

MEMO

To: Consumer Panel
cc: Georgia Klein, Dominic Ridley, Claudio Pollack
From: Xxxxx Xxxxxx
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Ref / Subject: **Self- and Co-Regulation**

1. Background

In March 2007, a member of Ofcom Approaches to Co- and Self-Regulation project team presented the initial work and findings of the project to the Consumer Panel. The Consumer panel duly provided its advice to Ofcom based on that feedback and material at the meeting and subsequently in writing. In addition to addressing the Panel's advice where it was able to, the project team continued to update the Consumer Panel regularly on the progress on the project with supporting material right-up to the period of the consultation.

The Ofcom project team took on board the advice from the Consumer Panel which has been reflected partly in the internal work of the project and partly the final consultation document, bearing in mind that the aim of the project was to provide a generalised means for Ofcom managers to make an initial assessment of when it might be appropriate to deploy a self- or co-regulatory solution rather than use its powers as underpinned by its statutory remit. The assessment would have to be designed to take into account not only schemes designed in relation to the consumer's but also to the citizen's interest and therefore spanned the broadcasting, telecommunications and new media sectors. The aim of the project was not to produce an review of existing schemes with the sector with recommendations for public consultation, although individual reviews of particular schemes have been undertaken and the work of the project team as been fed into these separate Ofcom projects, as appropriate.

Turning to the points of advice that the Consumer Panel provided, the Ofcom project team addressed them as follows:

1. The Consumer Panel was keen that Ofcom looked beyond the communications sector when undertaking this project. Ofcom took this advice on board through by looking at certain UK-based schemes outside the Comms sector and also via the literature review and interviews with stakeholders.

2. The Consumer Panel stressed that it was important to have working definitions of both self- and co-regulation with an explanation of the two concepts. The project team agreed that this was important and these were developed during the course of the project. Our final thoughts on this were summarised in the public consultation document published on 27 March 200 (see paras 2.17-2.42 of the consultation document for further information.)

3. The Consumer Panel wanted to see an evaluation of which enforcement process or sanctions for self- or co-regulatory bodies were effective and which were not. Clearly this was quite an involved task as there is no single legal framework by which Ofcom can implement a particular scheme or to take corrective measures to address the problems identified with particular schemes or indeed to delegate to co-regulatory body. Moreover in case of bodies which are purely self-regulatory, by definition, it is not in the gift of Ofcom to tackle these directly but only to engage in dialogue with such bodies and to see what alternatives may be viable, if it considered that this was indeed appropriate. Moreover, in some cases, issues were not applicable because different schemes are designed to achieve different outcomes, for example the provision of information to consumers alone rather than any specific duties to protect or provide redress to citizens or consumers.

Nevertheless, although this was not the main purpose of the project, which was to identify a generalised approach to make an initial assessment of when co- and self-regulation may be appropriate, Ofcom did undertake an analysis of its regulatory powers with respect to individual co-regulatory bodies, including what back-stop powers it had as well as what could be done where members transgressed the rules where this was relevant. Clearly, this was not relevant to each scheme in the UK communications sector for the reasons outlined in the above paragraph. This work fed into the separate projects that were reviewing and making recommendations on individual schemes by other Ofcom teams.

What was beyond the scope and resources of the project was what possible changes might be required to legislation to allow Ofcom to have overarching umbrella powers to co- and self-regulation to all schemes within the UK communications sector. Whether such an approach is desirable, and what it would require, would have to be examined as a separate project looking at changes to the Communications Act longer-term. Indeed subsequent feedback from PE was that the project team should remain focused on what was possible within the bounds of today's regime.

4. The Consumer Panel considered that it was a mistake to look at alternative dispute resolution (ADR) in isolation from dispute resolution in the round. The project team only examined existing ADR schemes marginally as part of gaining insights from existing schemes to form its views on a generalised approach to what 'good looked like' with respect to co- and self-regulation. In fact during the course of the project, the project team considered that the self-regulatory aspects of the two ADR schemes, CISAS and OTELO, were limited to a considerable extent by the oversight powers of Ofcom under the Communications Act. However, it was not considered by the Project Director to be within the

scope or the resources of the co- and self-regulation project to undertake an extensive review of ADR. Therefore what analysis we did have in this area we passed onto the Consumer Policy Team that was undertaking a separate review in this area.

5. The Consumer Panel recommended that Ofcom should pay close attention to the governance of self- and co-regulatory schemes. In particular, the Consumer Panel thought that schemes should not only be “independent of the interests of industry, but to be seen to be independent.” The Consumer Panel's advice as taken on board in relation to independence as set out in Ofcom consultation document at Criterion (h), specifically:

"Involvement of independent members: There is a clear tension between the desirability of autonomous schemes and the objectives of drawing on the experience, expertise, resources and engagement of the industry within them. The benefits of self-regulation may only be realised if the scheme is respected by other stakeholders including consumer and citizen groups, government and parliamentarians. Consequently a system involving a mixture of independent lay and industry members will be appropriate in both the scheme's governing body and further operating committees."

Of course, independence as indeed all the criteria set out in the consultation will have more or less importance depending on the type of scheme concerned and what the scheme is designed to do: whether the scheme is designed to inform consumers; whether the scheme is designed to provide redress to consumers; or whether a scheme is not consumer-facing at all but is in fact designed to improved intra-industry processes. It is the view of the Ofcom project team that not all schemes are designed for the same purpose and therefore do not require the same attributes. Equally there are limits what can be prescribed in the case of a self-regulatory scheme, by definition, compared to a co-regulatory scheme where Ofcom may have extensive back-stop powers.

With regard to the funding that the Consumer Panel also raised, Ofcom's consultation document stated that:

"Some cases, the direct costs of funding a bespoke scheme may not be outweighed by common or evenly distributed benefits to members. Industry members must ensure there are adequate resources to operate the scheme effectively, and that this is commensurate with the scale of the industry that it is imposed on. Staff resources would need to be sufficient to cope with the volume and type of work which is likely to arise. The operation of the scheme should dictate proportionate costs, rather than vice versa."

However guidance on the specific structure of funding will depend on the nature of the scheme and whether it is self-regulatory or the degree it is co-regulatory and is beyond the general criteria contained in the con doc and would have to be considered on a case-by-case basis. Generally it is important to recognise that the operation of a scheme will often dictate proportionate costs, and the circumstances to address particularly funding gaps will differ whether the scheme is co-regulatory with Ofcom having a say in the funding versus a self-regulatory scheme where Ofcom has no say in the matter.

6. The Consumer Panel queried to what extent had the project team analysed consumer detriment as part of its work. This played an important part in establishing the final criteria for making an initial determination of whether a self- or a co-regulatory solution was likely to succeed against the backdrop of individual and collective industry commercial incentives in any given area. Moreover, as part of our internal analysis of individual schemes, the project team identified possible weaknesses in some schemes to deliver outcomes that would be beneficial to consumers or citizens as appropriate.

7. The Panel asked what were the plans of Ofcom once the review had been undertaken. Strictly speaking, the project team was not undertaking a review but rather examining a variety of examples inside and outside the sector to develop a unified approach within Ofcom to making an initial assessment when a self- or co-regulatory solution may be preferable. Therefore the project team subsequently produced a consultation on its new approach based on its work during the previous year and this ran for 10 weeks until the beginning of June. This consultation is now closed with more than twenty responses from a range of national and international stakeholders. The project manager will review these responses and produce a summary. Based on the feedback, a final statement will be presented to the Ofcom Policy Executive for approval prior to publication. After the publication of the Statement, Ofcom will consider if more detailed internal guidelines might be required and the means they should be circulated to colleagues within Ofcom. However a number of projects have already the project team on the new, incentives-based approach and this has fed into the work of the Consumer Policy team and Content & Standards team.