

Chapter 31

Future Directions in Telecom Regulation: The Case of the United Kingdom

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1.0 Introduction

The next 10 to 15 years will see the evolution of what I call, and intend to continue calling, the new communications industry. Let's drop the "tele", in due course let's drop "broadcasting" and let's recognise the impact that the information industry is going to have. (Cruickshank 1996, 11).

Broadcasting issues are seldom drawn into discussion of telecom policy. Our analysis of telecom regulation in the UK and its future strays beyond the customary limits of such discussions. For the future of telecom regulation will depend on governments' response to the growing convergence and interdependence of media, of content and carriage, and of broadcasting and telecom in particular. The long heralded advent of the information superhighway means that regulatory arrangements for media and communication are bound to be reviewed. Proponents and prophets claim that integrated broadband intelligent digital networks will enable users to communicate cheaply over long distances and for long periods, exchanging sound, text, data, images and video over the same infrastructure. Text, images and data are to be reduced to a single bitstream, delivered over an integrated 'any-to-any' network, combining wired and wireless elements, and carrying messages spanning all communicative relationships – from the strictly private one-to-one communication characteristic of telephony to the one-to-every communication characteristic of broadcasting. But the regulation which currently applies to the superhighway was formulated when private communication was clearly separated from public communication, and when the media, books, newspapers, television, radio, film and so on were unequivocally distinct.

A combination of factors – technological change, organisational change within firms (notably the growth of media conglomerates) and within industrial sectors (growing numbers of firms) and new relationships between government and regulatory agencies – suggests that the UK's inherited order is ripe for reassessment. Although, thus far, the superhighway remains a mythical beast, it is a convenient myth. It provokes reflection on the extent of changes to media and communications and re-evaluation of regulatory arrangements inherited from the past. Statutory regulation of media and communications in the UK has (almost) exclusively applied to broadcasting, for two related reasons. First,

scarcity of radio frequencies meant that only a finite number of services (particularly television services) could be offered. Hence those to whom the scarce spectrum resource was allocated were charged with using it well. Second, because broadcasting was thought to be uniquely influential, the content of broadcasts was carefully controlled in the public interest. But technological change has substantially mitigated scarcity of the radio frequency spectrum and a multiplication of services has weakened the impact of any single service. Can regulation continue in new circumstances as it has in the past? How will government and regulators respond to these challenges?

The challenges faced by media and communication policymakers in the UK are unique to Europe because the UK's problems, to a considerable degree, are the problems of success. The performance of the telecom sector has improved markedly since liberalisation in 1982. Before liberalisation, service quality was demonstrably poor by international standards (Melody 1990); it now conforms to the best international standards (OECD 1990). Telephone penetration has risen from 70 percent prior to liberalisation to about 95 percent in 1995 with cable companies providing telephony to homes not formerly served by the incumbent British Telecom (BT). Total factor productivity has risen from 2.2 percent in 1983-88 to 7.2 percent in 1989-94 (London Economics 1994).

In 1982 there were three PTOs in the UK – BT, Mercury and Hull Telephones – now more than 150 firms are licensed by OFTEL. In broadcasting, a cornucopia of new channels have been established (the Independent Television Commission licenses more than 350 firms) but public service television (BBC1, BBC2 and Channel 4) has retained more than 50 percent of share of viewing. The UK enjoys a positive balance of trade in film and television programmes. The UK has attracted “footloose” firms (in and outside the media and communications sector) and London contains a thriving “industrial district” of protean media and communication firms where a pool of varied skills permits development of innovative products and businesses combining audio-visual, computing, information handling and distribution and marketing skills. Judged against this inheritance policy and regulation seems to have been strikingly successful.

Yet, viewed from another perspective, UK media and communications policy and regulation appears less impressive. Indeed, it appears to be a thorough mess. Media and communications are dominated by a few key firms; in 1994 British Telecom held more than 92 percent of the telecom market in terms of value; and UK media ownership is remarkably concentrated. Britain has the most concentrated ownership of newspapers in the European Union. The European Institute for the Media calculated that in 1990, News International's share of UK domestic media was the third highest in the EU after Ireland's Independent Newspapers and Austria's Mediaprint (Sanchez-Tabernero 1993). Furthermore, the Netherlands apart, the UK is the only Member State of the European Union which does not have competition rules based on articles 85 and 86 of the Treaty of Rome (Financial Times 5 June 1995, 10). And if an appropriate regulatory response is not made rapidly, technological change promises to ensure that a few dominant firms will control the key gateways in encryption, conditional access systems and digital broadcasting.

Unfortunately, the UK's regulatory system is not well adapted to respond quickly and appropriately to change. The UK has at least eleven separate bodies charged with some aspect of media and communication regulation and the number of actors in this

“riotous mixture of exclusive and non-exclusive regulation” (as the UK situation was described by Michael Redley, Secretary of the UK’s Independent Television Commission [Redley 1996, 20]) could be extended if bodies such as the Office of Fair Trading, the Monopolies and Mergers Commission, the Radio Communications Agency (all of which have jurisdictions which clearly stretch over media and communications) were included in the total. Ten years ago, the Director General of Fair Trading commented “A proliferation of regulatory bodies and regimes for different sectors of the economy requires some kind of rationalisation” (Director General of Fair Trading 1986, 11), but rationalisation seems as far distant in 1996 as it did in 1986. Consumers (and experts!) are confused by so many regulators. Resources are wasted, regulatory jurisdictions are contradictory and overlapping. Key regulatory issues may not be adequately covered and similar regulatory problems may be resolved inconsistently by so many different bodies. The UK’s regulatory institutions are poorly adapted to meet the challenges of convergence and an inescapable shift in regulatory practice. Once regulators could license a few firms and monitor their performance; now they license many and policing the system must be driven by complaints. Formerly, media and communications regulators could effectively exercise jurisdiction within a strictly national context; now their work has an inescapably international character.

2.0 Liberalisation

In 1982, the Conservative Government announced a new basis for communication policy. The dominant themes of “consumer choice and the disciplines of the market” (Department of Trade 1982, 1) informed a comprehensive liberalisation of broadcasting and telecom in the UK. In 1982 Mercury Communications, the first competitor to the dominant incumbent British Telecom, was licensed and in 1984 BT was privatised. An independent regulator, OFTEL, was created under the 1984 *Telecommunications Act* and charged with promoting competition and protecting the consumer interest. Its Director General is appointed by the Secretary of State.

Consumers have principally been protected through price regulation. OFTEL can cap the incumbent’s prices with RPI-X formula, where the value of X is reviewed periodically. The British Telecom/Mercury duopoly in both domestic and international services lasted until the “duopoly review” (Department of Trade and Industry 1991) in 1991 when cable television companies were permitted (indeed encouraged) to provide telecom services and other telecom carriers (e.g. Energis, COLT, MSF, etc.) were able to enter the market. To promote competition OFTEL has required incumbents to interconnect with competitors and has assisted new entrants: by waiving access deficit contributions (ADCs)¹ to operators with small market shares and by denying BT the opportunity, (enjoyed by cable television companies), to exploit economies of joint provision by providing both television and telephony services. Thus, in contrast with the “common carrier” approach of the US, the UK has chosen to promote competition specifically through infrastructure competition.

In broadcasting, the Government appointed Peacock Committee reported in 1986 (Peacock 1986) and advocated that “British broadcasting should move to a sophisticated market system based on consumer sovereignty” (Brittan 1986, 1). Government policy and technological change both moved broadcasting in this direction. The hegemony of the “comfortable duopoly” (as the Peacock Committee called the BBC/ITV system [Peacock

1986, para 197]) had begun to be eroded in 1982 when Channel 4 was licensed but started in earnest in 1990 when direct-to-home satellite television services effectively began. In 1990 the *Broadcasting Act* separated regulation of commercial radio from commercial television and merged the television functions of the Independent Broadcasting Authority with the Cable Authority to form the Independent Television Commission and established a separate Radio Authority. Satellite television has established a presence in about a quarter of UK television households, independent producers have been guaranteed a quota of 25 percent of programmes (some categories excepted) on terrestrial television. The growth of a price system in broadcasting has recently been further advanced through the first major experiment with pay-per-view services by the dominant satellite television service provider BSkyB² and British Telecom's experiment with video-on-demand (its current Colchester/Ipswich trials involve 5,000 homes). At the time of writing, a Broadcasting Bill, likely to result in a new broadcasting act, was proceeding through Parliament.

But, in spite of striking changes, the liberalised UK media and communications regime cannot be said to have fully achieved either competition or the consumer interest in the decade and a half since liberalisation began. In large part, the failure of UK policy and regulation to achieve its central goals is rooted in the characteristics of telecom and broadcasting markets. The Government's hopes that "the disciplines of the market [would] lead to more stable prices, improved efficiency and a higher quality of service" (Department of Trade 1982, 1) have been frustrated. Substantial barriers to entry remain in both broadcasting and telecom markets; because of the public good characteristics of broadcasting (which mean that markets and the price system are unlikely to maximise aggregate welfare); and because of the substantial economies of scale and scope which persist in telecom. The persistence of market failure – notably the presence of dominant firms and the threat posed by proprietary control of gateways – means that regulation cannot wither away if the public interest is to be secured. Policymakers and regulators are faced with the paradoxical task of permitting competition to work where it can and intervening where it cannot.

The transition from monopoly through duopoly to a pluralistic telecom market exemplifies this contradictory regulatory mandate. At each stage competition has increased but has not increased sufficiently to erode the incumbent's dominance. Regulation of telecom (from 1982 to date) and broadcasting (1955 to date) has been conducted by the principal regulators (OFTEL and the Independent Broadcasting Authority/Independent Television Commission) specifying detailed conditions in operators licences. But liberalisation has fostered a spectacular growth in the number of licensed firms in broadcasting and telecom and OFTEL has called for the established regulatory regime to be changed accordingly.

3.0 The Present State of Play

The transition from duopoly to a multi-operator market in telecom demands, but has not yet triggered, structural change in regulation. The system has become increasingly stretched. Licensing has proven overcomplicated, considerable barriers to entry remain and OFTEL has been forced to increase intervention rather than relax its presence in the market.

New instruments and new institutions are required. OFTEL has sought support for a new licence condition where detailed specification of instances of abusive behaviour would be supplanted by a general requirement that firms should not behave in a way which is anti-competitive in intention or effect. And because industries that were hitherto distinct are no longer so, regulatory mandates are complicated and sometimes confused. Cable companies, for example, obtain their telecom licences from the Department of Trade and Industry (DTI) and their broadcasting licences from the Independent Television Commission (ITC). They are subject to OFTEL rules for carriage matters and to the ITC's code of conduct for content, while the advertising messages they carry are overseen by the Advertising Standard Authority. Accordingly, in 1994 OFTEL embarked on a major consultation exercise publishing a succession of consultation papers:

- A Framework for Effective Competition. A Consultation Document on the future of interconnection and related issues, 1994;
- The Future Regulation of Premium Rate Services, 1995e;
- Beyond the Telephone, the Television and the PC, 1995a;
- Universal Telecommunication Services, 1995c; and
- Pricing of Telecommunications Services after 1997, 1996.

The proposals highlighted in the various consultative documents also reflect a deeper need to re-think regulation of the entire communications sector. The main contentious issues identified through OFTEL's consultations were: conditional access and other "new media" issues; and broadband network used for entertainment and broadcasting. And, who should regulate these? According to what principles?

We consider these issues in two clusters of related topics; interconnection, price cap and universal service; and competition, new media and conditional access issues.

4.0 Interconnection and Related Issues

The principal obstacle to the development of effective competition in the UK is the huge asymmetry in the bargaining position of British Telecom (BT) and the other operators in interconnection matters. This asymmetry has been counterbalanced by regulatory measures designed to protect entrants and by specific constraints on BT's pricing. Competition is shifting from intense price competition in the arena of long distance and business services, (with little concern for residential customers), to a struggle to reach and control the mass market of home users, where future revenues will, many believe, flow from home shopping and entertainment. In consequence, if competition is to work, the ability to access the local loop at a fair price and with equitable degrees of flexibility becomes a critical policy issue.

The access network has proved to be the bottleneck in the development of a well functioning competitive telecom market. Although the natural monopoly in local telephony provision is slowly being eroded by economies of scope and by new (wireless) technologies, BT is likely to remain dominant in the local loop for the foreseeable future. OFTEL has imposed an accounting separation of BT's network and retail operations, recognising that the ownership of the national local network has been the most significant bottleneck to the development of effective competition. This allows a closer monitoring

of BT's transfer prices between network and retail services, but leaves room for "creative" cost allocation. In other words, BT's ability to exploit its dominant position is limited but not eliminated.

A powerful action to enforce competition in a multi operator environment would be structural separation of BT into a network and a retail operation. This solution would establish a level playing field for the purchase of network services between BT and other operators and eliminate the problem of monitoring transfer prices within BT. It would preserve any economies of scale in provision of local wired telephony, and the benefits of a large and capable national firm, potentially important in the light of the imminent opening of EU telecom markets. Regulation could concentrate on public network issues and on the interconnection prices charged by BT-Network, while BT-Retail would enjoy the same freedom as other operators in its pricing and service decisions. Conversely, all other operators would be able to enjoy the same pricing flexibility as BT, since all will share input prices. However, recommending such a policy would require more information than is currently available in the public domain. Moreover, such an initiative would be extremely controversial and would be likely to be bitterly resisted by BT. Accordingly, OFTEL has proposed to establish a new cap on the price BT charges other telcos for access to its network.

A successful solution to the difficult issues of interconnection is the necessary condition for competition to be established at all levels. However, as long as BT is dominant and owns strategic inputs to its competitors' final products, a major role for OFTEL will remain. Interconnection payments are a significant income for the dominant player (8.3 percent of BT's turnover in 1994) and a very large cost component for competitors (29 percent to 43 percent of total telephony costs for cable operators); competitors and the incumbent have opposite incentives when negotiating charges. Interconnection charges should give accurate signals for investment decisions, by clearly *reflecting costs*. This way a new entrant can make the right judgement when evaluating whether (and where) to purchase interconnecting services or to build its own facilities. Interconnection charges should also give the *correct entry signals*, by ensuring that only more efficient competitors enter the market. Interconnection charges that are set too low may allow entry to operators who are less efficient than those already in the market. This would lead to an overall loss to society.

4.1 *How Should Interconnection be Priced?*

No system emerges as a clear winner among rival charging formulae. However, capacity charging has clear advantages: notably, the key benefit of offering greater flexibility in price setting for the interconnecting operators. Moreover, an interconnection regime designed today must be able to accommodate the new products that are likely to be on offer in the future. Broadcasting of entertainment along the telephone network, presently restricted to cable operators, is likely to be a standard service offered by many other operators in the future. The capacity-based pricing systems would not need to be altered if new services are added and of the two main variants (peak load and capacity booking) we favour capacity-booking which will shift risk away from the incumbent and towards all the operators in the market. This has the benefit of sending a clear message that telecom in the UK are now provided by a collection of competing operators.

The two main drawbacks of capacity booking is that new entrants may find it difficult to forecast their capacity requirements and that it is difficult to apply when more than one firm requires access to the incumbent's network. Against these significant disadvantages, capacity booking emancipates competitors from "me too" competition and BT's information advantage in defining the cost of interconnection, (notably whether new capacity is required at the busy hour), constitutes a much more serious disadvantage for the new entrant than those inherent in capacity booking systems.

5.0 Access Deficit Contributions

Final prices charged for use of the telecom infrastructure are usually averaged across users (offering similar prices to all customers irrespective of their usage volume and geographical location (Universal Service Obligation – USO), and/or across services. To maintain loss-making basic services at a low cost (access deficit) other services are priced above cost. The averaging system presented relatively few problems when only one operator was required to offer all services. But this system gave few incentives to the operator to allocate costs accurately and to price services efficiently. In a multi-operator telecom industry, price averaging increases the difficulties associated with distinguishing the costs of intermediate and final services. This in turn complicates the task of setting interconnect fees and distributing the costs of universal service provision fairly.

Nationally, the costs of providing customers' access to the network were defrayed by a geographically averaged connection charge and the cost of maintaining the access network was covered by line rental charges. BT has, thus far, been constrained from increasing rental charges by a specific line rental cap (RPI+2) set by OFTEL although BT claims to incur a loss in maintaining the access network with such a constraint. This notional loss has traditionally been paid by call revenues. However, reduction of call revenues, e.g. by competitors' cream skimming of business customers, gave rise to the access deficit cost (ADC) regime. OFTEL has restricted ADC contributions to firms serving over 15 percent of the relevant market as a form of entry assistance. The ADC mark-up was calculated as BT's opportunity cost of providing interconnection rather than the entire final product.

The ADC system is based on the notional cost structure of the incumbent, with its built in efficiencies or inefficiencies, and may thus preserve monopolistic profits for the incumbent *even when the incumbent is losing traffic to competitors*. Moreover, the ADC system may deter more efficient operators from successfully entering the market.

OFTEL has recently opted to rebalance tariffs to replace the ADC regime. Rebalancing makes telecom charges increasingly sensitive to the number of lines provided rather than the volume of traffic. It reflects the new character of the network: the fall in transmission costs results in fewer exchanges relative to the length of lines, opening up a possible future tariff regime less sensitive to distance and to time. The overall fall in transmission and switching costs makes billing costs a relatively larger element in total costs, therefore making non-usage sensitive pricing more attractive. But, rebalancing implies a significant increase in line rentals.

As long as UK regulation is based on an overall price cap on the dominant operator, each increase in the rental fees would have to be counterbalanced by significant cuts in the price of calls, particularly given the present weighting structure of the price cap. Although increased rental fees would offer incentives to operators other than BT

(e.g. the cable companies and Ionica) to accelerate their entry to the local loop by undercutting BT, the overall price of telephone services for some residential users, notably low traffic generating subscribers, would increase leading to subscribers dropping off the network, reduction of overall network utility and social loss. Clearly loss of subscribers or a slowing of the rate of extension of service to untelephoned homes is undesirable.

Moreover, where BT is the only option for the residential consumer, an increase in line rental would give BT a huge advantage. Given that at present only 20 percent of the country has the option to choose cable telephony (presently the only alternative in the local loop), rebalancing may result in a much stronger BT. Rebalancing, which is necessary for improved prospects of competition in the long term, would have the effect of making the dominant operator even stronger in the short term. This is a difficult conundrum which permits no perfect solution. OFTEL has decided to seize this nettle, discontinue the ADC regime and permit tariff rebalancing.

We believe that rebalancing should not take place without a simultaneous re-design of the established “light user” tariff scheme and measures to ensure that the average or median residential subscriber’s bill is not increased. We propose that specific action should be taken to prevent customers from dropping off the network.

At the moment BT offers a “light-user” scheme which is an elective option available to subscribers using less than 240 calling units. The reduced line rental available under the light user scheme should be automatically applied to all customers whose call revenues qualify for the scheme. This would significantly increase the number of customers benefiting from the scheme. It should also be revised to ensure that no customer is significantly worse off as a result of the re-balancing. In economic terms this solution is superior to the previous system of averaging, since the subsidies go only to the customers who need them, instead of being shared by everyone.

The costs of extending the “light user scheme” (and of the extension of service measures which we advocate below) should be considered as a part of the general costs of USO, and as such should be financed by *all* operators in proportion to their revenues. We believe that rebalancing to more closely approximate revenues and costs is desirable and that socially disadvantageous consequences of rebalancing should be redressed through an extension of the USO scheme.

6.0 Universal Service

OFTEL has defined the Universal Service Obligation (USO) as “the requirement to provide consumers with direct access to a switched telephone network, and the ability to make and receive voice calls, at a reasonable price” (OFTEL 1994, 40). Subsequently, OFTEL proposed that the USO definition be broadened to “basic telecom service” (OFTEL 1995c para 4.3). But currently, universal access to voice telephony in the UK is secured through the obligation specified in BT’s licence “to meet all reasonable demand for basic telephone service, including rural areas.” BT has also been required to provide a residential light user scheme, special telephony services to the hearing impaired, free emergency calls, free directory services for the blind and disabled, and public phones. Two principle USO issues arise under the current UK telecom arrangements. Who should be responsible for USO (and who should pay for its provision)? And, which services should fall within the USO basket?

Identifying the cost of USO presents formidable empirical and theoretical difficulties. It is an open question whether the USO is a net cost or net benefit to BT. Some have referred to the “universal service privilege” rather than the “universal service obligation” because the costs of extending access to voice telephony in a mature, quasi-universal, network may be exceeded by the benefits, (e.g., in extra traffic generated through calls to terminals connected under USO), which accrue to the operator(s) charged with providing universal service. Moreover, the cost/benefit balance is clearly determined by the efficiency of the operator responsible for the provision of USO. Broadly, we believe that the costs of providing USO should fall on the whole telecom industry rather than on the dominant incumbent but responsibility for the delivery of USO, as a whole or separate components of it, should be contracted to whichever operator tenders to provide such services at the lowest price.

The composition and extent of the USO will always be a matter of judgement. We have referred above to voice telephony. However, other services will, in time, become part of the USO basket. Indeed, the provision of public broadcasting services can usefully be considered as part of the USO. The universal service obligation for media and communications should be defined as universal access at affordable cost to the information and services necessary to participate fully in economic, social and political life. But how do we decide whether a particular service falls within this definition? And how are we to ensure that the general realisation of such an entitlement is not too costly? We propose that a service should come within the USO basket when the market has made it available to at least 70 percent of the potential user population, when at least 50 percent of those to whom a service is available have taken it, when the service is useful and when there is no satisfactory substitute for the service.

In broadcasting, as in telecom, liberalisation and the growth of competition have realised striking benefits but have also put in question the established instruments through which social goals have been achieved. The growth of satellite and cable television channels and establishment of a plethora of new commercial radio services has benefited consumers by extending choice and stimulating incumbents to tailor their programmes more closely to viewer and listener preferences. But regulation is required to ensure that the plurality of information sources required by a healthy polity is available to all at affordable cost. Specifically, regulation must inhibit concentration of ownership; ensure that both “positive programming requirements” and “negative programming requirements” (the ITC’s terms) are delivered; and that services are available to all at affordable cost.

Positive programming requirements ensure that “merit goods” such as comprehensive, reliable and well researched news, information and education programmes, innovative drama, arts and music, programmes for economically powerless groups, etc., which would not be provided in sufficient quantities by profit maximising commercial broadcasters, are supplied free at the point of use. Negative programming requirements are to inhibit the circulation of offensive material, misleading information, reckless claims in advertising and product promotion and so on. Positive programming has been achieved by public sector provision and by conditions in the licenses of commercial terrestrial broadcasters. In both cases public resources have been allocated to the achievement of these ends: through the licence fee, and through allocation of desirable radio frequencies respectively. However, technological change has reduced the

scarcity value of radio frequencies and the diminished consumption of licence fee funded services have put in question the basis of, and rationale for, broadcasting regulation.

The formerly distinctive and separate concerns of telecom and broadcasting regulation are being generalised across both sectors. Spectrum allocation, realisation of economies in joint provision of wired infrastructures, regulation of offensive material, universal provision of essential services at affordable cost and the growth of novel services which fall between the point to point character of telephony and the point to multipoint character of broadcasting (such as datacasting, video on demand, electronic newspapers) all point to the need for integration and harmonisation of regulation. As noted by Lord Borrie, formerly the Director General of Fair Trading, the “outdated segmented approach to regulation should go into the dustbin” (Borrie 1996, 17). But what kind of regulation should follow?

7.0 Competition, Conditional Access and the New Media

Leo Grey, an Australian media lawyer formerly with the Australian Broadcasting Tribunal, stated “there is very little point in having any detailed structural rules for regulating ownership and control.....the only objective that seems capable of being realistically pursued is the encouragement of real competition” (Grey 1992, 22). Similar arguments have been made in the UK see, *inter alia*, Carsberg (1995), National Consumer Council (1995) and, most recently and most pertinently, OFTEL. We endorse the National Consumer Council’s conclusions that “simplification of the UK law, and the closer alignment of our rules with those of the European Union, would be far more constructive than tinkering with the existing law” (NCC 1995, 70). The principles enshrined in EEC rules provide a valuable basis for strengthening UK competition policy and regulation. But, although the interests of the public and of consumers would be served by such a policy, we do not believe that strengthening UK competition law will not be sufficient to deal with legitimate public concerns about the structure and performance of the UK media. For many media sectors do not readily lend themselves to the establishment of real competition over long periods of time. Competition policy remains therefore a relevant but a rather blunt tool for media and communication regulators.

Despite more competition, big firms – public and private – still dominate media. And, communication markets and firms’ control of key “bottlenecks” enables them to control market entry by other firms and means that media markets cannot be left to themselves. The regulatory functions of the modern state cannot, yet, whither away.

- In spite of enormous growth in the number of licensed telecom operators in the UK, BT is still dominant and has a huge lead over its competitors. In 1994 – after 10 years of competition – BT had 92 percent of telephone lines and 87 percent of the value of business.
- The BBC has 19.7 percent of the share of voice of the UK media market “nearly twice the weight of its nearest rival” (Financial Times 21 March 1995, 11).
- News International has four national newspapers; the largest shareholding in the dominant satellite television system, BSkyB; and its control of the market leading encryption and conditional access system of transponders on the market leading

satellite, and of programming rights, has led to its competitors to complain to the Office of Fair Trading and the Competition Directorate of the European Commission.

Control of conditional access system (CAS) gives rise to “network externality” issues not dissimilar to those more familiar in telecom. The first operator to establish a significant number of users will be de facto dominant, as consumers will be unwilling to adopt rival (and less common) systems. Dominance may well rest on first mover advantages rather than any inherent superiority in the conditional access system. Arguing on these lines the UK Government has recently indicated that CAS, and related digital broadcasting issues, should be regulated by OFTEL under the provisions of the *Telecommunications Act*. This is a striking example, but not the only one, of regulatory convergence, of issues characteristic of the telecom domain occurring in broadcasting, and of the utility of regulation rooted in the general principles of competition policy (notably those which point to third party access to essential facilities and to regulatory powers to inhibit and punish abuse of a dominant position) rather than in specific conditions of licence.

8.0 Regulation for Convergence

The established structures of media and sector specific regulation in the UK are unlikely to cope with the challenges of convergence. Who regulates an electronic newspaper with moving images rather than still photographs accessed on the World Wide Web? Any or all of the following established regulatory bodies could legitimately claim some jurisdiction: OFTEL, the Independent Television Commission, the Press Complaints Commission, the Advertising Standards Authority, the Independent Committee for the Supervision of Telephone Information Standards, the Broadcasting Standards Council, and the Broadcasting Complaints Commission! Increasingly governments are devising “technology neutral regulation” to respond to the challenges of the new media. *Australia’s Broadcasting Services Act of 1992* and *Canada’s Broadcasting Act of 1991* are cases in point.

If “technology neutral” regulation is required, a clear statement of regulatory goals, or criteria, is necessary. For “technology neutral” law implies a return to first principles and to what one Australian broadcasting regulator has called “fuzzy law” (Brooks 1992, 9). We believe the “four central objectives for government policy” formulated by the Institute for Public Policy Research (IPPR) Commission on Social Justice: *security, opportunity, democracy and fairness* (IPPR 1993, 4-5) can, and should, provide a basis for a new UK “fuzzy law” technology neutral communications regime.

The objective of *security* reflects the idea that nobody in today’s society should fear poverty. The real aim is to prevent indigence; supporting the poor should be a second best. Translating this principle in the domain of communications leads us to view the ability to communicate as a basic entitlement of citizens. Universal Service Obligations should ensure that the means to communicate are both available and affordable.

The objective of *opportunity* points towards policies designed to increase autonomy and life chances. While there is a limit to the amount of help the state can offer to any individuals, there is no limit to the achievements that individuals can set for themselves. This objective points to policies designed to enhance choice, increase access to information and means of communicating.

The objective of *democracy* points towards policies designed to ensure diffusion of power and the accountability of institutions and providers. Democracy requires that distinct interest groups and regions are adequately served and that the media are democratically controlled. Effective consumer representation is also part of this policy objective.

The objective of *fairness* is designed to reduce *unjustified* inequality. This goal objective points to policies designed to minimise the gap between the information rich and information poor.

Specifically, a policy agenda informed by the IPPR criteria points towards:

- rebalancing of intellectual property law to strengthen the right to copy through compulsory licensing at reasonable cost;
- universal availability of media and communication services at affordable cost;
- freedom of information laws and measures to encourage and strengthen editorial and journalistic independence;
- a strong public sector presence where it can set threshold standards and beneficially influence the behaviour of commercial firms (the BBC and Channel 4 are the best cases in point here);
- regulation designed to ensure that the media are not subject to control by dominant power centres, whether government or business;
- a changed regulatory regime based on strengthened competition law with a single accountable and representative regulator charged with:
 - ◊ serving consumer interests;
 - ◊ consulting consumer bodies;
 - ◊ giving reasons for judgements; and
 - ◊ proceeding through public process and consultation.

Technological change has not made regulators redundant. But it has shown the need for a new kind of regulation. In late 1995, OFTEL made preliminary proposals for a transition to a “fuzzy law/technology neutral” regulatory regime. Its initial propositions, to move from a regulatory regime based on tightly defined conditions of license to a set of generic rules prohibiting anti-competitive behaviour and abuse of dominant positions, provoked a comprehensive and intense campaign of resistance by British Telecom. Whether OFTEL succeeds in re-focusing its remit and regulatory style and whether UK regulation in general will move in this direction remain open questions. But, notwithstanding the obvious advantages of a single regulator (empowered by broadly drawn statute law to require whatever arrangements it deems necessary to secure public policy goals), there are disadvantages to such a regime which are scarcely less apparent. Fuzzy law implies an increase (possibly unwelcome) in regulatory discretion. Increased regulatory discretion follows both from the need for specific case-by-case application of general principles to particular issues and from the need to steer whatever path seems

optimal between contradictory policy goals. For regulation frequently requires the exercise of judgement in order to trade off between contradictory policy goals and between rival interests. An increase in regulatory discretion is an increase in the power of unelected and imperfectly accountable arms of the state – as British Telecom was quick to point out. However administratively neat the relation between regulator and government presupposed under a regime of fuzzy law is, such an arrangement transfers power from those who are elected and accountable to those who are not. How much better it would be for decisions bearing on the content, cost and character of media and communications – resources essential to full participation in modern life – to be made by elected representatives of the public.

The unrepresentativeness of UK regulators is not simply an abstract theoretical concern. IPPR research showed that eight out of ten chairs of UK media content regulatory bodies³ are men. Half the chairs were educated at Oxford or Cambridge University. All chairs are white. The average age of chairs (excluding S4C where information was not available) was 63. Only one chair, Baroness Dean, (52) is younger than 60. Of the 89 members of the regulatory bodies only four were non-white; 22 out of 89 members were educated at the Universities of Oxford or Cambridge. Membership of the bodies is London dominated and all bodies are located in London.

9.0 Conclusion

The convergence of media through technological change and industrial re-structuring also points towards the advantages of one regulator (which could apply common principles with varying degrees of firmness to different media). Not only is there evidence of increasing complexity, and perhaps even confusion, in the interweaving of responsibilities between OFTEL and the ITC, but the growth of wider portfolios of products and services offered by regulated firms means that a single firm will either be regulated by several regulators (presenting intractable difficulties in calculation of the bases on which rate of return or price caps are to be calculated), or that regulatory convergence is required to match changes in industry structure. Moreover, for concentration of ownership to be regulated effectively, individual media and communication markets and the aggregate of UK markets must be overseen together. The difficulties already apparent in respect of cable regulation, arising from the division of responsibilities between OFTEL and the ITC, promise to be amplified in the regime the government proposes for digital broadcasting (Department of National Heritage 1995). There seem therefore to be palpable advantages in subsuming the functions presently discharged by OFTEL, the ITC, the BSC, the Radio Authority, the BCC, and the statutory responsibilities of the BBFC, in a single regulatory body. It would be advantageous if this body, perhaps called “OFCOM”, analogous to the Canadian Radio-television and Telecommunications Commission and the Federal Communications Commission, also oversaw the allocation of the radio frequency spectrum and undertook the regulatory functions presently discharged by the Governors of the BBC.

Whether regulatory change of this kind will be realised in the foreseeable future is uncertain. There will be an UK general election not later than mid-1997. Whether a Conservative or Labour government is returned, implementation of a single regulator “fuzzy law” regime based on IPPR’s criteria would involve integration of responsibilities at ministerial as well as at regulatory level. Functions currently discharged by separate

ministries, notably the Department of Trade and Industry (which has the lead responsibility for telecom and for the radio spectrum) and the Department of National Heritage, (which has lead responsibility for broadcasting), would have to be brought together. A strengthened competition policy would also require some re-organisation of ministerial arrangements. Moreover, both a strengthened competition policy and a single communication regulator would weaken ministerial power by vesting new powers and responsibilities in independent agencies. There are, therefore, good reasons to be sceptical about the realisation of a programme similar to that we outline – whichever party wins the next general election.

However, most observers would expect a Labour government is considerably more likely to promulgate such changes than a Conservative government. The last two Directors General of Fair Trading have resigned because of their conviction that Conservative governments did not favour strong competition policies. Whereas senior Labour politicians have explicitly advocated a stronger competition policy and some have even spoken of an “OFCOM”. Moreover, Labour disquiet at the integration of responsibilities for consumer protection and sponsorship of particular industrial sectors in the same ministry has stimulated speculation about the establishment of a ministry of consumer affairs (one existed during the period of Labour Government in the mid 1960s) with responsibility for regulation of public utilities. But Labour has proven vulnerable to the siren calls of dominant UK communications firms with aspirations to the status of “national champion” and, as James Curran – the senior UK communication scholar most closely identified with Labour policies and outlook – has recognised:

Labour governments have been characterised by a deep conservatism when it comes to media policy. It has been left to Conservative governments to innovate, to break free from conventional thinking and introduce bold new developments that, by and large, have been marked improvements (Curran 1995, 9).

The challenge to the next government is to acknowledge the advances achieved over a decade and a half of liberalisation and to re-regulate to seize the opportunities and meet the challenges of the next fifteen years.

Endnotes

¹ Richard Collins is Research Director and Cristina Murrone is Principal Researcher of the IPPR Media and Communication Research Programme which was established in 1994 by Richard Collins and Anna Coote (Deputy Director of IPPR). IPPR is an independent charity and a centre left “think tank”. The media and communications research programme is supported by British Telecom, the Cable Communication Association, London Weekend Television, Mercury Communications, News International and Pearson. Findings from the first stage of research, on which this chapter is based, will be published by Polity Press in 1996 as “New Media. New Policies” written by Richard Collins and Cristina Murrone. The authors thank Andrew Graham for permitting them to draw on his unpublished paper “Public Policy and the Information Superhighway. The Case of the UK” as a convenient and reliable source of data on the evolution of UK communications policy. They refer the reader to their publication “New Issues in Universal Service Provision” by Cristina Murrone and Richard Collins (1995.IPPR.London) for a fuller discussion of USO issues.

² A contribution paid by other telcos to BT for the maintenance of the notionally loss-making access network.

² When 650,000 subscribers paid to view the Bruno-Tyson fight in March 1996.

³ Advertising Standards Authority, British Board of Film Classification, British Broadcasting Corporation, Broadcasting Complaints Commission, Broadcasting Standards Council, Independent Television

Commission, Independent Committee for the Supervision of Standards of Telephone Information Services, Press Complaints Commission, Radio Authority, Welsh Fourth Channel Authority.

