

# OFFICE OF COMMUNICATIONS ACT 2002

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## EXPLANATORY NOTES

### 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.