

Leighton Andrews AC / AM
Y Gweinidog Addysg a Sgiliau
Minister for Education and Skills



Llywodraeth Cymru
Welsh Government

Ein cyf/Our ref SF/LA/1902/12

Ed Richards
Chief Executive
Ofcom
Riverside House
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29 May 2012

c.c. Elinor Williams, Director
Ofcom Wales
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Dear Ed,

By letter dated 28 May 2010, in exercise of its power under section 14(2) of the Welsh Language Act 1993 (the 1993 Act), the Welsh Language Board (the Board) referred to the Welsh Ministers a Welsh language scheme submitted by Ofcom on 26 March 2010 to the Board under section 12 of the 1993 Act for the Board's approval.

In that letter, the Board noted that it and Ofcom had discussed the preparation by Ofcom of a Welsh language scheme but no agreement had been reached over the terms of a scheme which the Board could approve. The Board stated that the failure to agree on the terms of a scheme was due to the refusal by Ofcom to accede to the Board's request for Ofcom to include in the scheme a measure where Ofcom would consider within its arrangements for licensing local sound broadcasting services the linguistic nature of the locality to which the provider would provide its services, and, as a result the need for a Welsh language radio broadcasting service.

In that same letter, the Board asked the Welsh Ministers to exercise their power under section 14(5) to decide upon the terms of the scheme and to include in the scheme the following measure (the Board's measure) which has been translated from Welsh:

"Issuing local radio licences is amongst the services Ofcom provides to the public. In carrying out this function in relation to an area in Wales, Ofcom will ensure that its policies and procedures take appropriate account of the linguistic nature of that area, including assessing, where appropriate, the degree that an applicant for a new licence will offer a Welsh language service."

On 19 October 2011, I wrote to the Board and to you asking for the Board's and your representations. Following receipt of the Board's and your representations, on 9 November 2011, I provided the Board and you with a copy of your and the Board's respective representations and invited the Board's and your comments.

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Wedi'i argraffu ar bapur wedi'i ailgylchu (100%)

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On 28 February 2012, in exercise of the Welsh Ministers' powers under section 14(4) of the 1993 Act, I wrote to the Board and to you to request that you and the Board try to reach agreement on the terms of a Welsh language scheme for you before 27 March 2012. No agreement was reached between the Board and you before that date, nor since.

I should note that, on 1 April 2012, under section 143(4) of the Welsh Language (Wales) Measure 2011, the Board's functions in relation to Welsh language schemes, were transferred to the Welsh Language Commissioner.

Exercise of the Welsh Ministers' functions under section 14(5) of the 1993 Act

I have decided to exercise the Welsh Ministers' functions under section 14(5) of the 1993 Act and decide upon the terms of Ofcom's Welsh language scheme.

In exercising the Welsh Ministers' functions under section 14(5) of the 1993 Act, I have taken account of Part II of the 1993 Act, and in particular sections 5 and 12. I have taken into account the terms of the Welsh language scheme presented by Ofcom under section 12, the Board's measure, both the Board's and your representations and the Board's and your responses to the representations. I have also considered the Guidelines issued by the Board under section 9 of the 1993 Act as to the preparation of Welsh Language Schemes, and in particular paragraphs 1.15 -1.21 inclusive and Guidelines 2, 3, 4, 7(v) and 8(v). Section 5(3) of the 1993 Act requires regard to be had to the section 9 Guidelines in the formulation of a Welsh language scheme by Ofcom.

Although not directly in issue, I of course bear in mind section 149 of the Equality Act 2010 and also the UK's international obligations, including those under Article 27 of the International Covenant on Civil and Political Rights, which inform the view I take of how the Welsh Ministers' powers under section 14 should be exercised and which will also inform the approach of Ofcom to the carrying out of its functions.

Terms of Ofcom's Welsh Language Scheme

In exercise of the Welsh Ministers' functions under section 14(5) of the 1993 Act, and in compliance with the Welsh Ministers' duty under section 14(5)(a) of the 1993 Act, I enclose the terms for Ofcom's Welsh language scheme upon which the Welsh Ministers have decided (Ofcom's scheme).

Ofcom's scheme closely follows the terms of the Welsh language scheme submitted by Ofcom to the Board under section 12 of the 1993 Act. Those terms appear not to be in dispute, since the reference to me under section 14(2) of the 1993 Act of the matter of Ofcom's Welsh language scheme raises only the Board's measure as the subject of dispute.

In the introduction section, I have updated some references in keeping with the section 9 guidelines to reflect the fact that the terms of Ofcom's Welsh language scheme have been decided upon by the Welsh Ministers under section 14(5) of the 1993 Act. I have also made amendments in section 2, 'background', for example, to telephone numbers, and I have removed a reference to staffing levels and management structures which may alter during the lifetime of Ofcom's Welsh language scheme.

Ofcom's scheme provides that it will come into force on 29 August 2012. Ofcom's scheme also provides that, by the same date, Ofcom will develop a detailed four year action plan which will note how Ofcom will ensure that it operates in compliance with Ofcom's scheme.

Ofcom's scheme does not include the Board's measure. In my view, the Measure proposed by the Board takes too broad a view of the activities that constitute a service to the public in Wales.

However, I have come to the conclusion that a measure can be formulated for inclusion in Ofcom's scheme about the consideration that could be given by Ofcom as to the use of the Welsh language in connection with the provision of Ofcom's services to the public in Wales. The purpose of such a measure would be to give effect to the principle set out in section 5(2) of the 1993 Act, namely to give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that in the conduct of public business and the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality. That measure is included at paragraph 3.5 of Ofcom's scheme and is framed in the following terms:

We will give appropriate consideration to the use of the Welsh language in carrying out our functions involving services to the public. Those services include:

- a. the drawing up and issuing of our Localness Guidelines, and**
- b. the carrying out of our licensing functions in a way which seeks to ensure inclusion in licensed broadcasting of local material, including material of particular linguistic content and/or presentation, where necessary by the imposition of licence conditions.**

(Broadcasting Act 1990 ss 85 and 105; Communications Act 2003 s 314)

In light of the concerns expressed by Ofcom in its representations, I wish to emphasise that this measure does not insist that, in each case, Ofcom will impose conditions upon licencees providing local sound broadcasting services in Wales that would require them to broadcast in Welsh.

Welsh Ministers' conclusions in relation to the inclusion of the measure set out in paragraph 3. 5 of Ofcom's scheme

It is my view that Ofcom's local radio service licensing and related functions comprise or include "services to the public" for the purposes of section 5 of the 1993 Act.

Thus, taking "services to the public" in its ordinary meaning (connoting provision of benefit generally) I consider that there is a strong argument that in applying the principles of "localness" to the licensing process itself, this aspect of licensing does, in the particular circumstances constitute or include "services to the public". Thus the powers and duties of Ofcom to be exercised in undertaking the licensing function itself go to content of the ultimate service provided to the public and not simply to more "objective" issues of oversight of standing of licence holders and formalisation of procedures for obtaining licences. It is therefore my view that the carrying out of Ofcom's licensing functions in a way which seeks to ensure inclusion in licensed broadcasting of local material, including material of particular linguistic content and / or presentation, where necessary by the imposition of licence conditions, constitutes "services to the public".

It is also my view that guidance and information for the public prepared and published by Ofcom, including the Localness Guidelines themselves issued under section 314(2) of the Communications Act 2003, clearly constitute "services to the public".

It does not appear to me that this has been disputed in the submissions received.

In my view, the use of the Welsh language may feature as a consideration in connection with the provision of those services to the public in Wales. I am of the view that Ofcom has the power to influence the linguistic character of programme content. I am of the view that programme content through the medium of Welsh (and I note in passing that it is my view that this would likely apply to material in other languages) may clearly constitute "local material" within the definition of "local material" in section 314(7) of the Communications Act 2003. I do not believe that the absence of an express reference to "language" in that definition means that "local material" cannot encompass linguistic character. In light of the wording of section 314(2) of the Communications Act 2003, the definition of "local material" is relevant to the scope and content of the Localness Guidelines (issued under section 314 of the Communications Act 2003).

My views on the scope of the definition of "local material" are bolstered by general obligations on Ofcom under section 85 of the Broadcasting Act 1990 to do all that it can to secure the provision of a range and diversity of local services. Ofcom is also obliged to have regard to the extent any proposed service would cater for the "tastes and interests" of particular areas within Wales and the extent to which proposed services would broaden the range of programmes available to persons living in the area for which the service would be provided, within the meaning of section 105 of the Broadcasting Act 1990.

It is on this basis that I have come to the conclusion that a measure can be formulated for inclusion in Ofcom's scheme about the consideration that could be given by Ofcom as to the use of the Welsh language in connection with the provision of Ofcom's services to the public in Wales. The purpose of the measure is to give effect to the principle set out in section 5(2) of the 1993 Act, namely to give effect, so far as is both appropriate in the circumstances and reasonably practicable, to the principle that in the conduct of public business and the administration of justice in Wales, the English and Welsh languages should be treated on the basis of equality.

Yours sincerely,



Leighton Andrews AC / AM
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Minister for Education and Skills