

Criteria for promoting effective co and self-regulation

Statement

Statement on the criteria to be applied by Ofcom for promoting effective co and self-regulation and establishing co-regulatory bodies.

Contents

Section		Page
1	Executive summary	3
2	Introduction	4
3	Respondent's comments and Ofcom's response	6
4	Criteria	10
5	List of respondents	14

Section 1

Executive summary

1. The Communications Act (the Act) requires Ofcom in discharging its general statutory duties to promote the development of effective forms of co and self-regulation. For example, the Act set out statutory requirements for the approval of two existing co-regulatory schemes, the regulation of premium rate services and the arrangements for dispute resolution and customer redress from public communications providers.
2. Last year, Ofcom published a consultation document seeking views on the criteria which Ofcom will use in promoting effective co and self-regulation. Seventeen responses were received. There has been a separate consultation on the co-regulatory scheme proposed for broadcast advertising.
3. Respondents in general welcomed and supported Ofcom's proposals including the suggested criteria for promoting effective co and self regulation and establishing co-regulatory bodies. The potential benefit for consumers was recognised by all respondents. A range of issues were raised both in response to the four questions set out in the consultation document and with respect to the proposed criteria.
4. This Statement sets out Ofcom's response to respondent's views and explains the changes that have been made to the criteria as a result of the consultation. In summary the criteria are:
 - Beneficial to consumers;
 - Clear division of responsibility between co-regulatory body and Ofcom;
 - Accessible to members of the public;
 - Independence from interference by interested parties;
 - Adequate funding and staff;
 - Achieve and maintain near universal participation;
 - Adequate funding and staff;
 - Effective and credible sanctions;
 - Auditing and review by Ofcom (including key performance indicators)
 - Transparency and accountability
 - Consistent, proportionate and targeted regulation;
 - Appropriate appeals mechanism;
 - Ability to diverge from the above criteria where appropriate.
5. However, this Statement is not intended to fetter Ofcom's discretion to consider other criteria when deciding whether or not to transfer regulatory responsibilities to a co-regulatory body or to act otherwise where it is appropriate to do so.

Section 2

Introduction

What this document is for

1. In November 2003 Ofcom published a consultation document on promoting forms of effective co and self-regulation. Seventeen responses were received (a list of respondents is set out in Section 5). One example of the promotion of contracting out of Ofcom's functions to an industry co-regulatory body is in relation to the proposals for broadcast advertising. This is being undertaken under the Deregulation and Contracting Act 1994 and Section 1 (7) of the Communications Act.
2. Respondents in general welcomed and supported Ofcom's proposals including the suggested criteria. A range of issues were raised both in response to the four questions set out in the consultation document and with respect to the proposed criteria. Ofcom's response to these points is set out below and in Section 3. The criteria that Ofcom will apply are set out in Section 4. The criteria have been amended in light of comments from respondents.

Benefits of co-regulation

3. The potential benefit for consumers of co-regulatory bodies was recognised by all respondents. There was however, a range of views in relation to the extent of such benefits. Claire Milne commented that the consultation did not mention any drawbacks and that this might create over-optimistic expectations. Ofcom agrees that there may be potential drawbacks with all forms of regulation. This is why the criteria emphasises that a co-regulatory regime will only secure benefits if it is effective and fit for purpose.
4. Conversely, the Mobile Broadband Group noted that it was competitive markets rather than regulation that delivered most benefits to consumers. Their view is that Ofcom should first evaluate whether any regulatory action is required at all and if so the initial response should be to consider self-regulation (without back-stop powers) before considering other measures such as co-regulation. Ofcom is committed to light touch regulation and will consider all viable options when deciding whether to proceed with a proposal for a co-regulatory scheme.
5. Claire Milne and the Mobile Broadband Group also both commented on the need for Ofcom to distinguish between formal regulation, co-regulation and self regulation. The overlap between these areas was also referred to by other respondents. The Newspaper Society in particular contended that such distinctions were important and that there was a need to guard against regulatory creep from the co-regulatory sphere to areas of pure non-statutory self-regulation.
6. Ofcom recognises the need to maintain clear distinction between different forms of regulation. In "pure" self regulation, as noted by the Newspaper Society, there is a complete absence of regulatory oversight. The criteria set out in this Statement relate to co-regulatory initiatives such as the regulation of premium rate services by ICSTIS. The Advertising Association suggested that it could be useful if the terminology of the Pre-Legislative Joint Scrutiny

Committee was adopted. The Committee referred to 'accredited self regulation'. Co-regulation is 'accredited self regulation' by an independent regulatory body.

Existing co-regulatory initiatives.

7. The introduction to the consultation document explained the statutory process for the approval of the two specific co-regulatory schemes mentioned in the Act (the regulation of premium rate communications services and the arrangements for dispute resolution required from public communications providers). The application of co-regulation to broadcast advertising has been the subject of a consultation by Ofcom.

Section 3

Respondents' views and Ofcom's response

1. In this section there is a broad summary of respondent's views in relation to the four questions set out in the consultation document and respondent's comments on the criteria proposed by Ofcom.
2. The first question asked whether there were other areas where co-regulation might have a role to play. Most respondents had no suggestions, but considered that areas might emerge in the future. Some respondents had specific suggestions aside from broadcast advertising:
 - (a) BT stated that there could be two areas where co-regulation may be appropriate – consumer protection and technical or structural measures.
 - (b) The European Calling Cards Services Association (ECCSA) proposed that there should be co-regulation for the UK pre-paid calling card and pre-paid residential sectors.
 - (c) The Christian Broadcasting Council considered that co-regulation could be appropriate for religious broadcasting (including licence applications by religious bodies and complaints with a religious context).
 - (d) The Commercial Radio Companies Association said that there could be value in the radio industry making its own regulatory arrangements.
 - (e) Broadband Ventures considered that consumer complaints could be an area where co-regulation might be applied.
3. Ofcom is willing to consider all detailed proposals for schemes for co-regulation taking account of the criteria published in this document. As set out in the criteria, in order for a function to be transferred it is vital that the proposed scheme should have near unanimous participation. The support of one stakeholder or one section of the stakeholder community is unlikely to be sufficient on its own.
4. The second question asked respondents whether they agreed with the criteria. All respondents welcomed the criteria. Many respondents provided comments on individual criteria; these are detailed below. Otelo while agreeing that the criteria were useful commented that their effectiveness would be dependent upon the way they are measured; Ofcom agrees. ITV indicated that for industry the key concern would be striking the right balance between the backstop powers of Ofcom and those of the co-regulatory body; again, Ofcom agrees.
5. The third question was whether respondents considered that there were other criteria that should be considered. The majority of respondents were satisfied with the criteria and considered there was no need for additional criteria.
6. Otelo commented that any scheme should be able to demonstrate that it can deliver regulation in a way that is cost effective. Channel 4 argued that it should be a pre-requisite for adoption of a co-regulatory scheme that it was 'less costly' in its application. ITV contended that Ofcom should make clear the level of cost savings it expects to achieve from each co-regulatory scheme and this should be reflected in a reduction in the licence fee. Conversely, Claire Milne commented that less expenditure on regulation is not always better and that it

was important that industry should not cut costs 'below the levels necessary for effective consumer protection'.

7. Ofcom understands stakeholders' concerns about regulatory costs. There is already a reference in the criteria to approving the funding arrangements of the co-regulatory body. On the issue of costs, as a general principle regulation should only be applied where its benefits exceed the costs. Another major consideration is ensuring proper control over the costs of the regulatory body. Changes have been made to the criteria to reflect these principles.
8. While reducing and keeping costs under proper control is a key concern, there can however, be no absolute guarantee that the costs of the co-regulatory body itself will be less than those that would have been incurred by Ofcom. In addition, while there may be cost savings, it may not always be possible for there to be simple hypothecation such that it can be guaranteed that there will always be an automatic reduction in fees.
9. The subject of the performance of the co-regulator and industry participants was raised by a number of respondents. Otelo commented that there were no criteria relating to effective or efficient service delivery. QVC suggested the need for the addition of Key Performance Indicators (KPIs). The Christian Broadcasting Council suggested there should be a code governing the co-regulator's standards and those of its participants. BT said there should be criteria for effective measurement of the provider's compliance with the scheme.
10. The criteria already include reference to the possibility of agreeing standards of performance with the co-regulatory body. There is a need to ensure adequate service delivery and monitor performance and the criteria have been amended to include a specific reference to consideration being given to the setting of KPIs both for the body itself and for industry participants.
11. Another issue raised by a number of respondents was the need for additional criteria to clarify the governance of the co-regulatory body and its relationship with Ofcom. The need for effective governance arrangements, terms of reference or an MOU was raised by BT, UKCTA, Teletext and ITV.
12. The ASA while commenting that the criteria were sufficient made a number of suggestions about additional criteria that could be considered. Ofcom agrees that there is merit in suggestions such as the co-regulatory body maintaining a register of interests and this has been included in the criteria.
13. The fourth question was how co and self regulation could be developed in the future. The general view was that it was for the relevant industry rather than Ofcom to come forward with proposals for areas that should be subject to co-regulation. There were exceptions to this view such as the Christian Broadcasting Council which suggested that Ofcom should be pro-active and encourage co-regulation in areas such as religious broadcasting. Ofcom considers that in general, industry will be the initiators of co-regulatory schemes, particularly as set out in the criteria it is important that such schemes have majority industry backing if they are to be implemented successfully. There may however, be cases where Ofcom may wish to help facilitate the development of co-regulation.

Comments on the criteria

14. *Benefits of co-regulation.* This aspect of the criteria was agreed by all respondents. ICSTIS pointed out some other benefits including preventative action, speed of action, flexibility and improved decision making.
15. *Clear division of responsibilities.* In response to the question on additional criteria, a number of respondents including UKCTA, ITV and Teletext (as explained above) commented that it would be useful to incorporate the need for terms of reference between the co-regulatory body and Ofcom. This has been done under this heading. A further amendment suggests that any such terms of reference could deal with the particular concern of the Mobile Broadband Group that the issue of the independence of the body should be addressed explicitly.
16. *Accessible to members of the public.* BT raised the issue of customer confusion about the appropriate body for consumers to turn to when they have a complaint. An amendment has been made to the criteria highlighting the point that the body and the industry need to inform consumers about the remit of the body. Ofcom may also have a role in this area. The Mobile Broadband Group was concerned about the scope of public consultation and the reference to the need for consultation now relates to significant procedural changes and significant code changes.
17. *Independence from interference by third parties.* BT and the Mobile Broadband Group questioned the need for a reference in the criteria to it being 'appropriate for independent representatives to make up half to two thirds of a co-regulatory organisations' governing body'. This criterion matches the recommendation of the NCC and is considered to be best practice in order to guarantee independence. As the Advertising Standards Authority commented: an 'organisation which lack[s] the necessary separation from industry...will be ineffective'. That separation is guaranteed by independent representatives. No change to the criteria is proposed in relation to this recommendation.
18. A change has been made to add clarity to the issue of code setting and review. The Advertising Association in their response said that for advertising, 'the industry body responsible for the Code should be made up entirely of industry representatives'. In general, this varies from the practices adopted by other co-regulatory bodies (such as ICSTIS). Therefore, without being prescriptive (and it is always the case that if there are good reasons the criteria allow departure from any recommendation) Ofcom considers that code setting and review should at the least have significant lay input on any committee established by the body for this purpose. The criteria have been amended to reflect this principle.
19. ICSTIS raised the issue of the application of the Nolan Committee's Seven Principles of Public Life. Ofcom agrees that so far as a body is exercising public functions those principles should apply. If a co-regulator is not exercising public functions Ofcom would still expect them to adopt similar principles to ensure adequate levels of transparency and accountability. An amendment has been made to the criteria.
20. *Adequate funding and staff.* ICSTIS raised the issue of the importance of sustainability in funding. This is agreed and an amendment has been made to the criteria.

21. A number of respondents raised the issue of the costs of a co-regulatory body. As set out above, on the issue of costs, as a general principle regulation should only be applied where its benefits exceed the costs. Ofcom also agrees that in setting up a new body and in relation to its operation, the costs of regulation must be kept under proper control. Ofcom has amended the funding criteria to make specific reference to these factors and to the need for published accounts (a suggestion made by ICSTIS).
22. *Near-universal participation.* A number of respondents commented on the difficulty of achieving this objective. There was no disagreement with the suggested requirement and no amendments have been made.
23. *Effective and credible sanctions.* There was general agreement to the approach outlined in this section including the need for Ofcom to have effective backstop powers. The Mobile Broadband Group was however, worried that such powers should not give rise to double jeopardy. The criteria have been amended to reflect this understandable concern. In addition, it has been made clear that the sanction of removing an undertaking's ability to function is one which resides with Ofcom.
24. *Auditing and review by Ofcom.* As set out above, a number of respondents made helpful suggestions about the need to monitor performance. The criteria have been amended to reflect the suggestion of QVC and others that consideration should be given to the application of Key Performance Indicators.
25. *Transparency and accountability* (changed from *Public Accountability*). Otelo expressed concern about the use of the term Public Accountability as they considered it was inappropriate for bodies or schemes that are not public bodies. In accordance with their suggestion the heading for this aspect of the criteria has been altered while Ofcom notes that such bodies, although a private body, may still be undertaking public functions.
26. *Consistency with similar regulation.* Otelo were also concerned that this aspect of the criteria required further explanation where, as in dispute resolution, there is more than one body or scheme that is approved covering the same area. The Mobile Broadband Group raised the point that while consistency is a laudable objective, the predominant principle was that regulation should be proportionate and targeted. Ofcom agrees the importance of this principle. The wording has been altered to reflect both of these points.
27. *Independent appeals mechanism.* ICSTIS raised a number of issues. ICSTIS stressed that if co-regulatory bodies are public bodies or are undertaking public functions then any appeals mechanism will need to comply with the Human Rights Act. This point is now reflected in the criteria. ICSTIS were also concerned that the term "dissatisfaction of either party" was unclear and ambiguous. A change has been made to clarify the intent. Finally, Otelo noted that an ombudsman's decision is not subject to appeal (other than judicial review). The wording has been altered to take account of the different position of the ombudsman's scheme.
28. *Divergence from the criteria.* This part of the criteria met with universal approval. It has been made clear that this Statement does not fetter Ofcom's discretion.

Section 4

Criteria for promoting effective forms of co and self regulation and establishing co-regulatory bodies

1. This section sets out the criteria as amended to take account of respondent's views. Ofcom will monitor and review the application of the criteria.

Beneficial to consumers

2. Clearly a co-regulatory mechanism will only secure benefits for consumers if it is effective and fit for its purpose. But Ofcom considers that it is also essential that proposals for a co-regulatory scheme demonstrate that there will be genuine additional consumer benefits as a result. Specifically, the advantages of co-regulation over regulation solely by Ofcom must be made clear.

Clear division of responsibilities

3. It is essential that there is a clear division of responsibilities between the co-regulatory body and Ofcom. It should be clear to all concerned, including consumers, who is responsible for which area, and what the precise role of Ofcom is. In order to provide clarity about remit and responsibilities it may be appropriate to agree and publish terms of reference or a memorandum of understanding. Such a document could also address the issue of the body's independence from Ofcom.
4. In general terms, Ofcom would serve as an enabler and evaluator but would not have responsibility for nor powers to second-guess individual decisions of the co-regulatory body. Ofcom would approve the co-regulatory body's governance and funding arrangements, and any significant modifications to them. Ofcom would expect to approve any codes and/or guidelines which the co-regulatory body publishes. Ofcom would also need to have an ability to make directions where it came under a specific legal obligation.

Accessible to members of the public

5. The co-regulatory scheme's procedures should be open, transparent and easy to use. Use of the procedures should generally be free of charge to the public, although charging mechanisms may be appropriate in some instances. There should be well-publicised contact and complaint arrangements (so that the public are aware of the extent of the body's remit), prompt feedback, and no hidden disincentives. There would also need to be effective arrangements for wide public consultation on significant issues (e.g. about substantive changes in codes or procedures).

Independence from interference by interested parties

6. There is a clear tension between the desirability of achieving independence and one of the objectives of co and self-regulation, i.e. to introduce industry expertise. The former would suggest reliance on expertise drawn from outside the industry being regulated; the latter would clearly work in the opposite direction. Consequently a system involving a mixture of lay and industry

members will often be appropriate, if possible allied to a genuinely independent review and appeals mechanism. The National Consumer Council recommends that up to 75 per cent of a co-regulatory organisation's governing body should be made up of independent representatives. Therefore, it would be appropriate for independent representatives to make up half to three-quarters of a co-regulatory organisation's governing body. If the body has a separate committee that sets or reviews codes this should also have significant lay input. Consideration should be given to the establishment of a register of interests. In so far as a body is exercising public functions, the Nolan Committee's Seven Principles of Public Life should apply. Where a body is not exercising public functions it should adopt similar principles to ensure adequate levels of transparency and accountability.

7. The independence of a co-regulatory body is increased if it is a dedicated structure, i.e. structurally separate from any existing industry bodies, such as companies and/or trade associations. Additionally, the system of funding would need to be consistent with the need for independent decisions.

Adequate funding and staff

8. The body will need to be adequately funded and its sources of finance would need to be robust and sustainable. Staff resources would need to be sufficient to cope with the volume and type of work which is likely to arise. The body will however, need to balance this objective with the need to keep the costs of co and self regulation under proper control; regulation should only be applied where its benefits exceed the costs of regulation. The body should publish its annual accounts.

Near-universal participation

9. A co-regulatory body should achieve and maintain near-universal participation by those parties which are to be regulated. Co-regulation will only work when almost all relevant parties are involved. Near-universal participation is crucial since it is those who stand aside from regulatory bodies who tend to be the main cause of consumer detriment.

Effective and credible sanctions

10. The co-regulatory body needs to have sanctions that provide a clear incentive to comply, and which can be imposed promptly and successfully. In order to administer sanctions, the co-regulatory body would need effective monitoring procedures to identify possible infringements.
11. One form of sanction is removal of the ability to function (e.g. denial of access to telecommunications networks). This power resides with Ofcom. For co-regulatory bodies more graduated sanctions also need to be available, e.g. fines or requirement for specific changes in output. Clearly, however, the sanctions need to be proportionate to the infringement which occurs. The precise types of sanctions which need to be available depend on whether there is some other form of constraint which operates, e.g. need to protect a firm's public image.
12. Some forms of sanction, for example removal of the ability to function, may necessitate Ofcom exercising specific statutory powers. The co-regulatory body

may in such circumstances ask Ofcom to take such action. Good administrative practice would require Ofcom, before doing so, to review the case. The recommendation of the co-regulatory body would, of course, be material in that review. The need for effective back-stop powers should not give rise to the risk of double jeopardy.

Auditing and review by Ofcom

13. Ofcom will need to be sure that the regulatory body is capable of handling the likely workload. This will require reviews of the co-regulatory body. Ofcom will need to audit the performance of the co-regulatory body and may wish to agree standards of performance (such as key performance indicators('KPIs')) with the body, covering quality of work and consumer satisfaction as well as speed and numbers of cases handled, along with publication of such standards. Where performance indicators have been agreed they should be published. In certain cases it may be appropriate for the body itself to consider setting standards of performance (including KPIs) for its members. Although Ofcom would not generally consider individual cases, the effectiveness of the scheme as a whole must be regularly reviewed and updated in the light of changing circumstances and expectations. Where there are demonstrable deficiencies and failures, Ofcom would be able to suggest remedies to the co-regulatory body in order to prevent reoccurrence.

Transparency and accountability

14. Accountability includes prompt, open and transparent reporting, and a willingness to consult on the establishment of, and changes to procedures, governance and appeal mechanisms, funding arrangements etc. As a minimum the co-regulatory body should publish an annual report.

Consistency with similar regulation

15. Since many different channels are used to deliver the same type of content and services to the public, it is desirable that there is some degree of overall consistency in the level and type of regulation in addition to it being proportionate and targeted. This consideration may also be relevant where more than one body covers the same area of responsibility.

Independent appeals mechanism

16. To deal with cases where those who are subject to a decision are dissatisfied it is desirable for there to be a genuinely independent appeals mechanism that complies with the Human Rights Act 1998. Examples of the features of an appeal process which promote independence include, appeal arbitrators or panel members drawn from outside the industry and appointed on fixed, preferably non-renewable terms, and open, even-handed and transparent procedures. Careful consideration will need to be given to who appoints the appellate body. A referral to Ofcom may in certain circumstances make sense, although this runs the risk of undermining the benefits of co-regulation. This requirement may not be applicable if the parties have agreed to be bound by the body's decision subject only to judicial review.

Divergence from the criteria

17. It is possible that a co-regulatory initiative may be established where the criteria are not applied in full. In any case where these criteria are not applied in full, it is incumbent on Ofcom to explain publicly and fully the rationale for a different approach. This statement is not intended to fetter Ofcom's discretion to consider other criteria when deciding whether or not to transfer regulatory responsibilities to a co-regulatory body or to act otherwise where it is appropriate to do so.

Section 5

List of respondents

- Advertising Association
- Advertising Standards Authority
- BT (British Telecommunications)
- Broadband Ventures Ltd
- Channel 4
- Christian Broadcasting Council
- Claire Milne
- Commercial Radio Companies Association
- European Calling Card Services Association Limited
- ICSTIS (Independent Committee for the Supervision of Standards of Telephone Information Services)
- ITV (Independent Television)
- Mobile Broadband Group
- Newspaper Society
- Otelo (Telecommunications Ombudsman)
- QVC
- Teletext
- UKCTA (United Kingdom Competitive Telecommunications Association)