, this has not prevented satellite and cable channels from voluntarily providing access services across many channels.
- 5.2 We believe that the best approach to this issue is for the current voluntary arrangements to continue. If the Government wishes to accelerate the growth in this provision it would be appropriate for these new public service obligations to be given financial support.
- 5.3 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.
- 5.4 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.
- 5.5 We would be very concerned if OFCOM were to introduce new requirements without regard to the ability of all broadcasters to meet these obligations.
- 5.6 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. We strongly believe that the Bill should include the ability to exempt whole channels.
- 5.7 Furthermore, we believe that the code should include provision for channels to make applications for exemptions from these requirements. 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.
- 5.8 With regard to the "cost and difficulty" criteria it is important that OFCOM is given the flexibility to deal with technological difficulties. 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.

- 5.9 We believe that the Regulatory Impact Assessment underestimates the number of channels that would be affected by these requirements. The RIA estimates that satellite and cable will broadcast approximately 325,000 hours next year. This equates to only 37 24-hour channels while we know that the ITC licences nearly 400 services.
- 5.10 We can only assume that the Government intends that no international channels – i.e. those broadcasting from the UK but aimed mostly at overseas audiences – are to be included in the requirements. We believe that this should be made explicit 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. 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 and the approval of new 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.

7. Ownership

- 7.1 We do not wish to make any detailed comments on the ownership aspects of the Bill but we 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.

8. Conclusion

- 8.1 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.

ANNEX – SCBG Respondents

The Chinese Channel

CNBC Europe

Discovery Networks Europe

Disney

Flextech/Telewest

MTV Networks Europe

Music Choice

National Geographic Channel

Nickelodeon UK

Paramount Comedy Channel

QVC International

Sci-Fi Channel Europe

The Travel Channel

Turner Broadcasting System Europe