EXPLANATORY DOCUMENT TO

THE PUBLIC BODIES (MODIFICATION OF FUNCTIONS OF OFCOM) ORDER 2013

2013 No. xxxx

1. This explanatory document has been prepared by the Department for Culture, Media and Sport and is laid before Parliament under sections 5(1) and 6 of the Public Bodies Act ('PBA') 2011.

2. Purpose of the instrument

2.1 This instrument makes amendments to a number of duties and functions, which are currently carried out by the Office of Communications, commonly referred to as Ofcom.

2.2 The instrument constitutes reform of the Schedules to the Office of Communications Act 2002 in order to modify Ofcom's internal structure and amendments of Part 1 of the Communications Act 2003 and functions of Ofcom in relation to broadcasters in Part 3 of that Act. A full list of the duties and powers to be amended are set out in the explanatory note to the order.

2.3 A separate statutory instrument will be laid later in the year that will remove the requirement that Public Service Broadcasters provide annual statements of programme policy – arising out of sections 266 and 270 of the Communications Act 2003.

3 Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4. Legislative Context

4.1. Ofcom is the UK's independent regulator and competition authority for telecoms and wireless telegraphy. It also has responsibility for regulation of television broadcast services. Ofcom was established in 2002[1], but was invested with its powers, duties and functions in the Communications Act 2003. Ofcom incorporated and replaced a number of earlier regulators including Oftel, the Radio Authority, the Radiocommunications Agency, the Broadcasting Standards Commission and the Independent Television Commission.

4.2 Ofcom has two principal duties:

- Furthering the interests of citizens in relation to communications matters, and

[1] Office of Communications Act 2002

- Furthering the interests of consumers in relevant markets, where appropriate, by promoting competition.

4.3 Ofcom has duties under a number of Acts of Parliament and other legislation. These include the Communications Act 2003, the Wireless Telegraphy Act 2006, the Broadcasting Acts 1990 and 1996, the Digital Economy Act 2010 and the Postal Services Act 2011. Ofcom is funded by fees from industry for regulating broadcasting and communications networks, and grant-in-aid from the UK Government for undertaking concurrent competition regulation and managing radio spectrum.

4.4 The Public Bodies Act 2011 confers powers on Ministers in relation to certain bodies and offices. Section 5 of the Act enables Ministers, by order, to modify the functions of a body specified in Schedule 5, or to transfer a function of such a person to an eligible person, and to make consequential and supplementary changes. The Office of Communications (Ofcom) is listed in Schedules 4 and 5 to the Act.

4.5 Section 11(2) of the Act provides that this explanatory document must introduce and give reasons for the order, explain why the requirements of section 8 of the Act are satisfied and contain a summary of the representations received in the consultation.

5. Territorial Extent and Application

5.1 This instrument applies to the United Kingdom.

5.2 The Communications Act 2003 applies to the whole of the United Kingdom with power to extend it by Order in Council to the Channel Islands and the Isle of Man.

6. European Convention on Human Rights

6.1 Maria Miller, Secretary of State for Culture, Media and Sport has made the following statement regarding Human Rights:

"In my view the provisions of the Public Bodies (Modification of Functions of OFCOM) Order 2013 are compatible with the Convention rights".

7. Policy background – what's being done and why

7.1 Ofcom carried out an analysis of its internal governance, duties and functions in February 2011 as part of the Government's drive to increase the efficiency, transparency and accountability of all its public bodies[2]. This was designed to reduce expenditure in response to the challenge facing the whole of the public sector. The review resulted in a number of efficiencies which collectively reduced Ofcom's budget by 28.2 per cent in real terms against its 2010/11 funding cap. The identified savings were made through a combination of efficiencies, a

[2] https://www.gov.uk/government/news/improving-efficiency-and-transparency-dcms-cuts-quangos

reduction in staff costs, streamlining projects and governance, and ceasing some activities.

7.2 The review also identified how much the communications sector had changed over the last decade, and that this was set to continue at a rapid pace. Certain legal duties were therefore considered to be too rigid and where greater flexibility for Ofcom could be achieved; to adapt its structure, and create a more fit for purpose and streamlined organisation, sufficiently nimble to reflect advances in technology and the changing regulatory landscape.

7.3 In addition, it was thought that it was no longer appropriate that Ofcom continued to perform certain duties according to a pre-set timetable regardless of the costs and benefits that are likely to result.

7.4 As a consequence, a number of changes to Ofcom's statutory duties and powers were identified with the aim of reducing duplication and unnecessary expenditure. Acting on this, the Department for Culture Media and Sport, published a consultation document on "*Changes to the Office of Communications' (Ofcom's) statutory duties and functions"* with accompanying Impact Assessment on the 23 April 2013, in which it sought views on those changes. The documentation, including a summary of the relevant legislation, is available here: https://www.gov.uk/government/consultations/changes-to-ofcoms-statutory-duties-and-functions

Compliance with Section 8 of the Public Bodies Act 2011

7.5 The Minister considers that the order serves the purpose in section 8(1) of the Act for the following reasons:

I. **Efficiency:** The EU Communications Framework Directive requires national regulatory authorities (like Ofcom) to establish and maintain "arrangements" which allow those bodies to consult consumers in their state on issues which impact on those consumers as regards electronic communications networks and services. The changes to Ofcom's internal governance proposed through this instrument will allow them greater flexibility than they have had previously to create structures through which a wide variety of stakeholder views can be efficiently expressed. This will provide safeguards to ensure that citizen and consumer voices are properly represented but allow more flexibility and ensure that Ofcom's governance arrangements are "future-proof".

II. At the same time Government and Ofcom recognise that Ofcom is a UK wide body and their governance structure must reflect that. That is why the Secretary of State will also have the power of approval where Ofcom proposes to abolish or substantially restrict the functions (including conditions under which functions may be exercised) of the bodies listed in the order, and can use that power of approval to ensure that Ofcom continues to be structured in a way that ensures the views of different groups are represented. The order also ensures that where the Ofcom Content Board continues, it does so as currently constituted, including members representing each of the countries of the UK.

III. To remove unnecessary duplication, we intend removing the duty on Ofcom to promote training and equality of opportunity for employees. It is unusual for a regulator to have such a duty, especially when there are other bodies which are placed to fulfil this role, such as Skillset.

IV. **Effectiveness:** In the UK the term "public service broadcasting" refers to broadcasting which is intended for and will benefit the public rather than a purely commercial operation. It has generally come to mean broadcasting that aims to do four things: to increase our understanding of the world; to stimulate knowledge and learning; to reflect the cultural identity of the UK; and to ensure diversity and alternative viewpoints. All the BBC's television and radio stations have a public service remit, as do Channels 3, 4, 5 and the Welsh language channel, S4C.

V. Ofcom is currently required to undertake a review of the Public Service Broadcasting landscape at least once every 5 years. The review requires that these broadcasters fulfil certain requirements as part of their licence to broadcast, such as the provision of news and current affairs programming and the amount of original and independent productions. However, given the speed with which change is occurring in the communications sector, the Government believes it is sensible to build in sufficient flexibility for the regulator to conduct the reviews of public service broadcasting when the timing is right, rather than on a rigid timescale, which may not account for the context or need for a review.

VI. Common consensus borne out through the responses to the consultation is that these reviews are costly and resource intensive for both Ofcom and broadcasters. Furthermore, they do not directly link into the timing of other reviews of broadcasting content, such as the BBC Charter Review. The order therefore removes the rigidity of when these reviews have to happen, and ensures that when they do they will be timely, and of relevant scope.

VII. In order to reduce unnecessary bureaucracy and red-tape, we are removing the duty on Ofcom to undertake a review, of the Channel 3 networking arrangements, the set of arrangements between the holders of the 15 regional Channel 3 licences which come together to provide a competitive public service network. Experience has shown that an annual review cycle places a considerable burden on the licence holders and Ofcom and has relatively little value. It is important to note here that Ofcom will still have the power to perform such a review as it sees fit. Reviews of a change of control of a Channel 3 or Channel 5 licensee will now take place at the discretion of the Secretary of State.

VIII. Notwithstanding the changes Ofcom still has an important and far-reaching role to fulfil in terms of its on-going public service broadcasting duties. For example, the requirements Ofcom sets out for PSBs will continue to include the quotas on news, current affairs, original productions, independent productions, production outside London and regional news. Ofcom will also

continue to monitor delivery against Channel 4's new digital remit, examining its Statement of Media Content Policy – a separate requirement in the Communications Act 2003 as amended by the Digital Economy Act 2010.

IX. **Economy:** Whilst the reduction of expense is not the key driver for these changes, given that the savings are relatively modest, these are still considered worthwhile. The measure to remove the duty on Ofcom to carry out a full Public Service Broadcasting review every 5 years will allow Ofcom to make cost savings of at least between £135,000 and £180,000 per annum. This is based on Ofcom carrying out reviews at half the frequency of the current requirement e.g. every ten years. There could be further savings if the scope of the review focused on fewer areas, and there will be further savings for the public service broadcasters required to participate in these wide-ranging reviews.

X. The measure to amend the duty to assess channel 3 networking arrangements should also result in savings of around £30,000 per annum for the Channel 3 broadcasters and savings for Ofcom of up to £60,000 per annum. Both changes would reduce the need to undertake unnecessary reviews, in line with the Government's deregulatory agenda.

XI. **Securing appropriate accountability to Ministers:** Removing the duty on Ofcom to review Public Service Broadcasting every 5 years will give the Secretary of State the power to request a review and determine its scope, achieving greater flexibility and bringing this closer to democratically accountable ministers. Both the Secretary of State and Ofcom will be working to protect the consumer interest in broadcasting content. Public Service Broadcasting remains of great importance. Over 70% of all TV viewing is of PSB content, and the Government wants to ensure that the public can continue to enjoy watching the content that they value, and which forms such an important part not just of viewing habits, but of the wider industry and the UK economy.

7.6 The Minister considers that the conditions in section 8(2) of the Act are satisfied, in that the primary aim of the instrument is to provide Ofcom with the tools with which to carry out its regulatory duties more effectively for the benefit of consumers. At the same time in setting overall regulatory frameworks, the Government remains committed to the six principles of economic regulation[3]: accountability, focus, predictability, coherence, adaptability, efficiency.

8. Consultation response and outcome

8.1 The public consultation ran for 9 weeks and closed on the 25 June 2013. The consultation document was made widely available to interested stakeholders and the wider public on the Department website. It can be found here: www.gov.uk/government/consultations/changes-to-ofcoms-statutory-duties-and-functions

[3] Principles for Economic Regulation, Department for Business, Innovation and Skills (April 2011)

8.2 A total of 29 responses were received. The majority of these agreed that the measures outlined were sensible and should help lift regulatory burdens on industry, and at the same time enable Ofcom to deploy its resources more efficiently. One respondent saw relatively small savings for both Ofcom and broadcasters. One respondent considered there was insufficient information in the Impact Assessment to be able to agree or disagree with the changes put forward.

8.3 In relation to Ofcom's duty to review public service broadcasting (PSB) every five years, the majority of respondents agreed that a more flexible approach to when reviews took place was preferable to the current fixed time-scale. However some did have strong reservations, and saw this as an example, of the PSB commitment to the parts of the UK outside of England and among the UK's crown dependency states. The Minister has subsequently sought to reassure those concerned that the intra-UK aspects of broadcasting continue to be important. A recent example of this is the announcement in the Spending Review settlement regarding funding for S4C and MG Alba.

8.4 Some respondents were concerned about the level of power the Secretary of State or the Government of the day would now have to determine the timings and scope of future reviews. It was hoped that industry would have a key role to play in determining when reviews should take place. A number of respondents were concerned that there was no commitment as to when the next PSB review would take place. They were keen to stress the importance of these reviews continuing along with Ofcom's role in monitoring its quality. One respondent clarified that there are already an existing suite of regulatory processes aimed at securing and reporting on the provision of public service broadcasting.

8.5 In terms of the other PSB measures outlined, the majority of respondents were supportive, including of the removal of Ofcom's duties to review channel 3 networking arrangements and of the requirement placed on broadcasters to provide annual statements of programme policy. It was suggested that these had largely been superseded by individual broadcaster's annual reports, which contained much of the same information.

8.6 A small number of respondents were keen to retain the automatic review if a channel 3 or 5 licence changed ownership. They considered this an important reminder to those concerned of the importance of PSB. Concerns were also raised that removing this duty may have an impact on media plurality, especially in certain parts of the UK where the Channel 3 licence is currently not owned by ITV plc.

8.7 All respondents that covered the duty from Ofcom to promote development opportunities for training and equality of opportunity agreed with its removal, especially in light of the role that Skillset already plays for employees and businesses in the media sector.

8.8 The majority of respondents were in favour of the change to allow Ofcom greater flexibility to their governance. Several sought further clarity on what the changes would be, in particular to Ofcom's advisory committees, and what role the

Secretary of State would have in this process. A number were also concerned that any changes made to its advisory committees were made on the basis that they retained their consumer-focused outlook, and that they remained independent from the regulator. In addition concerns were raised that changes could result in the loss of the UK wide representation on Boards.

8.9 To respond to these concerns: the Secretary of State retains oversight of any significant changes to Ofcom's governance structure. In particular she is mindful of the importance of ensuring that the devolved administrations continue to be represented. Whilst the instrument does allow Ofcom the flexibility to revise some of its advisory committees, it also ensures that where the Ofcom Content Board continues, it does so as currently constituted, including members representing each of the countries of the UK.

8.10 The majority of responses received specifically sought to address the intended power to allow Ofcom to charge fees for satellite filings made to the International Telecommunication Union. While many supported the change, they believed further clarity on the charging principles was required. A few respondents suggested that the costs to operators should be based on the recovery of administrative costs incurred only. A number of respondents questioned whether the data/evidence presented in the Impact Assessment reflected the accurate costs to businesses in the UK and Channel Islands as of 2013. A small number of respondents commented that once a fee was introduced satellite operators would expect a better value added service than is currently provided by Ofcom. In light of these responses, the Government has decided that further work is needed on how such costs will be calculated, and how they will be recouped. As such, the proposed measure on satellite filings will not be included in this Order, but if appropriate, the Government will bring forward a satellite filings measure once this further work has been completed.

9. Activity during legislative passage

9.1 An amendment (No.39) to remove Ofcom from schedules 4 and 5 to the PBA was moved by Lord Whitty (of Camberwell) at Lords Committee stage on 28 March 2011.

9.2 The debate from the opposition centred around concerns that the thrust of future changes to Ofcom scope and responsibilities would limit its power to intervene in crucial issues such as media ownership and changes to public service broadcasting, and that in future power would be centralised in the hands of the Secretary of State.

9.3 Baroness Rawlings (Lords spokesperson for the Department for Culture Media and Sport) responded that the Government intention at that time was that once a number of changes to Ofcom's duties were made[4] they would be removed from Schedules 4 and 5. However, as part of the Government's review of the media and telecommunications sector, we have identified a number of additional changes to Ofcom's legislative mandate, which would support the

[4] The changes referred to are those contained in this instrument.

efficient and effective discharge of Ofcom's functions. We will be publishing further details on our approach to digital connectivity, content and consumers shortly. In light of this, and the Government's decision on 9th May 2011 to accept an amendment removing all public bodies from the relevant schedules to the Public Bodies Act by 14th February 2017, we have decided not to use section 6 to remove Ofcom from the Schedules to the Act at this stage.

10. Guidance

10.1 The nature of this order makes it unnecessary to publish guidance in relation to it. A summary of the relevant communications legislation is included on the consultation website, here: https://www.gov.uk/government/consultations/changes-to-ofcoms-statutory-duties-and-functions

11. Impact

11.1 An Impact Assessment was prepared for the consultation. This was published on the Department's website, alongside the Regulatory Policy Committee's (amber) rating. https://www.gov.uk/government/consultations/changes-to-ofcoms-statutory-duties-and-functions.This is also included alongside this document.

12 Regulating small businesses

12.1 This instrument will be relevant to all businesses that have interaction with Ofcom, more specifically, small scale production companies making television programmes.

13. Monitoring and review

13.1 The Government has not finalised formal proposals for monitoring or review of impacts arising from the order, but will work closely with the regulator and other affected stakeholders to ensure that these are captured and considered.

14. Contact

14.1 Henry Anderton, Department for Culture Media and Sport. Please phone 020 7211 6110 or e-mail henry.anderton@bis.gsi.gov.uk with any queries regarding this instrument.

Annex A: List of respondents to the Government consultation

	Name / Organisation	Type of Organisation
1	UKTV	Broadcaster
2	Channel 4	Broadcaster
3	British Film Institute	Industry body
4	PACT	Trade body
5	The Commercial Broadcasters Association	Trade body
6	Ministry of Defence	Central Government
7	Channel 3 licence holders – ITV, STV and UTV – joint response	Broadcasters
8	States of Jersey and Guernsey	Government Departments
9	Creative Scotland	Delivery Agency
10	Scottish Government	Devolved Administration
11	ManSat Ltd (Isle of Man)	Micro-Business
12	Gibraltar Regulatory Authority	Delivery Agency
13	SES	Large Business
14	Radio Centre	Trade Body
15	Communications Consumer Panel	Independent Body
16	International Broadcasting Trust	Trade Body
17	Claire Milne	Individual
18	EchoStar Satellite Operating Company and Hughes Network Systems, LLC	Large Business
19	Three (telecommunications)	Large Business
20	British Screen Advisory Council	Trade Body
21	Creative Skillset	Trade Body
22	Welsh Government	Devolved Administration
23	Global VSAT Forum and the European Satellite Operators Association	Trade Body
24	Avanti Communications Group	Medium business
25	O3b Limited	Medium business
26	Voice of the Listener and Viewer	Charity or Social enterprise
27	Channel 5	Broadcaster
28	Isle of Man Communications Commission	Delivery Agency
29	Inmarsat Global Ltd	Large Business