



Centre for Policy Studies

OFCOM IS WATCHING YOU

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CHAPTER ONE

INTRODUCTION

The Ministry of Truth contained, it was said, three thousand rooms above ground level, and corresponding ramifications below. Scattered about London were just three other buildings of similar appearance and size. So completely did they dwarf the surrounding architecture that from the roof of the Victory Mansions you could see all four of them simultaneously. They were the homes of the four ministries between which the entire apparatus of the government was divided. The Ministry of Truth, which concerned itself with news, entertainment, education, and the fine arts. The Ministry of Peace, which concerned itself with war. The Ministry of Love, which maintained law and order. And the Ministry of Plenty, which was responsible for economic affairs. The names, in Newspeak: Minitrue, Minipax, Miniluv, Miniplenty.

George Orwell, *Nineteen Eighty-Four*

Ofcom. Even the word is heavy with echoes of Nineteen Eighty Four. It is the name of a new super-regulator proposed by the Government in its Communications White Paper published in December 2000. Ofcom will have huge powers to regulate everything from television to telecoms and is another of the radical reforms proposed by the Government, this time affecting the entire New Economy. It will also have implications for free speech.

Britain's media laws are outdated and obsolete, tangling what has been a growth area of the economy in a web of red tape. The Government is right to say it wants reform (although it has been slow in acting). Indeed, much in the Communications White Paper was welcome, with prominent place given to competition and consumer protection. There was also a promise from Chris

Smith, Secretary of State for Culture, Media and Sport and Stephen Byers, Secretary of State for Trade and Industry, to regulate the media “with a lighter touch”. This was good, common sense stuff.

However, in the detail, there was also much to give cause for concern. Few commitments were made to abolish or reduce the cross-media ownership rules which inhibit convergence and growing companies. But above all, the creation of Ofcom, a powerful new arm of the state, is a worry.

Ofcom will be endowed with powers far in excess of those needed for a “lighter touch”.

Ofcom will be endowed with powers far in excess of those needed for a “lighter touch”. It will absorb the five bodies, such as the Independent Television Commission and Oftel, which currently regulate the communications industry. The White Paper proposes that it will be authorised to:

- draw up “detailed rules” to enforce “acceptable community standards”;
- compel news providers to be “impartial”;
- enter premises and confiscate documents;
- fine companies and impose civil penalties on individuals;
- block take-overs and mergers, duplicating many of the extensive powers already exercised by the Office of Fair Trading and the Competition Commission;
- monitor training, making sure media companies have proper, approved schemes in place;
- be a broadcaster itself through an “Access Fund” for start-up projects.

Its chief executive will be a political appointment and could be one of the most powerful unelected figures in the land. Yet there is no mention in the White Paper of accountability to Parliament.

Its chief executive will be a political appointment and could be one of the most powerful unelected figures in the land. Yet there is no mention in the White Paper of accountability to Parliament or any other body, except a reference to “citizens juries”. Nor is there any mention of checks and balances to Ofcom’s powers, nor to any system of appeals and complaints.

It would be paranoid to suggest that the Government wants to use Ofcom to gain control over the media through regulation. But where matters of free speech and liberty are concerned, is it not best to err on the side of caution? The deadline for consultation is 12 February. Those who work in the communications industry generally are registering their concerns. After all, what is needed is deregulation, not the accidental creation of Big Brother.

CHAPTER TWO

THE NEED FOR REFORM

British media regulations grow more obsolete by the day.

Take, for instance, the last couple of months. In France, the giant Vivendi-Universal has just begun trading. It has acquired Universal Music, Universal Studios and has access to 12 million European cable customers through its Canal Plus subsidiary, plus another 70 million mobile customers through an alliance with Vodafone called Vizzavi. In America, AOL Time Warner finally had its merger approved, bringing together the internet group's 30 million subscribers and the resources of Warner Brothers, Warner Music, Time Magazine, CNN and another 10 million cable subscribers.

These giants were created to exploit the convergence of different media, made possible by new technology. The Government's Communications White Paper, published in December, recognises the speed of this technical change in the UK. Over a quarter of households – 6 million – now have digital television from a standing start of none 18 months ago (made up of 1 million subscribers to Ondigital and 5 million subscribers to BskyB). Every quarter, another 500,000 people sign up. Digital television is the ultimate example of how the media is converging. It brings together over 200 channels, radio broadcasts and the internet, allowing people to have e-mail accounts through their TV sets.

Other developments are equally as rapid. Over 30 million people now have mobile phones, double the number of two years ago. Playstation 2 games consoles allow access to the internet via the television, as well as the chance to play games with such advanced graphics that users almost feel they are taking part in a feature film themselves.

Nor does it stop there. Pace Micro, a British company which makes the set-top boxes for digital television subscribers, is developing the 'networked home'. This will see the set-top box come off the television set and disappear into a cupboard. It will be connected to the world via a high bandwidth pipe with terminals, such as PCs and televisions, linked up round the house. Digital television could one day be the fifth utility, providing services such as video on demand, games and banking in every room.

The current regulatory system was designed to stop any one organisation or individual – such as Rupert Murdoch – dominating the media. But controlling television where there are over 200 channels is virtually impossible.

Yet, by comparison to AOL Time Warner or Vivendi-Universal, British media companies like Granada or Carlton are minnows. With the advantage of the English language on their side, they would be expected to perform on the world stage too. Instead, Britain is caught behind two rival commercial empires, one European and one American.

Those who wonder about this should look no further than our current regulatory system, which is harsh and inadequate. The statutes on which it is based, such as the Broadcasting Acts of 1990 and 1996, were designed, among other things, to stop any one organisation or individual, such as Rupert Murdoch, dominating the media. But things have changed. Dominating the internet, or controlling television when there are over 200 channels, is virtually impossible.

The explosion of outlets and methods of distribution has changed everything. But the labyrinthine rules designed to control a completely different environment remain in place.

THE CURRENT SYSTEM

The current system dates back to 1996 (the last Broadcasting Act) or before. Those were the days before the internet, before digital television, before Channel 5 and before digital radio. Technical limitations meant there were only four main channels on television. As a result, the media had a natural tendency towards concentration and even monopoly. It would be easy for any one individual or organisation to gain a disproportionate control over the nation's news and entertainment. The explosion of outlets and methods of distribution which has occurred since then has changed everything. But the labyrinthine rules designed to control a completely different environment remain in place.

At present, there are five regulators and quangos covering the industry:

- Oftel regulates the telecoms industry;
- The Independent Television Commission regulates ITV;
- The Broadcasting Standards Commission oversees fairness and standards;
- The Radio Authority regulates and licences independent radio stations;
- The Radiocommunications Agency manages the radio spectrum.

The media is converging, driven by technical developments such as digital television. Companies like AOL Time Warner are being created to take advantage of the new opportunities. Yet in Britain there are rules specifically forbidding such mergers.

THE CROSS-MEDIA OWNERSHIP RULES

Rules governing cross-ownership in the media are the regulations which the industry finds the most restrictive. The media is converging, driven by technical developments such as digital television. Companies like AOL Time Warner and Vivendi-Universal are being created to take advantage of this. Yet, in Britain, there are rules specifically forbidding such mergers. These include:

- no ITV company may hold a radio licence in an area which is covered by one of its franchises;
- no person who runs one or more national newspapers with combined circulation of 20% of the market may own an ITV licence or Channel 5, or a national or local radio licence;
- no proprietor of national newspapers with 20% of the market may have more than a 20% stake in an ITV company or a local or national radio station;
- no ITV company may own more than 20% of ITN;
- disqualification from owning local radio licences in the same area, unless one is FM and the other AM.

OTHER RULES

There are other restrictions which media companies find vexatious and which stop them expanding:

- ITV must buy 25% of its programming from the independent sector, defined as companies in which no ITV company has a more than 20% stake. Some believe this starves the sector of capital as the two main ITV companies, Carlton and Granada, are held back from taking big stakes in independent production companies;

- no ITV company may have more than 15% of the audience. The Government has said it will scrap this rule;
- no radio company may have more than 15% of the audience. This is calculated according to a complicated points system and is loathed by the radio industry. Companies like Capital and GWR (the owner of Classic FM), are right up against their ceilings and are desperate for reform. The Government has made no commitment on this.

CHAPTER THREE

THE GOVERNMENT'S PROPOSALS

The Government committed to reforming media regulation in its 1997 Manifesto. It said:

The regulatory framework for media and broadcasting should reflect the realities of a far more open and competitive economy, and enormous technological advance, for example with digital television. Labour will balance sensible rules, fair regulation and national and international competition, so maintaining quality and diversity for the benefit of viewers..

That sounded sensible enough. The pity is that after four years we still only have a White Paper and no change in the law.

LOOKING TO AMERICA

As with the creation of the Financial Services Authority (FSA) in the City, where the model was the Securities and Exchange Commission in New York, the Government has chosen to look towards America and the Federal Communications Commission (FCC).

The FCC is the model for Ofcom. The FCC has five commissioners, politically appointed, each one regulating an area such as telecoms, cable television or wireless. However, the FCC has not been an unqualified success. Many blame it for America's backwardness when it comes to mobile phones. It has failed to introduce national licences (although they are now on the cards) so there has been no national standards. There is also no 'caller-pays' tariff structure, so if you own a mobile and someone calls you, you have to foot the bill yourself. This has discouraged people from subscribing. This is evidence that one big regulator can be even more slow-moving than an array of little ones.

In other areas, the FCC has been more successful, notably in encouraging the growth of the internet. But the FCC is working in the American free market tradition and its powers are, in many ways, limited. For instance, its control over content is restricted by the US Constitutional safeguard protecting freedom of speech. British measures compelling news providers to be 'impartial' might therefore be unconstitutional in America. This is why some radio shows in the US are so overtly political. Furthermore, because the FCC is appointed by the President and it is a Federal Body, the Commissioners have to be approved by Congress.

OFCOM

In the White Paper, the Government said:

We shall create a new unified regulator (Ofcom) responsible for the communications sector. The regulator will be independent, will act at arm's length from the Government but will work closely with the DTI, DCMS and other relevant departments, including European and other international negotiations.

Many of Ofcom's central objectives are entirely laudable. These include:

- protecting the interest of consumers in terms of choice, price quality of service and value for money, in particular through promoting open and competitive markets;
- maintaining high quality content, a wide range of content and plurality of expression;
- protecting the interests of citizens by maintaining accepted community standards in content, balancing freedom of speech against the need to protect against potentially offensive or harmful material, and ensuring appropriate protection of fairness and privacy.

Ofcom will have a duty to keep markets or sectors under review and roll back regulation promptly where increasing competition renders it unnecessary. It will encourage co-regulation and self-regulation where these best achieve the regulatory objectives. If only other regulators, such as the FSA, had such sensible duties.

WHICH OF THE OLD RULES WILL ACTUALLY GO, AND WHEN?

However, there are serious concerns. Despite Chris Smith talking of regulating "with a lighter touch", little has been made of tearing up the old rules. The only commitment to change by the Government has been to scrap the 15% audience ceiling for ITV companies. On the other rules, the only commitment is to consult.

According to the current timetable, consultation must be in on 12 February. If Labour wins the election, a draft bill has been pencilled in for the summer. A new Communications Act will therefore not be in place until 2002, at the earliest. That means more delay for an industry with a pressing need for deregulation.

NEW RULES AND NEW POWERS

The White Paper is surprisingly vague about the details of Ofcom's powers. However, there are various references to suggest that far from deregulating, Ofcom could add significantly to the burdens on the New Economy, at the very time that many start-ups are struggling to survive.

Section 8.9 says:

We will enhance the regulatory powers available to Ofcom. In addition, we will give Ofcom Competition Act type powers to levy financial penalties for breaches of sector-specific regulatory requirements. This will bring the range of enforcement powers into line with other regulatory bodies, for example the Financial Services Authority and the Office of Gas and the Electricity Markets. We invite views on whether this is an adequate toolkit for regulation in this field, or whether further powers could prove necessary in the future.

That does not sound like "a lighter touch". The Competition Commission can fine companies up to 10% of turnover. It is hard to see what giving these powers to Ofcom, in addition to the Commission, would achieve. After all, media companies are already subject to the Competition Act. The Financial Services Authority also has powers like Customs and Excise to enter premises, remove documents, compel witnesses to answer questions and levy civil penalties. Surely the Government is not proposing to introduce similar powers to control the media? Judging by what the White Paper says, that is in fact what it is planning.

Ofcom will also have concurrent powers with the Office of Fair Trading to exercise Competition Act powers. The potential for duplication and conflict here is huge and the implications for companies hoping to merge, answerable to two competition inquiries, could be considerable. It would be preferable if competition matters were transferred to the Office of Fair Trading and Competition Commission and that these bodies merely had a duty to have regard to Ofcom's recommendations.

THE REGULATION OF CONTENT

Ofcom will maintain standards of taste and decency. However, it will also consider other, related matters, which have a slight whiff of political interference, aimed at reinforcing some of Labour's other measures and prejudices.

For the first time, the BBC will be regulated. That is surely good news as, currently, it is not accountable to the Independent Television Commission and the Corporation's governors are responsible for overseeing matters of content.

Ofcom will be at the peak of a three-tiered structure. The first tier will be its "relevant underpinning codes" on content, such as the 9 o'clock watershed. The second tier will be Ofcom's powers to make sure basic public service requirements, such as having a peak-time news programme on television, are met. The third tier is one of self-regulation, covering more general public service requirements, such as the one in the BBC's Charter calling for the BBC Home Service to reflect the cultural diversity of the UK.

The White Paper says:

We will retain and strengthen the regional dimension to public sector broadcasting.

Ofcom will achieve this by developing:

...good links with the relevant policy committees and executives of the devolved assemblies and with representatives of the English regions.

As no mention is made of accountability to Westminster, there is a concern that this could be used to reinforce the regionalisation of the UK.

In order to reflect the attitudes of the public, Ofcom will have the power:

...to commission a programme of independent research, drawing on a variety of methodologies, including surveys and citizens' juries.

It will also:

...establish bodies to reflect the public interest in the content of communications services, whether it be as citizen or consumer, as parent or child, as one of a majority or minority group.

Accuracy and "impartiality" must remain at the heart of licensed broadcast services, says the White Paper. In the days when there were only two news providers, this was certainly desirable and probably remains so for free-to-air broadcasts. But, it could be argued, this provision looks outdated in a multi-channel age. For instance, the *Sun* newspaper once accused Tony Blair of being "The most dangerous man in Britain". If it was a television station under the new regime, it would be in trouble. As channels proliferate, imposing impartiality will be ever more difficult and more bureaucratic, stifling innovation, not to mention restricting the expression of different points of view.

As channels proliferate, imposing impartiality will be ever more difficult and more bureaucratic, stifling innovation, not to mention restricting the expression of different points of view.

Taken together with the powers to fine and enter premises, the regulation of content by Ofcom becomes more alarming. Only the paranoid would suggest that the Government intends to give Ofcom the kind of powers the Lord Chamberlain used to have in centuries past, when he could enter theatres and close them down. But it is clearly important that Ofcom is restrained. Violating public taste, before the 9 o'clock watershed, in a free-to-air broadcast, is clearly undesirable. But Ofcom's powers go beyond what is necessary.

THE BRITISH BOARD OF FILM CLASSIFICATION (BBFC)

Interestingly enough, the White Paper makes no explicit commitment on the Board. The only reference is under videos and DVDs in section 6.11, where it says that the Board will continue to act as Ofcom's agent in classifying films. But then it says:

Another approach would be for Ofcom to take over the pre-classification work of the BBFC.

It also says:

There is an argument that judgements about the suitability of material should be made on a more consistent and coherent basis across the media, according to our statutory objectives and principles for content regulations.

All regulators have a tendency to grow and extend their powers. Ofcom looks like being no exception. Even before it has reached the statute book, the possibility of the BBFC being subsumed has been raised. Just what this would achieve, apart from administrative tidiness, is hard to understand. The current system for film classification, where the Board is accountable not to central government but to local authorities (which licence cinemas) seems to work perfectly adequately. The prospect of this giant regulator adding statutory censorship of films to its portfolio of powers, using vague criteria such as “accepted community standards” is not an attractive one.

This seems unnecessary. Training is not the job of a regulator.

TRAINING

Ofcom is also to be given a role in training broadcasters and possibly journalists. In section 5.6.3 the White Paper says:

We believe there is a case for Ofcom to have a general responsibility to promote support for training across the wider broadcasting industry, including powers to research and monitor performance. This would be underpinned by licence requirements.

This, again, seems wholly unnecessary. Training is not the job of a regulator but of broadcasters themselves, or colleges and other bodies. Training could also jeopardise Ofcom’s relationship with those it regulates, as its inspectors use their powers to investigate companies and discipline those they deem to have inadequate schemes in place.

There are also plans for Ofcom to be a broadcaster itself, running an Access Fund. Rather vaguely, in section 4.5.3, the White Paper promises a fund:

...under the aegis of Ofcom, which would channel money from a number of sources to help start-ups of, and particular projects for, small-scale terrestrial cable, satellite, or even internet radio broadcasting.

The money could come from government or a levy on broadcasters’ licences.

As with training, this may sound attractive but is actually a superfluous extension of Ofcom’s influence. Ofcom should be a regulator outside the market not operating within it, even on a small scale. And such experimental broadcasting should be funded like any other start-up, through the normal commercial means. After all, it would be odd if the FSA launched a start-up bank.

ACCOUNTABILITY

Nowhere does the White Paper say how Ofcom itself is to be regulated, restrained and made accountable. There will be a non-executive chairman and chief executive (which is a step forward compared to the FSA, where chairman Sir Howard Davies has refused to split his role). But it is not clear how they will be appointed. Ofcom will fall under the umbrellas of two ministries, the Department of Culture Media and Sport, as well as the Department of Trade and Industry, adding to the confusion.

The chief executive of Ofcom will be hugely powerful, holding sway over so much of our cultural life. Those who worry that Labour is waging a cultural war, through the media, on traditional British values are unlikely to find Ofcom a comfort. That is especially so when you consider that the chief executive will most likely be appointed by the Government and those names currently in the frame – Baroness Jay, Gavyn Davies, and Patricia Hodgson of the ITC – are all seen as having links to the Government. Ofcom is just the kind of patronage open to abuse by Government's of all persuasions.

Yet, despite this, there is no mention of Parliament, or Select Committees or a complaints and appeals procedure in the White Paper ("Citizens juries" are hardly a substitute). Without such provisions, this would be in breach of the Human Rights Act which requires a right of appeal.

Given the huge powers to regulate both the commercial aspects of the media and its content, it is vital that appointments are made on a transparent basis. Who will interpret "acceptable community standards"? And imagine the fate of a journalist accused of breaking the rules of "impartiality" at the same time as his proprietor is trying to persuade Ofcom to approve a merger with a rival. Big Brother will indeed be watching you.

FUNDING

A related issue to accountability is funding. Presumably, Ofcom will be paid for out of a levy on media and telecoms companies (the White Paper does not make this clear). This is the method used to pay for the Independent Television Commission. There have been complaints that this is effectively a tax on broadcasters, but it is not seen as such by the authorities. This means there is no 'value for money' test or any scrutiny of how the levy is spent. If Ofcom's levy was seen more as a tax, it would have to report on how its funds were raised and spent every year to the Public Accounts Committee. It would also be subject to investigation by the National Audit Office, which would be no bad thing.

A useful precedent on accountability is to be found from the creation of the FSA. A Joint Committee of both Houses proposed the FSA should be directly answerable to Parliament via a Select Committee. The Government has, so far, shied away from this, but the Treasury Select Committee is keeping a watchful eye on the situation. Another recommendation was that an independent complaints procedure should be established, and this was adopted. The FSA's complaints commissioner is appointed by the Lord Chancellor and does not operate from the FSA's headquarters in Docklands.

CHAPTER FOUR

CONCLUSION

When the White Paper was published, many leading figures in the media, such as Charles Allen, chairman of Granada, and Michael Green, chairman of Carlton, were all supportive, whereas the public was almost silent.

But Ofcom, though not entirely a bad idea, has the potential to mutate into a menace. Only a perceptive few have dared point out the danger. In an article in the *Guardian* on 18 December 2000, Peter Preston said:

Now one agency fixes everything in an area that isn't about gas or electricity but shades of truth. Is it possible for such a construct to be modern and intelligent? Place long odds on the answer 'no'.

Whatever it may be, Ofcom is certainly not a means of increasing our freedom. Already the warning signs are there that this could be another of the Government's illiberal measures. Certainly, it is doubtful whether Ofcom will achieve the "lighter touch" in regulation proclaimed by Chris Smith.

Many of those who submit their views for consultation by 12 February will have pointed out the urgent need for deregulation of the communications industry. And the powers to be given to Ofcom will have been questioned vigorously.

The new regulatory structure for communications should be as light as possible and as simple as possible. First, the presumption should be that the competition issues should be dealt with under the Competition Act, as with any other industry. The Office of Fair Trading and the Competition Commission are perfectly capable of discharging this function and could, of course, take account

of Ofcom's views. As the number of media outlets proliferates, competition will become ever more fierce and the media's monopoly characteristics will naturally diminish. Competition, not Ofcom, will be the consumer's natural friend.

Competition, not Ofcom, will be the consumer's natural friend.

With this in mind, the cross-ownership rules should be gradually abolished and replaced by the normal competition tests of whether there is a "dominant market position" being created and whether that position is being abused.

Ofcom itself should be confined to promoting the interests of consumers in matters of taste and decency, especially in media which are freely and widely available. There is no need for it to be given "Competition Act type powers" to enter premises or fine a company 10% of its turnover. Nor is there any need for it to involve itself in training broadcasters and journalists, or to become a broadcaster itself through the Access Fund.

A Select Committee should oversee Ofcom. Its annual report should be laid before Parliament.

Accountability is also a vital aspect which the Government should give more weight to. A Select Committee should oversee Ofcom and its annual report should be laid before Parliament, for examination both by the Committee itself and the Public Accounts Committee. The Select Committee could also hold public approval hearings on the appointment of the chairman, chief executive and other directors. There should also be an independent complaints and appeals procedure for those who disagree with Ofcom's rulings.

Finally, how about a name change? Even the very word Ofcom is somehow frightening and reminiscent of a caricature like the Ministry of Truth. It also hints at something alarming about the style of government that Labour has grown to prefer. The Communications Agency would certainly have a lighter ring to it and, you never know, it might even have a lighter touch.

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In a proposal which had gone virtually unnoticed before the publication by the Centre for Policy Studies of Christopher Booker’s pamphlet, Nice and Beyond, federalist-inclined countries are to be allowed to push ahead with deeper integration – Leading article in the Daily Telegraph

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Are there really twice as many children who need special help at school as there were a few years ago? The proportion of pupils with Statements of Special Educational Need (i.e. those children with the most severe problems) has more than doubled in only eight years (from 1991 to 1999). The proportion of pupils with Special Educational Needs but without Statements (i.e. those children defined as having learning difficulties) has also risen very rapidly. Nearly 1.4 million are now judged to have special needs without statements. One fifth of all children are now classified as having some form of Special Educational Need and one-third of the total education budget (£7.1 billion out of £20 billion) is spent on them. The author suggests that the reason for the explosion in Special Needs may lie in the fact that so many pupils are not taught properly (particularly reading). He calls for the reform of teaching practices; a new definition of categories of disability; the use of more special schools for those children with severe problems; and a National Enquiry to establish accurately the scale of Special Educational Needs and the use – or misuse – of resources.

The idea that almost one in five school children have “special education needs” beggars belief... The worrying explanation is that there has been a huge increase in the numbers of children who have not been taught to read and write properly in their early school years – Leading article in the Daily Mail

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