

## **Independent TV: Content Regulation and the Communications Bill 2002**

1. The Communications Bill will re-structure the statutory framework which governs the regulation of broadcasting content of all independent (ie non-BBC) TV in the UK. There follows an outline of the current regime, followed by an examination of the impact of the Communications Bill and the key changes which have been proposed. The Bill is expected to become law in 2003. From around the end of 2003/early 2004 the regulation of content will pass from the Independent Television Commission (ITC) to a new "super" regulator, the Office of Communications (OFCOM). OFCOM will combine the roles of the five current regulators of the communications sector – the ITC, the Radio Authority, the Broadcasting Standards Commission (fairness and privacy), Oftel (telecommunications), and the Radiocommunications Agency (wireless telegraphy).

### **The Current System**

2. Currently the relevant legislation is contained within the Broadcasting Act 1990. The Independent Television Commission are responsible for regulating the content of television programmes and advertising in accordance with their general duty to  
*“discharge their functions ... in the manner ... best calculated to ensure the provision of television programme services which (taken as a whole) are of high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests.”* (section 2)
3. The Commission are charged with doing all they can to secure that licensed services comply with requirements specified at s6. These relate to preserving good taste and decency; preventing the encouragement of crime; preserving accuracy and impartiality in news reporting; ensuring that religious programming is responsibly presented; and preventing the use of technical devices to convey messages unknowingly.
4. The Commission is required to draw up, and has had in place for some time, Codes which licensees must comply with in respect of programmes and advertising, and which cover the criteria above. Both have been revised in the past couple of years. These codes apply to all independent broadcasters – whether analogue or digital, and using terrestrial signals, satellite, or cable to distribute their programmes. It is an active model of regulation: the ITC is responsible for ensuring compliance with the codes, which are “rules to be observed” (s6(3)), and interferes directly to take enforcement action in the event of a breach, often as a result of a viewer complaint.
5. Special requirements are set out (sections 16, 25, 29) which the ITC is required to include in the conditions of licences for Channels 3, 4 and 5. These make

increased demands on broadcasters as regards, amongst other things, programme quality, quantity of regional programming, and quantity of educational programming. With these licences, the ITC again enforces by direct intervention. It can require the licensee to broadcast an apology or correction, impose a financial penalty, or even revoke a licence (sections 40-42).

### **The New Regime**

6. In the new regime as proposed in the current confidential (July 2002) draft of the Communications Bill, the issues which apply to content are very similar, and will continue to include decency, accuracy, impartiality and so on. The July draft very much mirrors the published May 2002 version.
7. However there will be a number of structural changes. The most obvious is that the ITC will be superseded by OFCOM, a much larger body. There will be some standardising of content regulation across radio and television (radio content regulation is outside the scope of this note). The part of OFCOM responsible for monitoring content will be the Content Board, whose chairman will be a member of OFCOM but whose other members will be drawn from a variety of backgrounds and UK regions (clauses 18 and 19 of the July draft). A new Consumer Panel is also to be set up and this may have some (as yet unclear) input into content regulation.
8. OFCOM's duties include a similar provision to that listed at para 2 above:  
*“to secure ... that the range of TV and radio services ... comprise services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests”* (clause 3(1)(e))
9. There are two more parallel duties, the wording of which are influenced by Human Rights Act considerations. They indicate that the particular concern of parliament is to protect consumers from harmful content, an increasingly important issue as the number of satellite and cable licensees has grown significantly in the last twelve years:  
*“to secure ... that generally accepted standards are applied so as to provide adequate protection for members of the public from the inclusion of offensive and harmful material ...”*  
*“to secure ... that all persons are provided with adequate protection from*
  - (i) *Unfair treatment in programmes ...*
  - (ii) *Unwarranted infringements of privacy ...”* (clause 3(1)(g))
10. To enable OFCOM to carry out its duties, there will be a new three-tier system for regulation. The first tier consists of those “standards objectives” which apply to all programme content (clause 268). OFCOM will have a duty to set

standards for programme content which are best calculated to secure the standards objectives. These objectives are similar to the requirements listed at para 3 above, although not identical. There is a new objective in clause 268 that persons under 18 be protected. This first tier will still be directly enforced – conditions will be included in licences which OFCOM considers appropriate for securing that standards are observed.

11. In the event of a breach, OFCOM will have enforcement powers under clause 194 to direct a licence holder to include a correction or apology, to impose a financial penalty (clause 195) or to revoke a licence (clause 196).
12. All licensees are required to put in place procedures for the handling and resolution of complaints, as is OFCOM itself (clause 274). OFCOM may direct a licensee to exclude any advert or type of advert. Clause 276 requires that complaints procedures are brought to the attention of the public. These clauses represent a formal recognition of the importance of complaints procedures, which are not covered in the Broadcasting Act 1990.

### **Public Service Broadcasters**

13. The second and third tiers apply to a new category of public service broadcaster (PSB), ie at the moment the Channel 3, 4 and 5 licensees, and to some extent the BBC and S4C. (The regulatory obligations which apply to the BBC will be derived from the Charter and Agreement between the BBC and the Secretary of State, and fall outside the scope of this note.) This structure has two main objectives: to create consistency in the treatment of public service broadcasters, and to establish an element of self-regulation in accordance with the “light touch” philosophy of regulation.
14. The second tier consists of quantitative targets which are to be set in PSB licences (clause 236). Each PSB must include 25% of programming (measured by time) from independent producers. Each PSB must also include a certain percentage of original productions, to be determined by OFCOM. Note that the independent production quota is still subject to a policy debate at the moment. The Culture Secretary has asked the ITC to carry out a review of the programme supply market, and the conclusions of the review may possibly result in an amendment to the Bill.
15. The third tier objectives are qualitative and will be subject to self-regulation. The procedures which govern the new system are set out in the reporting provisions for both OFCOM (clause 225) and the PSBs (clause 227). OFCOM will be required to review and to produce a report on the extent to which public service broadcasters have between them satisfied the general and detailed requirements for public service broadcasting.
16. The general requirements (clause 225(3)) are the provision of a wide range of subject matter to satisfy as many audiences as possible; the provision of balanced services in terms of nature and subject matter; and the maintenance of high

standards with respect to content, programme quality and editorial integrity. Detailed requirements (clause 225(5)) relate to education, cultural activity, news and current affairs, sport, children's programmes, material for different communities and material produced outside of the M25.

17. Note that similar criteria are found in sections 16, 25, 29 and 31 of the Broadcasting Act 1990. However the various requirements are currently channel-specific, with the result that broadcasters are effectively subject to different regimes. The effect of the Communications Bill is therefore to increase transparency and competition between the PSBs, to make it easier for OFCOM to compare their relative performance, and to produce an (almost) level playing field between them. Clause 226 maintains the current distinction by which Channel 4's remit to provide innovative, diverse and distinctive programming differentiates it from Channels 3 and 5.
18. OFCOM's reports will comment on changes during the period and draw conclusions about the current state of public sector broadcasting in the UK. The first report will be due one year after the Bill comes into force, and then the exercise will take place every three years. NB the ITC has called for an increased regularity of reporting, preferably on an annual basis, to help ensure the new regulator has some real power to maintain standards in PSBs.
19. The individual broadcasters are required to publish an annual statement of programme policy (clause 227) and to report on performance against the previous year's statement. Any change in programme policy must be proposed to OFCOM before a new statement is published (clause 228), and the opinions expressed by OFCOM taken into account in the preparation of the statement.
20. OFCOM will nevertheless have enforcement powers in the event that a licensed broadcaster does not comply with its specified remit, or does not contribute appropriately to the delivery of the general remit (clause 231). Powers include a requirement that the broadcaster take action to remedy the failure in question, and as a last resort OFCOM can withdraw the right to self-regulation.

## **Conclusions**

21. The issues which arise in relation to television broadcasting content regulation – such as the protection of the viewer from obscene material, impartiality of news reporting, and a recognition that certain types of programming (eg educational) might fall by the wayside if not required by statute – have not changed dramatically since the Broadcasting Act 1990 was passed.
22. The changes in the Communications Bill are connected with the manner in which content is regulated. The creation of OFCOM and its Content Board means that a new group of people, chosen specifically to deal with content issues, will now look at issues connected with radio content as well as television. OFCOM of course will also have some limited powers to regulate

the BBC – the first time in the history of the BBC that an independent regulator has ever had such powers.

23. Since methods of delivery are converging and various services are broadcast on a mixture of digital satellite, digital cable, digital terrestrial and analogue terrestrial, the old division between analogue and satellite broadcasters is no longer sufficient. The three tier structure will draw a clear distinction between purely commercial broadcasters, who will be subject only to minimum standards requirements, and the public service broadcasters, who are grouped together for the first time and in the interests of limiting regulatory intervention, will be subject to a system based on self-regulation.

Trevor Barnes, Senior Counsel, Independent Television Commission

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