

# Promoting effective self-regulation

## Criteria for transferring functions to co-regulatory bodies

### Consultation document

Public consultation on criteria proposed by Ofcom for transferring regulatory functions to co-regulatory bodies

The deadline for comments is **Friday 9 January 2004**.

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## Section 1

# Executive summary

- S.1. The Communications Act 2003 requires Ofcom to promote the development and use of forms of effective self-regulation. This consultative document seeks views on the criteria which Ofcom will use in deciding whether to adopt co-regulatory schemes.
- S.2. The Communications Act 2003 sets out statutory requirements for the approval of two existing co-regulatory schemes:
- The regulation of premium rate electronic communications services, where the industry code is developed and decisions on individual cases are made by the Independent Committee for the Supervision of Telephone Information Services (ICSTIS); and
  - The arrangements for dispute resolution and consumer redress from public communications providers (the largest of which is run by the Office of the Telecommunications Ombudsman or Otelco).
- S.3. In addition, the advertising industry and a group of television and radio broadcasters have proposed a co-regulatory scheme for broadcast advertising which Ofcom would otherwise regulate directly using its powers under the Communications Act. There is a separate consultation on that specific proposal.
- S.4. Successful co-regulation has a number of benefits for consumers, including using the industry's knowledge about their sector. As a result, co-regulatory initiatives may better adapt to changing consumer needs than those run by Ofcom. A co-regulatory basis is likely to give the industry a greater incentive to see a successful initiative.
- S.5. This consultation document consults on the criteria which would be used by Ofcom in evaluating proposed co-regulatory initiatives. These criteria are complementary with - but do not of course replace - the statutory criteria which are set out in legislation for the existing co-regulatory initiatives (see Annex A). In summary these criteria are:
- Beneficial to consumers;
  - Clear division of responsibilities 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;
  - Have effective and credible sanctions available;
  - Auditing and review by Ofcom;
  - Public accountability;
  - Consistency with similar regulation; and
  - Independent appeals mechanism
- S.6. Ofcom seeks the views of consumers, consumer organisations, industry and others on the proposals contained in this consultation document by **Friday 9 January, 2004**.

S.7. Comments should be made in writing and sent – preferably by email – to:

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## Section 2

# Introduction

### What this document is for

- 1.1. The Communications Act 2003 requires Ofcom, in discharging its general statutory duties, to promote the development and use of forms of effective self-regulation; and, when it has been able to do so, to step back from Ofcom-imposed regulation, retaining only back-stop powers. This process of delegating formal functions to a self-regulatory body is an example of co-regulation.
- 1.2. This consultative document seeks views on the criteria which Ofcom will use in deciding whether to adopt co-regulatory schemes.

### Benefits of co-regulation

- 1.3. When it is successful, co-regulation has a number of benefits for consumers. A co-regulatory arrangement implemented by members of an industry will be designed with the needs and problems of that particular sector in mind from the outset. When the scheme is designed and enforced it will reflect the industry's knowledge about the sector which would not necessarily be available within Ofcom. As a result, the co-regulatory initiatives may better adapt to changing consumer needs than initiatives run by Ofcom. Perhaps most importantly, a co-regulatory scheme is likely to give the relevant parties greater incentives to participate and comply with the rules in order that the initiative succeeds – particularly when the prospect of formal regulation is held in reserve by Ofcom.
- 1.4. For these reasons, co-regulatory initiatives may be more successful in meeting consumer needs than other forms of regulation. But the benefits for consumers will only be realised when the co-regulatory scheme is successful. It is important therefore that before a co-regulatory scheme is implemented, it is evaluated properly.

### Existing and proposed schemes

- 1.5. The Communications Act 2003 sets out two specific co-regulatory schemes which already exist:
  - The regulation of premium rate electronic communications services, where the industry code is developed and decisions on individual cases are made by the Independent Committee for the Supervision of Telephone Information Services (ICSTIS); and
  - The arrangements for dispute resolution and consumer redress from public communications providers (the largest of which is run by the Office of the Telecommunications Ombudsman or Otelco).
- 1.6. There are statutory criteria which these schemes must meet. These are reproduced in [Annex A](#).
- 1.7. In addition, the advertising industry and a group of television and radio broadcasters have proposed a co-regulatory scheme for broadcast advertising which Ofcom would otherwise regulate directly using its powers

under the Communications Act. There is a separate consultation on that specific proposal.

### Proposals for co-regulatory initiatives

- 1.8. Ofcom would like to encourage stakeholders to come forward with co-regulatory initiatives. As a first step, it considers that it would be useful to publish a guide to the criteria it would wish to see before allowing a co-regulatory scheme to begin. This will help stakeholders in bringing forward co-regulatory initiatives and help Ofcom to evaluate these initiatives once they are proposed.
- 1.9. This consultation document consults on the criteria which would be used by Ofcom in evaluating proposed co-regulatory initiatives. These criteria are complementary with - but do not of course replace - the statutory criteria which are set out in legislation for the existing co-regulatory initiatives (see [Annex A](#)).

### Section 3

## Criteria for delegating Ofcom's functions to a co-regulatory body

- 2.1. Ofcom has had informed discussions with a wide range of stake-holders on the issue of co- and self-regulation.
- 2.2. Ofcom has discussed issues of co- and self-regulation with industry stakeholders, including communications providers, broadcasters and advertisers. Also, Ofcom has met with various co- and self-regulatory bodies, such as ICSTIS and Otelo.
- 2.3. In addition, Ofcom has met with the National Consumer Council (NCC) and Consumers' Association (CA) regarding co- and self-regulation. Ofcom has studied CA's correspondence with Oftel on the subject and has also reviewed the NCC's guidance on the topic, specifically "Better business practice: how to make self-regulation work for consumers and business" (2001) and "Three steps to credible self-regulation: a checklist of good practice in self-regulation" (2003). Although Ofcom uses language and ideas more closely tailored to the communications industry, the criteria described below are based on these sources.

### Beneficial to consumers

- 2.4. 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

- 2.5. 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.
- 2.6. 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

- 2.7. 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, prompt feedback, and no hidden disincentives. There would

also need to be effective arrangements for wide public consultation (e.g. about changes in codes).

### **Independence from interference by interested parties**

- 2.8. 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 NCC recommend 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.
- 2.9. The independence of a co-regulatory body is increased if it is a dedicated structure, ie 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**

- 2.10. The body will need to be adequately funded and its sources of finance would need to be robust. Staff resources would need to be sufficient to cope with the volume and type of work which is likely to arise.

### **Near-universal participation**

- 2.11. 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**

- 2.12. 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.
- 2.13. One form of sanction is removal of the ability to function (e.g. denial of access to telecommunications networks). But co-regulatory bodies may only be prepared to use such sanctions as a last resort, so other, 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.
- 2.14. Some forms of sanction may depend on statutory backing. The co-regulatory body may in such circumstances ask Ofcom to take enforcement 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.

### **Auditing and review by Ofcom**

- 2.15. 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 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. 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.

### **Public accountability**

- 2.16. 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**

- 2.17. 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.

### **Independent appeals mechanism**

- 2.18. To deal with decisions where either party is dissatisfied with a regulatory decision it is desirable for there to be a genuinely independent appeals mechanism. 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. An appeal to Ofcom may in certain circumstances make sense, although this runs the risk of undermining the benefits of co-regulation.

### **Divergence from the criteria**

- 2.19. It is possible that a co-regulatory initiative may be established where these 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.

## Section 4

# Consultation questions

3.1. Ofcom seeks responses to the following questions raised by this consultation document:

**Question 1:** *In which specific areas might co-regulation have a role to play?*

**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?*

**Question 4:** *How should self- and co-regulation be developed by Ofcom in the future?*

## Section 5

# Consultation

- 4.1. Ofcom seeks the views of consumers, consumer organisations, industry and others on the proposals contained in this consultation document by **Friday 9 January, 2004**
- 4.2. Where possible comments should be made in writing and sent by e-mail to [neil.buckley@ofcom.org.uk](mailto:neil.buckley@ofcom.org.uk). However, copies may be posted or faxed to the address below.

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- 4.3. If you have any queries about this consultation or need guidance on the appropriate form of response or have any other query, please call Ofcom's consultation helpdesk on 020 7981 3003 in working hours. Ofcom is keen in making responding to consultation easy and we will endeavour to give appropriate support and advice.
- 4.4. Ofcom has designated Philip Rutnam, Partner Competition and Strategic Resources, as its consultation champion. If you have any concerns or comments about the consultation process in general or this consultation in particular, please contact:

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## Confidentiality

- 4.5. We aim to publish the outcome of this consultation and all responses to it. Unless you make a specific request to keep all or part of your response confidential, all submissions will be published as soon as practicable after they have been received by Ofcom. If you wish your response or part of it to remain confidential please give reasons.

## Consultees

- 4.6. We are sending this document to a [range of organisations](#). Please tell us if you know of organisations who would be interested. Further paper copies are available from the address above.

## Section 6

# Conclusions and next steps

- 5.1. Ofcom believes that the criteria set out in Chapter three are appropriate for assessing whether it should delegate functions to a co-regulatory body.
- 5.2. Ofcom will assess the responses it receives to the consultation, and will aim to publish a statement confirming the criteria to be used in early 2004.

## Annex A

# Communications Act criteria for co-regulation

### 54 Approval of dispute procedures for the purposes of s. 52

(2) OFCOM are not to approve dispute procedures unless they are satisfied that the arrangements under which the procedures have effect –

- (a) are administered by person who is for practical purposes independent (so far as decisions in relation to disputes are concerned) of both OFCOM and the communications providers to whom the arrangements apply;
- (b) effect to procedures that are easy to use, transparent and effective;
- (c) give, in the case of every communications provider to whom the arrangements apply, a right to each of his domestic and small business customers to use the procedures free of charge;
- (d) ensure that all information necessary for giving effect to the procedures is obtained;
- (e) ensure that disputes are effectively investigated;
- (f) include provision conferring power to make awards of appropriate compensation; and
- (g) are such as to enable awards of compensation to be properly enforced.

### 121 Approval of code for premium rate services

(2) OFCOM are not to approve a code for those purposes unless they are satisfied –

- (a) that there is a person who, under the code, has the function of administering and enforcing it; and
- (b) that person is sufficiently independent of the providers of premium rate services;
- (c) that adequate arrangements are in force for funding the activities of that person in relation to the code;
- (d) the provisions of the code are objectively justifiable in relation to the services to which it relates;
- (e) those provisions are not such as to discriminate unduly against particular persons or against a particular description of persons;
- (f) those provisions are proportionate to what they are intended to achieve; and
- (g) that, in relation to what those provisions are intended to achieve, they are transparent.

## Annex B

# Ofcom's consultation principles

Ofcom has committed to meeting the seven tests for consultations set out below:

1. Hold discussions with stakeholders before issuing a major consultation document – so that Ofcom's thinking is subject to an early sense-test. If this is not possible, an open meeting to explain the proposals will be held soon after publication.
2. Be clear about who is being consulted, why, on what questions and for how long.
3. Make the document as simple and concise as possible – with a summary of no more than 2 pages - and make it easy to respond to. This may involve issuing a shorter version aimed at hard-to-reach groups, like SMEs.
4. Allow 10 weeks for responses, other than on dispute resolution.
5. Analyse responses with care and an open mind. This involves giving reasons for subsequent decisions, and an account of the views expressed.
6. Monitor and evaluate consultations, and designate a consultation champion – an evangelist within Ofcom for better consultation and reach out, and a contact point for comments on our process.
7. Explain why Ofcom is departing from any of these tests if it has to – for example, because of urgency or confidentiality. If a shorter period is required, Ofcom will draw this to the attention of stakeholders, as a red flag item.