

"Working for quality
and diversity in
British broadcasting"



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Ofcom consultation: Initial assessments of when to adopt self- or co- regulation.

A response from Voice of the Listener & Viewer.

1. Voice of the Listener & Viewer (VLV) is an independent, non-profit-making association, free from political, commercial and sectarian affiliations, working for quality and diversity in British broadcasting. VLV represents the interests of listeners and viewers as citizens and consumers across the full range of broadcasting issues. VLV is concerned with the structures, regulation, funding and institutions that underpin the British Broadcasting system.

2. VLV welcomes the opportunity to respond to the Ofcom consultation: Initial assessments of when to adopt self- or co- regulation.

3. VLV supports the overall contention of the consultation document, which proposes that Ofcom should develop a clear set of criteria regarding the possible adoption of self- or co- regulatory solutions. VLV believes that it is essential that regulatory bodies operate in a transparent and consistent fashion for the benefit of the public. We therefore view Ofcom's consideration of this matter as a positive development that responds to Ofcom's obligations under the 2003 Communications Act.

4. However, we have a number of comments to make; the general thrust of these is that, as written, Ofcom's proposals do not provide an appropriate level of protection for citizen and consumer interests. The comments which follow address these concerns in more detail.

5. In the first instance, Ofcom's proposals are oriented towards the needs of businesses; co- and self- regulation are supported primarily as means of reducing costs and regulatory burdens, rather than in terms of their benefit (or cost) for citizens and consumers.

6. Ofcom states that its promotion of self-regulatory solutions is required by section 6 (2) of the 2003 Act. VLV questions this assertion, noting that the relevant section of the Act merely requires Ofcom to 'have regard to the extent to which the matters which they are required under section 3 to further or to secure are already furthered or secured, or are likely to be furthered or secured by self-regulation'.

7. It is our contention that the Act does *not* require Ofcom to promote co- or self- regulatory solutions, but simply to consider these solutions alongside other regulatory options.

8. Therefore, we submit that Ofcom's primary statutory obligation (to further the interests of citizens and consumers in media and communications matters) overrides any orientation towards a particular regulatory strategy. Ofcom's proposals regarding self- and co- regulation must therefore reflect this.

9. In this vein, we note with concern that Ofcom's current proposals (and the evidence base from which they are developed) seem to underestimate the role of underlying statutory tools in the development of effective self- or co- regulatory solutions.

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10. To illustrate: in sections 2.27-2.31, Ofcom discusses the development of the Internet Watch Foundation as an example of good self-regulatory practice. However by Ofcom's own admission, the IWF's success is dependent upon 'Tough laws that prohibit any form of possession or distribution of child abuse images with strong sanctions for transgression' (2.30). It is clear that strong statutory backstop powers remain in force- on this basis, the example of the IWF is not a satisfactory argument for self-regulation.

11. More generally, Ofcom's own recognition of the volatility of communications markets seems to support a more cautious approach to regulation; one which would seek to retain backstop powers in all but the most exceptional circumstances.

12. Ofcom's incentive-based approach to self- or co- regulation assessments is subject to this qualification. While the proposed set of criteria represent a strong engagement with the relevant issues, the practice of making an initial assessment would inevitably be based upon judgements of a market ecology that is subject to frequent and volatile change, the nature of which can cause problems for consumer and citizens.

13. For example, such criteria as 'collective industry incentives to participate' and 'free-rider issues' (3.8) are contingent on the nature of the market and its participants at a particular time. Therefore, an initial assessment in favour of self- or co- regulation is no guarantee that these conditions will persist.

14. In Section 4 of the consultation, Ofcom seems to tacitly acknowledge some of these issues, recognising that a variety of techniques (including the maintenance of some backstop powers, and a strong role for independent and lay representatives within self- and co- regulatory bodies) may be necessary to adequately protect citizens and consumers. VLV supports this assertion, and strongly contends that such concerns must be central to Ofcom's policy formulation.

15. On this basis, we wish to make two general recommendations:

- i) that the 5 'steps' outlined in section 3.8 be considered in a different order, in which step 2 ('Delivery of Benefits to the citizen and consumer') becomes the initial step. Any shift from statutory regulation must be initially predicated on a substantive body of evidence that demonstrates consumer and citizen benefits, in accordance with Ofcom's primary statutory obligations.
- ii) That where such a body of evidence exists and other appropriate conditions are met, any initial regulatory change should be to co-regulation as opposed to self-regulation. This would enable Ofcom (in conjunction with consumers, citizens, and their representatives) to analyse the impact of industry engagement in regulation in specific cases, whilst at the same time retaining substantive backstop powers to ensure consumer and citizen protection. In many cases, intervening factors (such as market volatility, or a substantial citizen interest in a market) are likely to rule out a shift to self-regulation based on Ofcom's primary statutory obligations to citizens and consumers.

ADDENDUM

VLV also wishes to draw Ofcom's attention to procedural issues regarding this consultation document. The document contains a number of grammatical errors and a tendency towards confusing sentence structure. These flaws create an extra burden for those responding to the consultation.