

## **Competition and the public interest: a more transparent approach**

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### **Introduction**

There is no need for me in this session to rehearse in detail the changes that are taking place in the communications market.

But it is worth at the start to emphasise how close we are to a very different and more converged world. Most young people are already there. They are already fully at ease with multi-channel digital TV, they use mobile phones for communications and for content, they are keen games players, they download music and other content to their PCs and hand held devices, and they are active participants in online communities of interest. The old notions of limited channel, linear scheduling, and public service broadcasting mean little to this age group. Telephony often means mobile and SMS, not fixed calls.

As regulators and policy makers we need to radically adapt the way we think about the communications sector as this group evolves into the mainstream. And we need to start doing this now. We will have to learn to rely more on markets than ever before. And we need to rely more on individual consumers and on companies exercising responsibility in those markets, with increasing emphasis on self-regulation and co-regulation.

In a world in which technology, business and consumer demands are changing so quickly, regulation carries with it big risks and big potential costs. Regulatory interventions, no matter how well intentioned, risk hindering market development and innovation rather than promoting them. Rules to protect consumers may be out of date before they have a chance to reach the

statute book. Globalisation means that nationally based and enforced regulations may be increasingly ineffective.

This doesn't mean sending all our current regulatory principles into the recycle bin. It does mean thinking again about how they can be adapted and applied in the new digital and broadband world. And, importantly, identifying areas in which regulation is no longer needed.

In this session, I want to talk about the broad direction I think we need to be taking in three main areas, and to point out some of the issues we will have to resolve as we redefine the regulatory framework in each of those areas. I don't intend to provide all the answers. To some questions there are as yet no answers. But I hope to raise a few important questions for debate.

The three areas are:

- Allocation of spectrum for content and communications services
- Ensuring effective competition in content provision and distribution
- Securing public interest aims for content.

Taken together, these three areas will determine much of the overall framework for communications and content regulation in a converged world. Successful future regulation depends on addressing these three areas in a consistent and mutually reinforcing way.

### **Allocation of spectrum**

First, spectrum allocation. This is one of the areas which offers significant scope for a reduced role for the regulator.

In the UK, we are moving from a central command and control approach to spectrum management and planning, to one in which we place more trust in the market to deliver an efficient use of the radio spectrum.

Ofcom's spectrum framework review has proposed a move to a much more liberalised approach, in which at least 70% of the spectrum in 2010 will be managed through market mechanisms. (In 2004, 94% was subject to a command and control approach). This means new spectrum property rights will be made available through auctions, can be traded in the market, and can be used in whichever way the owners wish, subject to meeting specified interference constraints.

This is some distance from a world in which we made limited amounts of spectrum available for specific uses (such as TV channels or radio stations) and often awarded them to the organisation offering the best quality programming ideas or promises, via so-called beauty contests. In theory, we should be able to dismantle large resource-intensive areas of regulatory activity as a result – no need for big teams to reach judgements on competing licence applications, no need for extensive analysis of the most efficient use of different parts of the radio spectrum, perhaps less need, even, for all those international radio spectrum conferences?

This general move should be welcomed. It is becoming more difficult for the regulator to work out the best use of the spectrum, and to keep that use up to date with changing demands. Much better to let those decisions be made by those closest to market needs – the spectrum users themselves.

But we also need to recognise the potential costs of taking this approach, and some of the complexities involved in its implementation.

For example, we have long used the incentive of privileged access to spectrum as a means of extracting public interest commitments from spectrum users. Most notably here in the UK with the commercial TV broadcasters - which have historically provided costly regional programming in return for access to scarce analogue spectrum. In radio, too, we have insisted on localness requirements from commercial radio stations operators. All in return for free or low cost access to spectrum.

In future this approach will be increasingly difficult to sustain – if they don't like the public service commitments attached to the spectrum they have been allocated, TV and radio broadcasters may be able to find equally effective spectrum they can use elsewhere.

The same applies to investment commitments. The development of mobile telephony in the UK and elsewhere has been arguably helped by the fact that only a few licences have been made available – hence making the potential returns from rapid and wide scale investment in networks more predictable, and encouraging network roll out. There is much less scope for this sort of managed market in a completely liberalised spectrum environment.

Is it possible to combine the benefits of spectrum markets with an element of continued management, so that some of the old benefits can be retained in the new system? And even if it is possible, is it desirable?

These are the questions that we and others are grappling with in a practical way today. For example the continued success of DAB may depend on making more spectrum available for local and national DAB stations. But if we allocate that spectrum in an open auction, rather than designating it for DAB, there is no guarantee that it will end up being used for digital radio rather than, say, new mobile services. So a policy choice has to be made.

One thing is clear, if we do try to maintain some of the old managed elements in the system going forward, it will be essential for the regulator to spell out very clearly the public policy rationale for so doing, and to be much more precise than in the past about the benefits and costs – including the knock-on risks to efficiency of resource allocation and the effective operation of the rest of the market which might flow from such intervention.

In Ofcom, an important step in helping us do this is our commitment to carrying out detailed impact assessments for all our important decisions, which set out policy objectives, options, and the costs and benefits of the various approaches.

## **Ensuring effective competition**

On to my second issue - that of effective competition regulation.

If we are to rely much more on a market-orientated approach to regulation in the communications sector, then we need to be pretty sure that we can encourage and secure effective competition in as many relevant markets as possible.

The competition issues arising in telecommunications regulation are well known. But there are equally difficult issues to be tackled in broadcasting, and more challenges may arise from convergence.

First, a key feature of the broadcasting market is that we are only just emerging from a period of heavy control and regulation. For many years, the market (in the UK at least) has been characterised by just a few powerful players, entrenched in their position through the policy decisions referred to earlier. We are not starting from a level playing field.

Second, broadcasting markets are complex – market definitions are not always obvious, and the fact that much broadcast output is provided free at the point of use makes many standard competition tests difficult to apply. The existence of large publicly funded broadcasters like the BBC further complicates matters.

Third, broadcasting markets are changing rapidly – and the nature of those changes means that there is the potential for a small number of players to establish a stranglehold on new and emerging markets, well in advance of achieving what would normally be considered to be a dominant market position. This suggests the need for more rapid and earlier action than would normally be possible through the application of conventional competition law.

And, finally, as we approach convergence, there is a risk of leverage of market power from one market (e.g. network operation) into parallel or downstream markets (such as content distribution).

In recognition of these complexities, the Communications Act in the UK has granted Ofcom sector specific competition powers for broadcasting, in addition to the normal competition law framework. In addition, the EU of course has a clear competition framework within which we work, with Articles 81 and 82, and specific regulation of access control systems, through the Access Directive. State aid rules, too, have an important bearing on the broadcasting market, given the range of interventions designed to encourage PSB.

At first sight, this hardly seems like regulatory forbearance. But what we have here is a recognition that as we free-up some aspects of the market from regulation – a liberalised approach to the licensing of broadcasters and content providers, for example – we sometimes need to be more vigilant in securing a competitive market place for those who do decide to enter.

A longer-term desirable outcome in broadcasting would be for there to be sufficient competition between distribution systems to reduce concerns about gateway control, and for there to be a large number of content providers, rather than just a powerful few. But we are not there yet.

This raises difficult questions about the nature of effective competition. At what stage do we think there are enough network or platform providers to be able to step back? When will the content market be sufficiently competitive? Do we need to be concerned about vertical as well as horizontal integration, or should we let the market decide?

Again, as with spectrum decisions, the primary requirement for the regulator, in designing responses to all of these issues, is to be clear about the objectives of any intervention, the hoped for benefits, and the costs to different stakeholders of making an intervention.

## **Public interest objectives.**

Third, we need to consider public interest objectives, and how they can be achieved in a fully digital world. These public interest objectives can be usefully divided into content standards (standards of harm, offence, fairness, privacy etc) and positive public interest goals – what we usually call public service broadcasting – which are all about the quality, range, and diversity of content delivered by suppliers.

### Content standards

Regarding the first – content standards – significant challenges here are posed by rapidly changing and sometimes fragmenting consumer attitudes towards such things as the portrayal of sex, violence and the use of bad language on screen, and by the emergence of new ways of delivering content to the end user, which circumvent current regulation.

In the old world there were just a few content providers, licensed by the regulator, and there was a reasonable public consensus about what was acceptable to be shown on the TV screens in peoples' homes. In the new world, there will be many providers, using on-demand access via the internet as well as conventional broadcasting, and public consensus about acceptable standards is breaking down.

If we continue with the current system, we could be in the untenable position of imposing strict regulation on content delivered via broadcast TV, with no regulation of similar content delivered over the internet. On the other hand, many would argue (persuasively) that imposition of current broadcasting regulation to the internet is neither feasible or desirable.

Faced with this challenge, there is a clear need to look again at the future of content regulation as it can be applied across the different distribution media.

Far from a simple read across of TV regulation to internet content, we will need to rethink the whole framework. It is almost inevitable in my view that this will mean a greater reliance on individual responsibility and self regulation by the industry.

The public must take a bigger responsibility for deciding and controlling what they want to watch (provided that they have access to practical technology to allow content filtering, and useful information to help them make those choices). Content providers must recognise that there are benefits in offering a guaranteed safe environment for some of their services. Perhaps we might move to a sort of “opt in” regulation, where some content providers agree to meet certain standards, in return for a publicly recognised kite mark or mark of approval. This does not necessarily need to involve the regulator. We have already seen good progress in self regulation, encouraged by bodies such as ISPA and ATVOD.

Partly because it is likely to be the only practical route, but more importantly because it may be the better way forward, the area of content standards regulation seems to offer the scope for a significant move to regulatory forbearance in future –if (a big if) it can be engineered through the provision of appropriate consumer information, technical support, and self regulation.

#### Public service broadcasting.

Regarding the second challenge, that of public service broadcasting and its continued survival in a more market-orientated world, Ofcom has had a lot to say over the past year or so. We produced our final report into the future of PSB in February this year, and used that to set out what we think are the key parts of a new system going forward.

As noted earlier, the old system by which we offered access to scarce spectrum in return for public service commitments will no longer hold in the converged and digital future. Future provision of PSB will need to be much

more transparent, and will require access to direct public funding, rather than hidden implicit subsidies.

In that world, we have a real choice to make. Either leave the provision of PSB to one publicly funded provider – in the case of the UK, leave it to the BBC. Or establish a new funding framework which makes available public funding to a range of providers, based on their ability to contribute overall to range, diversity and quality of content.

Leaving it all to the BBC, we think, would risk the emergence of a complacent, less efficient, probably less innovative monopoly supplier of public service broadcasting. Over time, this would mean that the PSB space became smaller, that audience tastes were largely conditioned by the commercial sector, and support for the licence fee and for the BBC would gradually decline.

Instead we need a new funding framework to support a range of PSB providers, and a new approach to PSB in the broadband world. We proposed that direct funding should be made available to other PSB providers alongside the BBC, and we argued for the creation of a new public service publisher (the PSP) which would be charged with the provision of PSB content in the broadband rather than the broadcast world. The PSP would be publicly funded with a clear remit. The contract to run it would be managed through a competitive tender process to ensure the best ideas were identified. It would focus on new media not on old, and seek to exploit the benefits of on-demand, interactive content, delivered across a range of new delivery systems. PSB for the future, not preserving the past.

The key message here again, is the need to be clear and much more transparent about the benefits and costs of public interest intervention. To help markets provide where possible, but to have an explicit, direct and carefully targeted intervention where markets are unwilling to provide.

The main unresolved issue going forward here is not the model or mechanism for intervention – that is a relatively easy challenge to address – the challenge is more about deciding how much intervention is justified and for what purposes, and how that should evolve over time as the market changes. In our Review, we held out the prospect that the level of intervention might reduce over time, as markets work more effectively to deliver what consumers want.

## **Conclusions**

In conclusion, what does this brief run through of some of the issues tell us, other than that some complicated regulatory and policy challenges lie ahead?

Three things, I would suggest.

First, we need to be prepared to rely more on markets to deliver the best outcome for citizens and consumers – it is just not possible or desirable for regulators to plan either the best use of the spectrum, or to pick winners in key markets or technologies, or to impose desired structures on the sector – better to encourage innovation and dynamic growth through the market process

Second, that puts more weight than ever before on securing effectively competitive markets, but also on clear and transparent intervention to address market failures – competition in broadcasting markets needs special treatment, at least for the medium term as we transit from a heavily controlled regime to one which has the potential to be much more open

Third, we need new instruments for securing key public interest goals, which might mean less regulation or self regulation in some areas – such as content standards – but specific measures backed by public funding in others, such as PSB. And we should continue to look for ways of reducing that intervention over time.

In all three areas, it will be essential to be as clear as possible about the ultimate goals, and the benefits and costs of any measures involved. Clear impact assessments should be part of the standard regulatory toolkit here. We need to be much more transparent and precise about what we are trying to achieve, the trade-offs we are making, and the reasons for our ultimate decisions.

So, all in all, quite a challenge, and significant scope for regulatory forbearance if we get the right approach. At Ofcom, we look forward to the challenge and to the debate about how best to meet it.