**Response to Ofcom's consultation on criteria for delegating functions to a co-regulatory body**

## 1 Introduction

This is a personal response to Ofcom's consultation. It builds on long experience, mainly of supporting consumer interests, in and around industry bodies with some co-regulatory or self-regulatory characteristics. Communications industry bodies I have been involved with include ICSTIS, Internet Watch Foundation (with visibility of ICRA), Comparable Performance Indicators Forum, National Code and Number Change policy and implementation groups, Network Interoperability Consultative Committee User Panel, Nominet and the Mobile Broadband Group. I also have some experience of financial sector regulatory arrangements (for example, from being a public interest member of various LAUTRO committees).

In addition I have taken part in a large number of Oftel-led initiatives involving both consumer and industry representatives, for example the Numbering Advisory Group, Universal Service working groups leading up to the 1997 Statement, Number Administration working groups in 1999-2000, and the continuing Consumer Issues Task Group on implementation of Wholesale Line Rental and Carrier Pre-Selection. These have all brought industry expertise into formal regulation.

## 2 Meaning of terms used

The consultation paper says little about how it is using the important terms "self-regulation" and "co-regulation". The main point given is that delegating formal functions to a self-regulatory body (while retaining back-stop powers) is an example of co-regulation. The Communications Act does not appear to refer to co-regulation, although it refers a few times to self-regulation. In particular:

- One of the factors to which Ofcom must have regard in performing its duties is *the desirability of promoting and facilitating the development and use of effective forms of self-regulation* (S 3(4)(c)).
- Ofcom must review its performance to avoid imposing or maintaining unnecessary burdens. In doing this, it must have regard to how far its aims can be fulfilled by *effective self-regulation.* Determining effectiveness of self-regulation must include consideration of *sufficient independence* (of the person administering procedures, from the persons subjected to the procedures) and *adequate funding* (S 6).
- In the context of failure by public service broadcasters to fulfil their public service remit, *self-regulation may be replaced by detailed regulation*. Self-regulation here refers to each broadcaster's own monitoring of its own performance in relation to its own statement of programme policy (S 265-270). This is plainly a rather different idea from the earlier references and is not mentioned in the consultation paper.

In this response, "self-regulation" is used to mean regulation of more than one company's activities by an industry body separate from Ofcom, in whose affairs Ofcom has no formal standing. "Co-regulation" means self-regulation under Ofcom's oversight, and where Ofcom or another body has backstop enforcement powers (to be used only in exceptional cases). "Formal regulation" means regulation by Ofcom's own staff using Ofcom's own powers.

Of course, many variant and hybrid arrangements are also possible. There is plenty of scope for misunderstanding about terminology among people from the different sectors of communications now combined under Ofcom.

## 3 General comments

This section responds to consultation questions 1 and 4:

Question 1: In which specific areas might co-regulation have a role to play?
Question 4: How should self- and co-regulation be developed by Ofcom in the future?

### *A balanced view of co-regulation*

The Act is clear that any reduction in Ofcom's formal regulation must be replaced by *effective* alternative arrangements. Ofcom itself is committed to an evidence-based approach. However, general benefits of co-regulation are outlined in 1.3 of the consultation document without reference to any factual base, and with no discussion of drawbacks of co-regulation. The discussions referred to in sections 2.1 to 2.3 should be seen as a transitional input, while Ofcom is finding its feet. They should be supplemented as soon as possible by broader-based, more objective study.

The lack of mention of drawbacks gives an impression that expectations of co-regulation, let alone of self-regulation, may be over-optimistic. Of course, formal regulation also has drawbacks, and decisions about what is best will vary from case to case. But the current favour for self-regulation pays little regard to its realities.

In this industry, with many big companies and fast changing technology, industry holds all the cards. It has the money, the expertise, and the inside knowledge. Pure self-regulation amounts to handing over control as well. Consumers are likely to lose their influence, and smaller industry participants may also do so. Co-regulation keeps some control in the public domain.

The two main benefits of successful co-regulation mentioned in the document are:

- *Co-regulatory schemes have access to industry expertise which is unavailable within the regulator*. True, but the regulator can bring in industry expertise, either through voluntary working groups such as the Oftel ones mentioned above, or through consultancy (if voluntary industry input is inadequate or biased). On the other hand,

in a co-regulatory scheme, it may be hard to challenge the input of industry experts, although it plainly risks being biased.

- *Co-regulation increases incentives for participation and compliance.* This is only true if the alternative (presumably, formal regulation) both is a credible threat and would be significantly less favourable to the industry. By implication, the co-regulatory option must be more favourable to the industry. In theory, this need not mean that it is worse for consumers, but in practice this is often the case.

The consultation paper touches on a third often-quoted benefit of successful co-regulation, namely its ability to adapt quickly to changing circumstances. This is a real advantage which (for example) underlies much of ICSTIS' success. However, formal regulatory frameworks can also be designed to be flexible and adaptable[1]. The Act already envisages this approach, for example in Sections 52 and 53 on codes of practice for consumer protection.

The consultation paper does not discuss the costs of different approaches to regulation and alludes only briefly to funding. These issues are central and must be addressed. Of course, poor management and waste should always be avoided. But less expenditure on regulation is not always better than more expenditure (as Ofcom itself is well aware).

For each regulatory task, there should be an optimal resourcing level, matching efficient performance of what really needs to be done. A major perceived advantage of co- and self-regulation is normally that the required funds come directly from the industry and are not a charge on the public purse. But, especially in times of stress, the industry has a strong incentive to cut funding and/or participation to well below the levels necessary for effective consumer protection. This may be short-sighted, but it happens.

Self-regulation (and, to a lesser extent, co-regulation) entails other serious risks. It is all too easy for a self-regulatory body to do its real work "behind the scenes". It can claim that it has consulted or involved consumers, when in fact only a few people have been made aware of the issue and fewer still have expressed views. Industry representatives may plausibly (and often sincerely) claim that their proposals are in the public interest. Consumer representatives may acquiesce, having been fed selected information, and without either time or expertise to explore in more depth. And it is all too easy for a regulator to accept an outcome which the industry agrees on and nobody opposes, even though it may not be in the public interest.

### *Applicability of co-regulation*

It is hard to generalise about when co-regulation is likely to be a good solution. Much depends on history, and on the particular balance of commercial, legal and personal forces in each case. Plainly, adjustments to a well-established working model such as the ASA are a very different issue from setting up new bodies.

What is best for consumers will depend on many factors, including the size and nature of the public affected by the activity to be regulated (businesses may need less protection

[1] The recent Demos publication *The Long Game* (available at www.demos.org.uk) discusses this theme at length. There it is termed "regulating self-regulation".

than residential consumers), and the risk to any individual affected by the activity (compare being offended by an advertisement with financial loss or bodily injury). What will work likewise varies, among other things with the industry's sensitivity to public opinion and its political exposure.

Co-regulation (or some hybrid) may be the best approach where there is a large volume of day-to-day work and/or operational detail. For example, a joint consumer/industry group could have front-line responsibility for oversight of the Section 52 codes of practice.

An assessment using criteria like those in the consultation paper should be supplemented by public consultation on each new proposal (as is currently being done for broadcast advertising), informed by consumer research.

Despite the drawbacks mentioned above, self-regulation will have a valuable role in certain situations, in particular:

- Where the issues in question are of a genuinely technical nature, without public interest implications (e.g. many NICC issues). Informed oversight will still be desirable to ensure that public interest issues do not slip through.
- As a first resort to handle new problems, until alternative machinery is established. This was the history of ICSTIS, and could be the future of the current Mobile Broadband Group initiatives.
- In cases of divided, unclear or missing formal responsibilities. Many Internet issues fall into this category. To be useful, regulation of Internet-related activities generally requires international co-operation. This may well be furthered by self-regulatory approaches, with official support. As the converged communications regulator, Ofcom seems the natural focus for Internet regulatory issues (which are currently scattered across government departments).

## 4 Comments on Ofcom's proposed criteria

The following comments are offered in response to consultation questions 2 and 3.

Question 2: do respondents agree with the criteria set out for assessing whether a co-regulatory organisation is likely to be effective?

Question 3: What other criteria should be considered?

**Beneficial to consumers:** a good overall criterion. It should also state that the decision in favour of co-regulation will be made only after open and informed consultation.

**Appropriate scope for the proposal:** A criterion is missing here. Before responsibilities can be divided, the scope of the proposed activity must be defined. As far as possible, the scope should correspond to consumers' reasonable expectations as well as to the industry's convenience. (People are often surprised, for example, to find that IWF does not deal with pornographic spam). The option of an existing body taking on new responsibilities should be considered along with the option of forming a new body. Two or more bodies with similar scope but different membership (as we now have with Otelo

and CISAS) are confusing for consumers and make it harder for anyone to get an overall picture.

**Clear division of responsibilities:** When considering the body's governance, funding, codes and/or guidelines, Ofcom should look for an appropriate balance between prevention of problems and their cure. Putting resources into prevention calls for a long view, but is often worthwhile for both industry and consumers.

**Accessible to members of the public:** This important criterion should be split into two, one referring to access on individual matters (typically enquiries and complaints) and the other, access on policy issues. The former should include the requirement that the relevant rules or Code of Practice be presented in clear, user-friendly language. The latter deserves expansion beyond the current last sentence of 2.7, to ensure overall transparency of policies and outcomes (eg case reports) and genuine responsiveness to views expressed in public consultations.

**Awareness:** an additional criterion should ensure that adequate measures are in place to ensure consumer awareness of the co-regulatory body when they need it, and of their rights in relation to it.

**Independence from interference by interested parties:** It is certainly desirable to have a high proportion of independent members on the governing body. Other vital considerations are:

- The manner of appointment of all members of the governing body (preferably open, with independent participation on any selection panel);
- Whether the conditions of service on the governing body are likely to attract enough commitment from appropriate types of people. It is important not to rely only on retired or semi-retired professionals who can work for little or nothing, or on volunteers who turn up when it suits them.
- Arrangements for training non-industry members and keeping them abreast of industry developments.
- The role of industry members – are they there to support industry interests or to contribute their expertise in the public interest?

**Adequate funding and staff:** As mentioned above, this is critical and deserves fuller treatment. Funding must be adequate to cover what should be done, not just what the industry may easily agree to do. And (as touched on in the last sentence of 2.9) the mechanisms of access to funding are as important as the overall level. An independent governing body is powerless if individual funding decisions depend on industry agreement. Quality and manner of appointment are if anything more important for staff than for the members of the governing body.

**Near-universal participation:** The paper recognises that companies opting out of co-regulation may cause serious problems. This is an inherent defect of any voluntary system. The criterion should be expanded to cover how non-participation (and consumer detriment arising from it) will be handled. Any competition-limiting effects of the system must also be clearly understood.

**Effective and credible sanctions:** Tied to the last point, a particular test for the sanctions should be how they would affect a "marginal" company – that has joined the scheme only under duress, cares little about its image and would be happy to save the subscription fee.

**Auditing and review by Ofcom:** This criterion should be extended to cover the circumstances in which, and mechanism whereby, the threat of reverting to formal regulation could be exercised. Another aspect of performance that should be monitored is the governing body's record for timely decision-making. Delay may be a convenient technique for keeping up a façade of agreement.

## 5 Conclusion

Ofcom should have dedicated resource to keep track of and stay in touch with communications-related self-regulatory and co-regulatory initiatives. It should also be prepared to instigate and support the development of new initiatives as needed.

It should collect evidence on how such bodies are working, in order to improve its understanding of the different approaches to regulation. The conclusions reached following this consultation should be reviewed regularly in this light.

This part of Ofcom could also usefully help people involved in self-regulatory initiatives to be aware of each other's activities, so as to promote good practice and consistency. Links with related bodies in other countries will also be of great value.

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