

# OFFICE OF COMMUNICATIONS ACT 2002

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## EXPLANATORY NOTES

### INTRODUCTION

1. These explanatory notes relate to the Office of Communications Act 2002 which received Royal Assent on 19 March 2002. They have been prepared by the Department of Trade and Industry and the Department for Culture, Media and Sport in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.
2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a section or part of a section does not seem to require any explanation or comment, none is given.

### SUMMARY

3. The Communications White Paper – *A New Future for Communications* (Cm 5010) - published on 12 December 2000, announced the Government's proposals for the reform of the regulatory framework for the communications sector. It sets out in broad terms how the sector should be regulated. Responses to the consultation on the White Paper can be found at [www.communicationswhitepaper.gov.uk](http://www.communicationswhitepaper.gov.uk), together with an Executive Summary of those responses, prepared by independent consultants. At the centre of the White Paper were proposals for the creation of a unified regulator for the communications sector. There are currently 5 bodies or office holders regulating the communications sector. These are the Broadcasting Standards Commission, the Director General of Telecommunications, the Independent Television Commission, the Radio Authority, and the Secretary of State, who has a regulatory role through the Radiocommunications Agency (part of the Department of Trade and Industry). The Government's objective is to replace all of these regulators with one unified regulator, the Office of Communications (OFCOM).
4. In the Queen's Speech on 20 June 2001, Her Majesty announced that a draft Bill (the 'Communications Bill') to create a single regulator for the media and communications industries and reform the broadcasting and telecommunications regulations would be published during the 2001-02 Parliamentary Session. The draft Communications Bill and associated documents, including a document explaining the policy background to the Bill, were published on 7 May 2002. The draft Bill and associated documents can be found at [www.communicationsbill.gov.uk](http://www.communicationsbill.gov.uk) A Joint Committee of the House of Lords and House of Commons has been established to undertake pre-legislative scrutiny of the draft Communications Bill.
5. The aim of the Communications Bill will be to create a less complex system of codes and rules which is flexible enough to cope with the pressures of technological change over the long term in this fast-moving sector. This new regulatory regime could not come into effect until after the Communications Bill attained Royal Assent; which itself would be mid-2003 at the earliest. OFCOM would apply and enforce these new codes and rules. Establishing OFCOM, planning and managing the practical transition from the existing five regulators will be a complex task, which will take much time and effort to complete. The Office of Communications Act makes it possible for the Secretary of

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State to create OFCOM before the main Communications Bill achieves Royal Assent, which should enable regulatory functions to be transferred to OFCOM more quickly thereafter.

6. On 12 October the results of an initial scoping study, undertaken by independent consultants, were published. This study assesses the kind of organisation OFCOM might be and how the complex task of transition might be managed. It notes that the appointment of a Chair and Chief Executive of OFCOM would be a significant step in enabling the more detailed design of policies, and would allow the making of key strategic decisions on such matters as structure, appointments, vision and organisational culture. The proposals represent a basis for planning, although final decisions will be for OFCOM once appointed. The Government proposes to appoint the Chair of OFCOM and other non-executive members thereafter, with a view to them being in a position to appoint a Chief Executive in the early autumn of 2002.
7. The Office of Communications Act enables Government to establish OFCOM, so that practical steps can be taken to get the regulator ready to receive the functions a Communications Bill would confer upon it. This Act should enable a more orderly transition by:-
  - establishing the Office of Communications;
  - giving OFCOM a preparatory function; and
  - placing the existing regulators under a duty to assist OFCOM to prepare.

## **COMMENTARY ON SECTIONS**

8. The Act has 7 sections and 1 schedule.

### ***Section 1 and the Schedule: The Office of Communications***

9. *Section 1* establishes OFCOM as a statutory corporation with not more than 6 and not less than 3 members. The power to make appointments is conferred upon the Secretary of State. It is intended that appointments will be made by the Secretary of State for Trade and Industry and the Secretary of State for Culture Media and Sport acting together. The Secretary of State is also given power to make orders, subject to negative resolution procedure, to alter those limits. This power could be used to increase the size of the board when its preparatory function is supplemented by regulatory functions under the Communications Bill. She will appoint the Chairman and the non-executive members. The Chairman and non-executive members will appoint a Chief Executive, with the approval of the Secretary of State, and the Chief Executive will be a member of OFCOM. It is also for the Chairman and the non-executive members to decide on appointing executive members to the OFCOM board, after consulting the Chief Executive.
10. The remainder of Section 1 and the Schedule cover the members, staff, finances, organisation and procedures of OFCOM. Some specific provisions that relate to OFCOM are explained below.
11. *Paragraphs 1(4), 17(8) and 20* of the Schedule contain provisions dealing with the relationship between OFCOM and persons involved in the existing regulatory arrangements. On the one hand, they provide that persons connected with the existing regulators will not be regarded as having an interest which affects the performance of their role as members of OFCOM or of its committees solely by reason of being, or being a member or member of the staff of, an existing regulator. On the other, it provides that membership of OFCOM does not disqualify a person from any office connected with an existing regulator or from acting in relation to matters connected with OFCOM for such a regulator. The persons affected by these provisions are: the Director General of Telecommunications and the members of his staff, the members and staff of the other

existing regulators and civil servants working on wireless telegraphy (primarily those in the Radiocommunications Agency).

12. *Paragraph 14* of the Schedule provides that OFCOM has the power to establish committees. The membership of those committees may include people who are neither members nor employees of OFCOM; but except in the circumstances specified in subparagraph (3) of paragraph 14, the committees must include at least one member or employee of OFCOM. This allows lay members to be included within the process of setting codes and standards for the communications sector once OFCOM has received the relevant functions when the Communications Bill comes into force. OFCOM will have the flexibility to determine their own internal working arrangements – committees can either be advisory or can have decision-making functions delegated to them. *Paragraphs 15 to 19* deal with the arrangements for the procedures of OFCOM and their committees. Under *paragraph 16*, OFCOM is required to maintain proper records of their proceedings whether in OFCOM, in any of OFCOM’s committees, in meetings of the Chairman and other non-executive members, or in the course of delegated action by OFCOM staff. In addition, *paragraph 23* makes OFCOM subject to the provisions of the Public Records Acts 1958 and 1967 and places it under obligations in relation to the maintenance and safe-keeping of its records.

### ***Section 2: Initial Function of OFCOM***

13. *Section 2* sets out the single function of OFCOM under this Act. This function is to prepare to assume functions at a later stage. OFCOM will be involved in making transitional arrangements. These might include setting up the structures of OFCOM and making ready for the transfers of staff, property and other rights and liabilities when the Communications Bill comes into force. OFCOM is not given powers to exercise any regulatory functions in relation to the communications sector under this Act. Those functions will be set out in the Communications Bill.
14. *Subsection (2)* provides for close co-operation during the transitional period between OFCOM and those involved in the existing regulatory regimes. This co-operation will be essential both to prepare for the smooth transition of functions under the Communications Bill to OFCOM and to avoid disrupting the existing regulatory regimes. OFCOM receives no regulatory functions under this Act, which will continue to be discharged by the Secretary of State and the existing regulators.

\*the meaning of “existing regulators” is given in subsection (1) of Section 6. Those regulators are the Broadcasting Standards Commission, the Director General of Telecommunications, the Independent Television Commission and the Radio Authority. The expression does not include the Secretary of State and therefore does not include the Radiocommunications Agency.

15. *Subsection (3)* identifies the proposals about the future regulation of communications to which OFCOM’s function under the Act relates. *Subsection (5)* imposes limits on what OFCOM may do in relation to such proposals. These subsections make it plain that, if the proposals require Parliamentary approval for their implementation (e.g. if implementation would require the passing of an Act of Parliament or the approval of a statutory instrument), then nothing in the Act removes the need for that approval or authorises OFCOM to undertake activities other than those connected with the formulation of the proposals or to take steps other than those preparatory to implementation when that approval is given.

### ***Section 3: Management of OFCOM***

16. *Section 3* places OFCOM under a duty, when managing their affairs, to have regard to such guidance concerning the management of public bodies as they consider appropriate and, subject to such guidance and insofar as they are applicable to OFCOM, to generally accepted principles of good corporate governance.

17. Guidance on the running of public bodies includes that provided by the Cabinet Office, for example the *Guidance on Codes of Practice for Board Members of Public Bodies* (February 2000). Principles of good corporate governance are currently set out in the *Combined Code* published by the Committee on Corporate Governance in June 1998, which combines the provisions of the *Cadbury* and *Greenbury* codes on corporate governance with the Committee's own work. Since guidance on the management of public bodies is more likely to be relevant to OFCOM, it takes precedence over principles of good corporate governance.

#### ***Section 4: Functions of existing regulators***

18. *Section 4* provides additional functions for the existing regulators. These are in addition to those functions that they perform under the Telecommunications Act and the Broadcasting Acts.
19. In practice, the preparation for OFCOM to receive functions should proceed in a similar way in relation to functions currently exercised through the Radiocommunications Agency as for the functions of the four existing regulators. Section 4, however, makes no provision in respect of the Agency, because it is not an "existing regulator" as defined by section 6(1) but part of the Department of Trade and Industry, which needs no statutory authority to be able to prepare for OFCOM.
20. *Subsection (2)* imposes a duty upon existing regulators to comply with directions by the Secretary of State to prepare schemes for transfer to OFCOM of their property, rights and liabilities, so that they can be transferred with the minimum of delay when the regulatory functions are ready to be transferred to OFCOM under the Communications Bill.
21. *Subsection (3)* provides that the existing regulators have power to do anything incidental or conducive to their functions under this Act. This includes assistance to OFCOM by means of secondment of staff, payments and provision of information. This power is essential for the establishment of the correct structure and procedures that will need to be put into place to allow the smooth transition of functions and property under the Communications Bill.
22. *Subsection (4)* subjects the powers of the existing regulators in performing their new duty under this section to the same limitations concerning Parliamentary approval as OFCOM, in performing its initial function, is subject to under section 2(5) (see paragraph 15).

#### ***Section 5: Winding up of OFCOM on abandonment etc of proposals***

23. *Section 5* provides that if the Secretary of State considers that it is no longer necessary for OFCOM to continue to exist because of the abandonment or modification of relevant proposals about the regulation of communications, she may by order provide for the winding up and dissolution of OFCOM. *Subsection (3)* provides that the power to make an order for the winding up of OFCOM is subject to the affirmative resolution procedure in both Houses of Parliament.
24. The Secretary of State has the power, once she is of that opinion, to wind up OFCOM at any time; but if she is of that opinion after the end of 2003, *subsection (2)* places her under a duty to lay before Parliament a draft order providing for OFCOM to be wound up.

#### ***Section 7: Short title, commencement and extent***

25. This section gives the Secretary of State an order-making power to bring sections 1, 2 and 3 and the Schedule into force on different days for different purposes. This order-making power will be used so that OFCOM can be operational by the time that the Communications Bill is brought into force. It gives the Secretary of State flexibility

in timing so that relevant appointments and practical matters can be dealt with before OFCOM is established or actually has a function to perform. The other provisions of the Act came into force upon Royal Assent.

## **FINANCIAL EFFECTS OF THE ACT**

26. The Government does not envisage that significant public expenditure implications will arise from this Act. The Act provides simply for the setting up and preparation of OFCOM to receive functions, not the carrying out of those functions. The current cost of regulating the communications sector is in the region of £118 million. Once fully operational, the Government would expect the costs of OFCOM to be met almost entirely from those it regulates. However, as is common with setting up new statutory bodies, the Government will share with industry the cost of initial establishment, in the form of an advance or an initial grant in aid. It is intended that subsequent repayment of any advance would be met out of the powers that OFCOM would have to charge fees to the sector under the subsequent Communications Bill. The Government envisages that the initial planning costs of establishing OFCOM so that it can prepare to receive its functions will be of the order of £5 million spread over the period of transition.
27. By adding to the existing regulators' statutory functions, the Act allows existing regulators to recover a proportion of the establishment cost from the communications sector. These powers mean that the net cost to public expenditure will be significantly less than the overall gross cost of the practical transition. In the long term this Act and the subsequent Communications Bill is expected to have little impact on net public expenditure, but will be more fully assessed in the draft Explanatory Notes which will accompany the publication of the draft Communications Bill.
28. There will be almost no effect on public service manpower under this Act. However, the expectation is that civil service manpower would decrease by some 870 when the Radiocommunications Agency and Oftel are moved into OFCOM under the Communications Bill.

## **REGULATORY IMPACT ASSESSMENT**

29. The negative regulatory impact of this Act is minimal, although the communications industry might have to bear part of the transitional cost. The positive impact in terms of a smoother transition to the new regime should be substantial, but is unquantifiable. The impact of the new regime as compared with the existing five regimes is expected to be positive but will be more fully assessed in the draft Regulatory Impact Assessment which will accompany the publication of the draft Communications Bill.

## **COMPATIBILITY WITH EUROPEAN CONVENTION ON HUMAN RIGHTS**

30. Section 19 of the Human Rights Act 1998 requires the Minister in charge of a Bill in each House of Parliament to make a statement about the compatibility of its provisions with the Convention rights (as defined by section 1 of that Act). Patricia Hewitt, the Secretary of State for Trade and Industry, and Baroness Blackstone, the Minister for the Arts, made statements to the effect that -

"In my view the provisions of the Office of Communications Bill are compatible with the Convention rights."

## **COMMENCEMENT**

31. [Sections 1, 2 and 3](#) and the Schedule will be brought into force on a day or days appointed by commencement order by the Secretary of State. The other provisions of the Act came into force upon Royal Assent.

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***Hansard References***

***The following table sets out the dates and Hansard references for each stage of this Act's passage through Parliament***

<b>Stage</b>	<b>Date</b>	<b>Hansard reference</b>
<b>House of Lords</b>		
Introduction	12 July 2001	Vol 626 Col 1180
Second Reading	15 October 2001	Vol 672 Col 349-361 and 397-470
Committee	29 October 2001	Vol 672 Col 1176-1187, 1202-1242 and 1262-1288
	6 November 2001	Vol 628 Col 133-194
Report	22 November 2001	Vol 628 Col 1246-1305
Third Reading	13 December 2001	Vol 629 Col 1485-1495
<b>House of Commons</b>		
Introduction	13 December 2001	Votes and Proceedings
Second Reading	14 January 2002	Vol 378 Col 54-122
Committee	24 January 2002	Hansard Standing Committee E
	29 January 2002	
	31 January 2002	
	5 February 2002	
Report and Third Reading	6 March 2002	Vol 381 Col 322-390