

# **BT'S RESPONSE TO THE DTI/DCMS CONSULTATION ON THE DRAFT COMMUNICATIONS BILL**

## **1. EXECUTIVE SUMMARY**

BT strongly supports the draft Communications Bill's core objectives of creating a converged regulator to address the issues of a converging communications industry. We believe the draft Bill takes a realistic and balanced approach to many of the fundamental issues, in particular;

- combining stronger enforcement powers with appeals on merit against the regulator's decisions,
- acknowledging the inevitability of conflict between the many, individually desirable, objectives laid on OFCOM, and requiring the regulator transparently to address these conflicts on a case by case basis rather than attempting to establish priorities in advance,
- appropriate regulation of the internet,
- establishing an independent Consumer Panel, and
- keeping the need to remove unnecessary rules in the mind of OFCOM by creating a duty to review regulation regularly.

It is clear that the draft Bill has been drafted in a way that provides OFCOM with wide discretion in how certain duties will be interpreted. This is not an insignificant issue: OFCOM's interpretation will potentially have a material impact on the regulated companies and markets. This discretion needs to be balanced by meaningful accountability, the genuine adoption of good regulatory principles and enforcement procedures that incorporate basic legal safeguards.

Our response is designed to promote the achievement of the goals of the draft Bill and we make suggestions in the following areas: good regulation and accountability; translating policy into the Bill; legal; and structures and relationships.

## **2. INTRODUCTION**

The draft Communications Bill ("the draft Bill") is a key element in a radical revision of UK communications regulation. The new European Union Communications Directives<sup>1</sup> ("the new EU Directives") also prescribe significant changes for the electronic communications regime, including the replacement of individual licences by a General Authorisation. Oftel's programme for implementing the Directives is now underway, and this exercise will also address the detailed implementation of the general principles set out in the draft Bill. Consultation documents relating to the draft General Authorisation and Access obligations have already been issued, and we await the publication of Oftel's proposals for other aspects of the framework such as Universal Service.

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<sup>1</sup> The Framework Directive ((2002/21/EC), the Access Directive (2002/19/EC), the Authorisation Directive (2002/20/EC), and the Universal Service Directive (2002/22/EC).

BT believes that the draft Bill represents a significant step in the construction of a fair and effective regulatory system for this vital market. The draft Bill recognises that;

- regulation in the public interest of a market as complex as communications is not a simple task, reducible to a single, simple principle or a hierarchy of importance. There are many desirable objectives which may, in particular cases, conflict with each other. The job of the regulator is to look at cases on their merits and decide which objectives are most important in individual cases.
- a balance must be struck between strong enforcement powers for the regulator and effective safeguards in the shape of appeal rights and fair procedures;
- the perspective of the regulator, who needs to consider the entire market and its international ramifications, needs to be balanced by a consumer body whose focus is the impact on individual and small business consumers,
- an external stimulus, such as a statutory obligation, encourages regulators to identify and remove unnecessary rules.

BT, accordingly, strongly supports these particular provisions;

- the **General Duties of OFCOM (Clause 3)**.
- the **Duties to secure light touch regulation (Clause 5)**.
- the **Duty to publish and meet promptness standards (Clause 6)**.
- the establishment of a **Consumer Panel (Clauses 96 and 97)**
- the arrangements for **Appeals on the merits** set out in **Chapter 3 of Part 2**.

We believe that the basic approach of the draft Bill is right. Our detailed comments are made on the following issues grouped into 4 main themes:

- Good regulation and accountability
  - the principles of good regulation;
  - light touch regulation;
  - OFCOM's accountability to Parliament.
- Translating policy into the Bill
  - internet regulation;
  - spectrum;
  - the implementation of the EU Directives.
- Legal
  - checks and balances;
  - repeals and consolidation.
- Structures and relationships
  - the Consumer Panel;
  - the powers of OFCOM and the relationship with the OFT;
  - OFCOM's operating costs and charging structures.

### **3. GOOD REGULATION and ACCOUNTABILITY**

#### **3.1 The Principles of Good Regulation**

3.1.1 We support the principle of the draft Bill's proposal to give OFCOM a general duty to have regard to the principles of good regulation set out by the Better Regulation Task Force - transparency, accountability, proportionality and targeting (Clause 3, (2) (a)). These principles, however, need to be strengthened and reflected throughout the draft Bill if they are to be fully effective.

These regulatory principles, which inform all OFCOM's actions and decision-making are of a different order from the rest of the 'social' principles set out in (c) to (h) of Clause 3 (2) of the draft Bill. They should be set out in a separate sub-clause and because the five principles of better regulation will underpin everything OFCOM does, it should have a duty to observe them all the time and not have discretion not to comply with them.

To achieve this we propose that:

(1) Clause 3(2) should read:

“It shall be the duty of OFCOM, in carrying out its functions under this Act,

(a) to observe the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only in cases in which action is needed; and

(b) without prejudice to the principles described in paragraph (a) above, to have regard to such other principles as appear to OFCOM to represent the best regulatory practice.”

(2) there would then follow a new sub-clause (2a) as follows:

“It shall also be the duty of OFCOM, in carrying out its functions under this Act, to have regard to such of the following as appear to them to be relevant in the circumstances of any particular case:

[(a)-(f) reproducing (c)-(h) in the current draft Clause 3(2)]”

3.1.2 It would promote transparency if OFCOM was required to explain the rationale behind its decisions in significant cases. This would also be of considerable use to stakeholders in enabling them to understand OFCOM's policy and, in the expectation that OFCOM would make decisions on a basis consistent with previous ones, would assist in promoting regulatory certainty.

3.1.3 The draft Bill proposes to confer functions on the 'Secretary of State' although its subject matter clearly involves the activities of at least two Departments of State. It is accepted that this conforms with normal drafting practice, but it would be appropriate for the Government to make clear which Secretary of State will normally exercise the various functions.

### 3.2 Light Touch Regulation

Although paragraph 5.2 of the Policy Document accompanying the draft Bill says that OFCOM "is required to ensure that regulation is kept to the minimum necessary", Part 2 of the draft Bill is short of provisions for light touch regulation or de-regulation. Clause 5, requiring OFCOM to keep its functions under review so as to secure that regulation does not involve the imposition or maintenance of unnecessary burdens is the only provision which specifically tackles this issue, and it is left to OFCOM's discretion to decide what is "unnecessary". All OFCOM must do is to "have regard" to a statement it must publish saying how it proposes to meet its 'light touch' obligations.

We believe that the "light touch" / de-regulatory emphasis of the draft Bill could be significantly strengthened by the inclusion of duties along the following lines:

- (a) a duty on OFCOM, in carrying out its functions under Part 2 of the Bill, to secure that minimum regulatory burdens are imposed consistent with the obligations on Member States under EU Directives;
- (b) a duty on OFCOM to ensure the implementation of the principle that regulation shall diminish as competition increases;
- (c) a duty on OFCOM to take utmost account of a statutory presumption in favour of self-regulatory and co-regulatory solutions wherever possible;
- (d) a duty on OFCOM to ensure consistency of application of relevant EU Directives between the UK and other Member States;
- (e) a duty on OFCOM, in the light of the convergence of the different elements of the communications sector and the principle of technological neutrality, to ensure consistency in its approach towards regulation in respect of those different but converging elements;
- (f) a duty on OFCOM to ensure that in designating networks, services and facilities for notification purposes under Clause 23, it imposes minimum burdens on providers subject to the need for effective policing of the regulatory regime. In particular there should be no requirement for additional or repeat notifications arising out of additions or modifications of the provider's portfolio of services, or changes to its network.<sup>2</sup>

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<sup>2</sup> The EU Authorisations Directive makes clear that the least onerous authorisation system possible is to be used, and we believe that its intention is essentially to ensure that the national regulatory authority is aware of who the providers of electronic communications networks and services are. There is a danger that if notifications have to be made at too detailed a level of granularity, the industry will be mired in a disproportionate degree of red tape, contrary to the intention behind the Directive, and undermining the principle of a 'general authorisation', namely that anyone can offer any service.

### **3.3 OFCOM's Accountability to Parliament**

The draft Bill adopts the form of accountability currently used for regulators such as Oftel. OFCOM will present an annual report to the Secretaries of State which is then required to be laid before Parliament and published.

We believe that the size and responsibilities of OFCOM mean that Parliament should receive a report to provide a suitable basis for policy scrutiny. Our proposals for OFCOM's report are:

- OFCOM should be required to include in its report an account of how it has met its statutory objectives.
- OFCOM should describe how its actions relate not only to statutory obligations but to its own policy goals.

The intention is to secure an account of how OFCOM's activities relate to what it is supposed to do. This would enable informed debate to take place about the success of its efforts, the reasonableness of trade-offs and the allocation of its resources.

## **4. TRANSLATING POLICY INTO THE BILL**

### **4.1 Internet Regulation**

#### **4.1.1 General Principles**

We believe that the basis for the draft Bill's approach to the Internet should rest on two general principles. The first is well expressed in the Guidance narrative which states that 'it is not the intention for the draft Bill to extend regulation into the Internet' (Guidance notes clause 8.3.3.2). This approach, if correctly applied, would allow the Internet industry to continue to provide and develop valuable content and services for UK consumers and businesses.

The second principle is clarity. It is essential that all stakeholders can clearly identify from the outset what regulation will apply to what Internet activity and when. It should be made clear which Internet activities will be regulated purely through the implementation of the new EU Directives via the draft Bill and associated secondary legislation. We also seek clarity on which aspects will be considered to relate only to the 'infrastructure' or 'access' provisions of the draft Bill.

Internet content is, of course, already regulated by general criminal and civil laws (e.g. obscenity, incitement, libel, copyright). There is no point replicating such provisions in new legislation.

The fundamental problem is that the draft Bill uses concepts derived from traditional broadcasting which are defined in such a broad way that they could be held to apply, inappropriately, to Internet content. This section provides examples of such inappropriate consequences and indicates possible solutions. The areas covered are:

- Why it is appropriate to regulate broadcasting and the Internet in different ways,

- The definition of a 'television licensable content service', and,
- Other Internet related provisions.

The draft Bill should formalise current “light touch” regulation practise in the internet field. The present draft introduces new licensing requirements for internet content and facilities that will create burdens and uncertainty for both users and businesses, to the detriment of growth and uptake of the internet in the UK.

BT considers below the overall approach in translating policy into the draft Bill and the impact of the current drafting at a detailed level. BT, Yahoo and Nortel are carrying out further work in this area and will be jointly submitting separate additional information.

#### **4.1.2 Why it is appropriate to regulate broadcasting and Internet content in different ways**

The principle of 'technology neutrality' should not preclude different regulatory treatment of broadcast and Internet content where this is appropriate. Users (and Governments) have different expectations, responsibilities and degrees of control over content available from broadcasting and the Internet. The reasons that currently justify state regulation of broadcast content remain valid. The application of such rules to Internet content, however, would represent an unjustifiable interference with such rights as freedom of expression, receiving and imparting information without interference by public authorities. Moreover, such regulation would not address the real and reasonable concerns of citizens.

Traditional broadcasting involves one-to-many, tightly scheduled communication, planned in advance, and provided by a small number of easily identifiable organisations within the UK's jurisdiction. Signalling is one-way – from the broadcaster to the user's equipment to provide content to the user. Providers are state-licensed and users may exercise little choice of content after switching on the receiving equipment. It is, therefore, appropriate to make provision for standards of taste and decency, political neutrality, and devices such as the 9 o'clock watershed to provide protection against undesired content. Citizens expect such standards and provisions to be in place.

The Internet is characterised by one-to-one communication, no or minimal scheduling and dynamic planning. It is available from multiple, unlicensed sources, the majority outside the jurisdiction of the UK. There is continuing two-way signalling – from an internet “facility” to software in the user's equipment and vice versa. Users exercise free choice over content. There is no expectation that prescribed standards are in place from an external regulator, applying to the entire medium. The real anxieties about Internet content concern the ability of users to exercise control over what they, and their children, can access. Literacy in this particular media is the key to addressing the issue.

### **4.1.3 The definition of a 'television licensable content service' (Clauses 154, 155 and 238)**

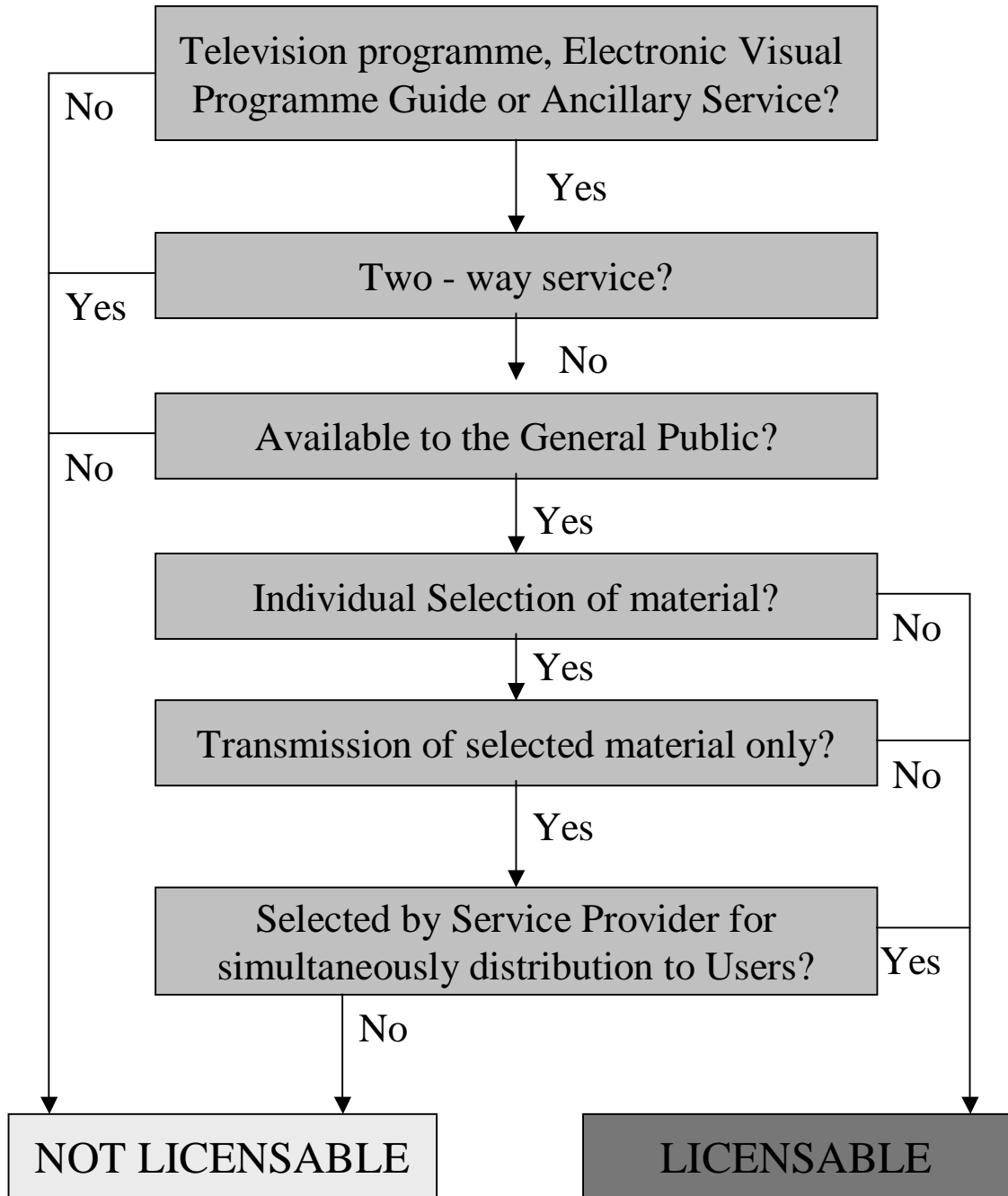
#### ***4.1.3.1 The significance of the definition***

The key issue for the treatment of Internet services in the draft Bill is whether or not they constitute a 'television licensable content service'. If they do, then significant areas of Internet business will be subject to broadcasting regulation. This is a complex idea where the basic definition ('television licensable content service' (Clause 154)), rests on the following series of other defined terms;

- 'programme' (Clause 257),
- 'electronic visual programme guide' (Clause 154),
- 'relevant ancillary service' (Clause 154),
- 'two way service' (Clause 155) and,
- 'available for reception by members of the general public' (Clause 238).

These defined terms constitute a series of tests – represented in the following flow diagram (next page) - that have to be applied to decide whether Internet activities are within the definition of 'licensable content' or not.

# Tests for a 'television licensable content service'



In practice, each test is difficult to apply and the overall result is that the most simple Internet content, such as web pages, plain TV listings or links pages could be deemed a 'television licensable content service'. The provisions could even be construed to classify hosting of third party content a licensable activity (under Clause 238.5 'distribution'). A table showing the results of applying these tests to various Internet features is reproduced at Annex A. It is unlikely that this result was intended. The following sections address the general approach taken to defining licensable content and the difficulties applying the present tests.

#### ***4.1.3.2 The approach to defining licensable content<sup>3</sup>***

The approach to defining licensable content should support the clear policy not to regulate the Internet set out by the Government. It should also lead to legislation which is straightforward to apply, giving clarity and certainty to the industry, and easy to enforce to protect the public interest.

Although the draft Bill should aim to be technology neutral wherever possible, it should also recognise real differences between media and associated delivery mechanisms. The Government should be clear whether it intends to make licensable *any* content that comes into the home via a television monitor, whether it has been broadcast or been retrieved from the Internet, because of current consumer expectations associated with passive viewing 'in the living room'.

The Government's policy statement<sup>4</sup> indicates the activities that require licensing;

*...the new licence should be required for all television-like services, that is those that are packaged as linear channels and distributed simultaneously or virtually simultaneously to viewers. (8.3.3.1)*

The current approach of the draft Bill is to make virtually all content licensable, with a few narrowly defined exceptions. As mentioned above, this is implemented by a series of cumulative tests, some of which, in the search for precision, may be difficult to apply in practice and provide answers that are anomalous<sup>5</sup>. This would be appropriate if there were few exceptions and many activities that ought to be licensed. It is suggested that the balance is the other way round once Internet activities are taken into account. Accordingly, we suggest that consideration is given to a different approach based on defining virtually all content as *not* being licensable, and making a few exceptions to bring within the licensing framework the television-like services packaged in linear channels<sup>6</sup> the Government wishes to regulate.

This would be backed up by a reserve power to include new broadcast services if certain criteria are met. This would be on similar lines to the proposals in Clause 156 of the draft Bill, supplemented by a duty placed on the Secretary of State to consult

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<sup>3</sup> Our comments concentrate on visual licensable content, but many of the points are also broadly applicable to a consideration of internet and "radio licensable content service"

<sup>4</sup> *The draft Communications Bill – the Policy*, Cm 5508-III, May 2002.

<sup>5</sup> Variations in the particular way a single service (or "package" of services) is offered will result in some variants being characterised as licensable and others as not being licensable (see Annex A).

<sup>6</sup> The definitions and lists in the recently released draft provisions on must-carry and must offer could be imported into this Part of the draft Bill as the basis for defining licensable content.

with OFCOM - and for OFCOM to consult fully with industry - before making modifications to these provisions.

We believe this approach would be simpler and easier to apply. It would create a regime in which services which should obviously be specially regulated (as traditional broadcast content) were licensed. The following section examines the problems applying the definitions currently proposed in the draft Bill which have given rise to our alternative proposal.

#### ***4.1.3.3 Problems in the application of the draft Bill's definitions***

This section examines the key definitions and shows the breadth of possible interpretation of clause 154.

##### ***(a) 'television programme' and 'programme'***

In clause 257 of the draft Bill 'television programme' is defined as

*'...any programme (with or without sounds) which consists of moving images or still images or of legible text or of any combination of those things'*

This is a very broad definition which could encompass many things far removed from the conventional meaning of the term. Any web-page, any attachment, any link (icon or URL), advertising, cookies in visual form, could fall within it. Moreover, the definition of 'programme' in clause 257 further extends the scope of the idea by stating that it;

*'includes any advertisement, and in relation to a service, anything included in that service'*

This could extend the meaning of 'programme' to include any web page containing advertising.<sup>7</sup>

It is felt that if the Government wishes to follow the current approach of the draft Bill, consideration should be given to a narrower definition of 'programme' to make it clear that only traditional broadcast television content is intended.

##### ***(b) 'electronic visual programme guide'***

As a 'television programme' may be simple text, the definition of 'electronic visual programme guide' in clause 154 (3) appears to be broad enough to catch links pages, search engine facilities and search results, and web services that collate and present content produced by others for users to select. It may even extend to advertising where users may be directed to another site by clicking on a link.

Again, if the current approach of the draft Bill is to be maintained, we would urge that a narrower definition is framed to exclude the possibilities outlined above.

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<sup>7</sup> It is also worth noting that although the term 'programme service' is employed in clause 154(3) the definition of it provided in clause 257 does not extend to Part 3 of the draft Bill – where it is used.

***(c) 'relevant ancillary service'***

Clause 254(3) (b) extends this definition to;

*'...services which are not advertising but which-*

*(i) are ancillary to any such programmes and relate to their contents; or*

*(ii) relate to the promotion or listing of such programmes'*

It is not clear what types of services are envisaged to fall within the ambit of this definition and how broad 'ancillary' is intended to be. As drafted it might extend to content hosting facilities, or even domain - name services. There is also potential overlap between this definition and the definition of 'electronic visual programme guide'.

***(d) 'two-way service'***

A crucial test to determine if a service is licensable is whether it is a 'two-way service' within the meaning of clause 155 (3). If it is two - way, it is not licensable.

Unfortunately, the definition of 'two-way service' in clause 155(4) is difficult to apply with certainty, primarily because the scope of clause 155(4)(b)(ii) is not clear. This states that two - way services;

*'are not signals sent for purposes relating only to the contents or operation of the service'*

It is assumed that simply turning on a TV or changing channels via a remote control switch do not constitute a 'two-way service' – beyond that we are unsure. For example, services that are highly interactive and clearly 'two-way' in the ordinary sense of the term, such as games playing, may also be deemed not to be 'a two way service'. At a technical level a player's instructions may consist of no more than 'signals sent for purposes relating only to the content or operation' of the gaming service. We consider it to be unlikely that the intention of the draft Bill is to render a gaming service (single player or multiplayer) outside the exemption for 'two-way services' and therefore 'licensable content'.

If the overall approach of the draft Bill is to be used, it is suggested that the 'two-way service' definition needs to be amended so that the test is easier to apply and it is clear that services involving high levels of interactivity such as gaming are clearly within it. Clearer use of the concepts of 'on – demand' and 'interactive' would also improve the definition.

***(e) 'available for reception by the general public'***

In the draft Bill, the primary route to exclude Internet services from being 'licensable content' is through the definition, at clause 238, of services that 'are available for reception by members of the general public'. The drafting, however, is difficult to apply.

There is a core definition (clause 238 (1)), cumulative exclusions from it (clause 238 (3) and 238 (4)) and then an exception to the exclusions (clause 238 (5)) that brings some excluded activities back within the scope of the definition.

The overall approach is to capture virtually any conceivable service as being 'available for reception by the general public' (the core definition) and then provide narrow exemptions.

*(i) 'available for reception by the general public' – the core definition*

It is not obvious that the core definition excludes content accessible through the Internet and the facilities which enable users to view such content. Is content accessed by a user from the world-wide web actively '*made available*' by an Internet Service Provider (and therefore within the core definition) or is it merely accessible to users (and therefore outside it)? Is 'reception' confined to conventional TV reception from transmissions that are broadcast on airwaves or does it extend to any form of content made visible or audible on any apparatus irrespective of the mode of distribution?

*(ii) Conditions for exclusions from 'made available to the general public'*

The application of each of the conditions set out in clauses 238(3) and 238(4) is limited. Clause 238(3) applies **only** if the service is 'confined' to a user choosing and receiving selected material. Clause 238(4) applies if what is sent to the user is **only** in response to the user's selection.

On clause 238(3) if the 'selection and receipt service' is 'packaged' alongside other service offerings from a supplier it cannot fall within the condition, irrespective of the nature of the additional services, such as helpdesk, access, e-mail. It is, and will continue to be, common for multiple services to be available in a 'package'<sup>8</sup>.

It is also common for Internet content to contain advertisements (usually in banner or pop-up form) and for web-sites to send cookies (session-based or persistent-state). Such cookies are not usually sent simply in response to a conscious request by a visitor to a site for a particular selection of content. How do clauses 238(3) and 238(4) apply if advertisements and cookies are deployed (by the site-owner or third party sites that are accessible from an initially visited site) when a selection is made?

*(iii) The exceptions to the exclusions*

On clause 238(5), it is not clear what activities this definition is intended to cover, and so bring back into the definition of 'available for reception by the general public'. Is there significance in the use of the term 'distributed' in clause 238(5) when the term 'transmitted' is used in clause 238(4)(b)?

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<sup>8</sup> For example BT Openworld's Dotmusic broadband site currently: updates on the latest music charts and pop and rock news; shows your favourite artists' videos; lets you listen to artist interviews; read reviews of singles and albums; chat to other fans online; has a gig guide; has specific music genre sections, and shopping area for tickets, videos, DVDs and CDs.

The limits of 'virtually simultaneous' are also not clear. Internet content providers may decide to create interest by means similar to traditional broadcast experiences. Users may be invited to click onto the site at a particular time to hear the latest single from a popular musician. Moreover, the nature of the content people wish to see can create near-simultaneous selection of the same material by a large number of users – football scores during the World Cup is a recent example. When using the Internet, each visitor to the site interacts with it individually, and what takes place in these examples will be numerous one-to-one selections of content that are made very close in time. This is different in kind from traditional broadcasting and this difference should be treated accordingly in new legislation.

We do not feel that Internet content obtained through multiple one-to-one interactions that occur very closely in time is equivalent to traditional, 'one-to-many' broadcasting. The distinction, we feel, should be made clear if such a test is to continue to have a role in the draft Bill.

#### **4.1.4 Other Internet Related Issues**

##### ***Liability for third party content; "Information Society Services" generally***

The draft Bill does not contain any cross-reference to the e-Commerce Regulations, which transpose the European e-Commerce Directive,<sup>9</sup> in particular the liability provisions for intermediaries. Given that the e-Commerce Directive explicitly absolves intermediaries of all liability for the transmission, caching or hosting of third party content (provided certain conditions are met), we would expect the draft Bill to maintain explicit consistency with the Directive and the UK Regulations.

At a general level, any proposed licensing/authorisation provisions in the draft Bill must also be consistent with EU requirements relating to "Information Society Services"<sup>10</sup>. These requirements constrain the extent to which a Member State can impose regulations such as licensing /authorisation schemes in respect of "Information Society Services" (in order to ensure that barriers to the provision of such services in the internal market are not readily created by individual Member States). It is not clear that the present drafting is compatible with such requirements.

##### ***The role of the Content Board***

We believe it would be inappropriate, as well as impractical, for the Content Board's remit to extend to Internet content. It would also conflict with the Government's commitment in the Guidance Narrative if that were to happen. We appreciate that Clause 18 has to be read in conjunction with Clause 238, but an explicit sub-clause exempting the Internet would be a useful clarification.

Regarding the composition of the Board itself, we would suggest that it includes representatives of all industry sectors covered by its remit.

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<sup>9</sup> The E-Commerce Directive ( 2000/31/EC)

<sup>10</sup> The Transparency Directive ( 98/34/EC as amended by 98/48/EC), Article 1(2) and the E-Commerce Directive, Article 2(a) and Recital 17.

## 4.2 Spectrum

With regard to certain spectrum issues, the draft Bill is best viewed as work in progress. Much is still to be decided and the Policy Document makes clear that the Government intends to revise the draft Bill when the policy has been finalised.

At this stage, BT has confined its comments to three areas:

- Recognised Spectrum Access (RSA) is a new concept that will, amongst other things, enable OFCOM to represent the interests of those operators who may not otherwise have a "legitimate" voice in the UK because the signals originate outside the UK even though the interested UK customer base may be quite strong. This seems an entirely clear aim. However, the concept overlays the existing use/ownership of the spectrum and as such we cannot see how an auction or other competitive process would have any coherent place in enabling an organisation to secure such representation.
- Again in relation to RSA, the current drafting raises uncertainty about the policy relating to spectrum users where emissions are from within the UK but where no Wireless Telegraphy licence is required (licence exempt). It could be interpreted that users could be expected to register an interest in such spectrum and be required to bid for its use. It seems probable that this interpretation is unintentional and if so, we suggest that the Bill be clarified to positively exclude Wireless Exempt spectrum from RSA. There has been much public debate on licence exempt spectrum and we believed that the statement by Stephen Timms on 10th June 2002 had clarified matters: it would be regrettable if the Bill were to re-introduce uncertainty.
- The traditional interpretation of a satellite circuit is one that comprises both an uplink and downlink. However, the draft Bill may require a UK based operator to register the downlink in addition to the uplink because the "emission" is from outside the UK (i.e. from the satellite). In our opinion this would be "double accounting" and should neither be necessary nor a possible interpretation of the new regulations.

## 4.3 The Implementation in the UK of the European Union Communications Directives

The Government is, of course, under a Community obligation to implement directives from the EU correctly and must therefore ensure that the draft Bill does so. There are, however, a number of respects in which the draft Bill does not correctly implement the new EU Directives. For example:

- Clause 67(2) of the draft Bill says that OFCOM *may* carry out further market reviews after the initial reviews - Article 7(3) of the Access & Interconnection Directive and Article 16.3 of the Universal Service Directive say that National Regulatory Authorities *shall* carry out further reviews "periodically";
- Clauses 64(2) and 64(3) of the draft Bill say that OFCOM "shall have regard, to such extent as they consider appropriate" to the Commission Recommendation

and Guidelines - Articles 15 and 16 of the Framework Directive say that OFCOM shall take "the *utmost account*" of these documents.

Annex B to this submission sets out BT's detailed comments on the aspects of the draft Bill which relate to the implementation of the EU Directives, highlighting the clauses which in our view are not consistent with the corresponding provisions of the Directives or where consistency could be improved.

## **5. LEGAL**

### **5.1 Checks and Balances**

The general regulatory regime envisaged by the draft Bill is more mature and sophisticated than the present Telecommunications Act 1984. BT welcomes the intention behind the draft Bill, to focus regulation only where necessary, to make it technology neutral, and to give OFCOM the powers necessary to police a converging industry. We note however that the draft Bill introduces a significantly stronger enforcement regime in relation to electronic communications than exists under the current legislation. In particular it proposes powers for OFCOM to impose penalties for breaches of authorisation conditions and suspend or restrict operators' entitlement to provide networks or services. It would also give third party rights to sue immediately for a breach of condition. Such significant powers need to be accompanied by an adequate system of checks and balances not least to provide the certainty necessary for sustained investment. The draft Bill does not contain such a system.

#### **5.1.1 Protections**

Part 2 of the draft Bill contains a number of provisions entitling OFCOM to impose penalties, in particular for breaches in relation to notifications and charges, contraventions of conditions, and of the communications code, and breaches of information requirements. Although these are not criminal offences as such, the penalties are akin to criminal penalties, in so far as penalties which OFCOM may impose are intended to be both penal and a deterrent. Accordingly, we believe they should attract the protections applied to those accused of criminal offences by Articles 6 and 8 of the European Convention on Human Rights.

In addition, the draft Bill contains a number of specific criminal offences, including providing an electronic communications network or service in breach of a suspension or restriction of the entitlement under the general authorisation.

In our view, the draft Bill may not be consistent with Article 6 in at least two respects:

- instead of a presumption of innocence until guilt is proved, the opposite is the case: the process under which steps to comply and remedy the consequences are to be taken during the period specified by OFCOM for making representations in a notification about an alleged contravention amounts effectively to a presumption of guilt;

- there is no protection against self-incrimination during the course of an OFCOM investigation. We suggest that a provision be included in the Bill equivalent to section 174(2) of the Financial Services and Markets Act 2000, which applies not only in relation to criminal offences under the Act, but also in relation to the power to impose penalties in cases of market abuse under section 123 of the Act. In this connection, we also note and concur with the concerns expressed by the House of Lords and House of Commons Joint Committee on Human Rights in its Nineteenth Report (on the draft Bill) of Session 2001-2 on this issue, and support the recommendations set out in paragraphs 24 and 25 thereof.

## 5.1.2 Process Issues

### 5.1.2.1 Processes in relation to contraventions of conditions

- (a) The process in relation to contraventions of condition (this is the most significant type of contravention: the process in relation to other contraventions is similar) is set out in Clause 74. Under Clause 74(1), where OFCOM, has 'reasonable grounds to believe' that there has been a contravention, it may issue a notification. This will allow the provider a period of at least a month (less in an urgent case) to take the opportunity to make representations, comply with the condition and remedy the consequences.
- (b) Under Clause 75, where OFCOM is satisfied that the provider has committed the contravention and has not, during the period allowed under the notification, taken the steps considered by OFCOM as appropriate to comply and remedy the consequences, it can issue a legally enforceable enforcement notification ;
- (c) In addition, or alternatively, under Clause 76, where the provider has committed the contravention and has not during the period specified in the original notification taken the compliance/remedy steps considered by OFCOM to be appropriate, OFCOM may impose a penalty of up to 10% of turnover (clause 76).
- (d) This means that:
- a provider in receipt of the Clause 74 notification must second - guess what steps OFCOM would consider 'appropriate' to comply/remedy the breach, and
  - a provider must in any case take steps to comply/remedy, during the period he has been given to make representations, or risk enforcement action and/or having a penalty imposed, and
  - the provider must do all this, not on the basis of a conclusive finding of guilt, but on the basis of 'reasonable grounds to believe'.

We believe this process to be seriously flawed, and we do not believe that it represents the process intended by Article 10 of the Authorisations Directive. At the very least, that Article must envisage a process (which would include the making of representations) resulting in a finding of non-compliance, which would precede any obligation to take steps to comply/remedy the consequences.

### **5.1.2.2 *The process in urgent cases***

In relation to urgent cases (clause 78), the process is seriously defective in two respects:

- Where OFCOM issues a clause 74 notification ('reasonable grounds to believe') and has 'reasonable grounds for suspecting' that the case is urgent (Clause 78(1)(b)), it can, amongst other things, make a direction under Clause 78(4) that the provider's entitlement to provide electronic communications networks or services is suspended or restricted. Breach of the suspension or restriction is a criminal offence. We believe that 'reasonable grounds' to believe/suspect is an inequitable basis for the creation of a criminal offence. We propose that the suspension or restriction of the entitlement should in this case not be a criminal offence under Clause 80, but should only be enforceable by civil proceedings.
- The direction in an urgent case to suspend or restrict the provider's entitlement can under Clause 78(7) include a condition requiring the provider to pay compensation to his customers for loss suffered by them as a result of the direction. This means in effect that on the basis only of two sets of 'reasonable grounds', of which OFCOM will be the judge, OFCOM can impose what amounts to a financial penalty on providers. This falls far short of an acceptable standard of proof. We propose that Clause 78(7) should be deleted and that any failure to provide a network or service as a result of the direction should be left to be dealt with on the basis of the contract between the provider and the customer.

### **5.1.3 Third Party Rights**

Clause 81, providing for third party rights to sue for contravention of a condition, raises two issues:

- there are many potential contraventions which are simply not susceptible to determination by a court (either as a matter of fact or of law), but are regulatory decisions which can only satisfactorily be referred to and made by the regulator. Examples would include whether alleged discrimination was 'undue', whether a preference was 'fair', whether a cross - subsidy was 'fair', or whether prices were 'cost oriented' or complied with complex price control rules.
- In spite of the Government's express intention to avoid double jeopardy the right of a third party to sue for breach nevertheless creates a situation of double jeopardy, since, even though OFCOM may not have found the provider to be in breach, the complainant can have a 'second bite of the cherry' in the courts. Furthermore, issues can arise about the status of any finding, of guilt or otherwise, on OFCOM's part, and about the position where, at the same time a third party is bringing proceedings, the provider is pursuing an appeal in the Competition Appeals Tribunal.

We propose that Clause 81 should be removed from the Bill, and that civil liability to third parties should only be incurred for failure to comply with the steps specified in an enforcement notification under Clause 75.

#### **5.1.4 Penalties**

Under Clause 77, the maximum level of penalty for contravention of a condition is set at 10% of turnover over a maximum period of 12 months. Since the power to impose a penalty is backed by a power under Clause 79 to suspend or restrict the provider's entitlement for repeated contraventions where penalties have not worked, it is felt that this limit is too high. We propose that it be set at lower level, but one which still has punitive and deterrent effect. Companies in the electronic communications field tend to undertake a wide variety of activities in different markets or market sectors, and we suggest that the approach currently taken by the European Commission and the Office of Fair Trading, of relating penalties to the turnover of the company in the activity in question, as opposed to the company's total turnover, would be appropriate and proportionate.

#### **5.1.5 Criminal Offences – Individual Employees**

The draft Bill is unclear whether the provisions relating to criminal offences in relation to breaches of information requirements extend to individual employees of a communications provider. Since the draft Bill already includes the normal statutory provision under which criminal offences by a body corporate can be laid at the door of any director, manager, secretary or similar officer who connives at the breach, it would seem disproportionate for the draft Bill to include a further provision under which there can be individual personal criminal liability, and this should be clarified.

#### **5.1.6 Criminal Offences – OFCOM's Roles**

OFCOM's functions include, under Clause 1(5)(a), the power to institute and carry on criminal proceedings for any offence relating to matters for which it has functions. For example, OFCOM may have investigated an alleged contravention, found the operator guilty and exercised its powers to suspend or restrict the operator's entitlement to provide networks or services, whether for repeated contraventions (Clause 79) or because the matter is urgent (Clause 78). If the operator breaches the suspension or restriction (a criminal offence under Clause 77) the regulator, namely OFCOM, will be the person to make the decision whether to prosecute, and will then be the prosecutor in a criminal case in which they will be the principal provider of evidence and producer of witnesses, and would be relied on by the court as an expert witness. We believe that this type of situation creates a significant potential for conflict or distortion of judgement in relation to the bringing and conduct of any criminal proceedings for breach of the suspension of entitlement, and that it is wrong in principle for OFCOM to have this dual role. We propose that prosecutions in this type of situation should only be instituted and conducted by the Director of Public Prosecutions.

### **5.2 Repeals and Consolidation**

The draft Bill proposes the repeal of more than half the provisions of the Telecommunications Act 1984, with significant amendments to the remaining provisions. Similarly large parts of the Broadcasting Acts 1990-96 are proposed for repeal, with widespread amendments to the remaining provisions, and the Wireless Telegraphy Acts 1949-98 receive similar treatment.

It seems inappropriate, in the light of convergence and the creation of a new regulatory structure for the communications industry, inconsistent with the principle of technological neutrality, and conducive only to 'stove-piping' within OFCOM, for regulation to continue to be dealt with in part on the basis of legislation which relates to the pre-OFCOM distinctions between telecommunications, wireless telegraphy and broadcasting, and where the draft Bill adopts the terminology of 'electronic communications' and 'spectrum use'. Furthermore, the heavily amended and truncated remaining statutes will be extremely difficult to use and apply. To that extent, the draft Bill fails to achieve the transparency that is intended to be a hallmark of the new regime.

We suggest that it is necessary, and consistent with the philosophy behind the draft Bill, to repeal the current statutes completely and consolidate their remaining provisions, to the extent that they cannot be accommodated in the Communications Bill, in another Bill.

## **6. STRUCTURES and RELATIONSHIPS**

### **6.1 The Consumer Panel**

We believe the Consumer Panel has a crucial role to play in the system to be established by the draft Bill. Although the essential purpose of the system is to protect the interests of consumers there will be many other voices competing for OFCOM's attention. Providers will have arguments to make. Legal and economic arguments can acquire a momentum of their own almost irrespective of the impact on consumer welfare. In this environment the Consumer Panel has the vital role of ensuring that consumer priorities are kept at the forefront of OFCOM's mind.

It is inevitable that a degree of creative tension should exist between OFCOM and the Consumer Panel. The Panel may, from time to time, criticise OFCOM for pursuing policies whose contribution to consumer welfare may be difficult to perceive, however sound its basis in economic theory, or may require an unduly long time to take effect. As the Consumer Panel must be prepared to adopt such positions if it is to do its job effectively, we believe measures to protect its independence are appropriate. In particular:

- its members should be appointed directly by the Secretary of State, not by OFCOM, and
- the Consumer panel should have its own budget and support staff. No provision for these is made in the draft Bill.

### **6.2 The proposed powers of OFCOM and their relationship to the powers of the Office of Fair Trading and other agencies**

At the core of the draft Bill is the elimination of duplication and overlap between multiple regulators. BT supports this fully. In the interests of avoiding the problems associated with duplication and overlap we believe that careful consideration should

be given to the issues arising from the proposal for full concurrency of competition law powers between OFCOM and the Office of Fair Trading (OFT).

The converged field that the draft Bill deals with represents a major sector of the economy, which significantly affects the UK's population at large. The Government's apparent underlying assumption that competition and consumer matters in this area should be subject to a "niche" regulator, OFCOM, and not to the regulator for the economy generally, namely the OFT, requires serious examination and consideration of the consequences. Similar issues arise in respect of data protection.

It is important that there is a clear statement of the respective roles of OFCOM, the OFT, the Information Commissioner and other agencies. This would facilitate effective transparency, predictability, impartiality and clarity. All stakeholders need to be able to predict accurately and in advance which specific regulator will intervene on particular matters. Failure to address duplication concerns effectively leaves the threat of multiple jeopardy in place.

The roles of OFCOM and OFT need to be clarified to reflect more accurately the market analysis procedures set out in the new EU Directives. The Framework Directive, at Article 16, requires Member States, where appropriate, to ensure that this analysis is carried out in collaboration with the national competition authorities. An approach that engages the OFT in market analysis procedures is more consistent with the movement towards *ex post* competition law featured in the new EU Directives. The Office of Fair Trading's involvement at an early stage in market analysis and market definition may serve to reduce uncertainty and the risk of double jeopardy. Collaboration between OFCOM and the OFT in relation to market analysis is highly desirable and appropriate. We comment further on this in Annex B.

## **6.3 OFCOM's Operating Costs and Charging Structures**

### **6.3.1 Payments for numbers**

The draft Bill includes provisions for persons to whom numbers are allocated to make payments to OFCOM. Nothing is said about the purpose to which such payments are to be applied. BT believes that the existing number conservation measures have been successful and our understanding is that there is no scarcity of numbers that needs addressing through any charging mechanism. Furthermore, there are a significant number of numbering initiatives currently being instigated at both national and EU levels that are already likely to add to the costs of access operators. Charging for numbers would be an added burden.

### **6.3.2 OFCOM's operating costs**

The draft Bill proposes a structure that should bring increased efficiency in regulation. As competition in communications increases, the need for specific economic regulation should also diminish. Both these developments should lead to reduced costs, and, therefore, reduced charges to providers. The National Audit Office should monitor OFCOM to ensure that cost savings are reflected in lower charges.

### **6.3.3 The proceeds from penalties**

Nothing is said about how penalties paid to OFCOM are to be applied. A serious penalty under Part 2 of the draft Bill could easily amount to more than the costs incurred by OFCOM under that Part. We believe that it would be inappropriate for OFCOM to benefit from windfall payments. On the other hand, it would be equally inappropriate for OFCOM, in calculating how charges should be determined in any particular year, as required by Clause 29, to take account of possible “income” from fines. To do so might cause an appearance of prejudice, if it subsequently appeared that OFCOM were imposing a penalty in a particular case effectively to meet their budget obligations.

### **6.3.4 OFCOM and Cost Recovery**

Article 12 of the Authorisations Directive places clear limits on the charges that National Regulatory Authorities may levy on providers of electronic communications networks and services. Apart from charges for the use of frequencies and numbers, which may be set so as to reflect the need for optimal use of these facilities, charges must:

- cover only the administrative costs incurred in the management, control and enforcement of the general authorisation and other conditions of entitlement;
- be imposed objectively, transparently and proportionately.

In addition, National Regulatory Authorities must publish a yearly overview of their administrative costs and the total sum collected.

Article 12 is reflected in Clause 29 of the draft Bill and requires OFCOM to adopt a statement setting out the principles according to which it will fix administrative charges. In BT’s view this statement, and the yearly overview of administrative costs required by Article 12, must;

- give sufficient detail for providers to be confident that they are only funding the appropriate OFCOM activities. For example, costs relating to OFCOM’s Competition Act or Enterprise Bill activities should not be recovered through these charges.
- Additionally, the sectors for which OFCOM will be responsible should be required to fund OFCOM’s costs only to the extent to which those costs are relevant to those sectors.

The same principles and procedures should apply to the initial costs of setting up OFCOM which will be recovered over a number of years; only set up costs relating to OFCOM’s functions as a National Regulatory Authority under the new EU Directives should be borne by electronic communications providers.

