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A response to the Secretary of State's open letter 'A Communications Review for the Digital Age'

Enders Analysis

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The Secretary of State's Open Letter regarding the forthcoming Communications Review asks 13 questions, some of which imply that certain courses of action are desirable

Much has been achieved in communications regulation since the formation of Ofcom as a 'converged' regulator under the 2003 Communications Act and a number of important regulatory initiatives are ongoing

While a clearer statement of policy would be welcome, many key issues are already being addressed or could be best dealt with under existing legislation

In this note we respond to the Open Letter from Jeremy Hunt, Secretary of State for Culture, Olympics, Media and Sport, dated 16 May 2011, inviting views pertaining to the forthcoming Communications Review, which is expected to result in a Green Paper by Christmas 2011.

The letter asks 13 questions under three broad themes:

- Growth, innovation and deregulation
- A communications infrastructure that provides the foundations for growth
- Creating the right environment for the content industry to thrive

We have not answered the specific questions in Mr Hunt's letter, but instead make comments related to a number of key aspects of communications regulation: next generation access, spectrum, net neutrality, television content, PSB licence structure, print and regulatory structure.

Next Generation Access

In next generation access, Ofcom has completed its review of the wholesale access market. It has concluded that BT has significant market power, and as a result has ruled that Openreach must provide Virtual Unbundled Local Access (VULA) and Physical Infrastructure Access (PIA), with prices orientated to their long run incremental cost, in addition to pre-existing Local Loop and Sub-Loop Unbundling remedies. Ofcom has decided for the moment against ex ante regulation of BT's pricing for high speed broadband at a retail level, i.e. BT Retail's Infinity service, which is based on VULA. Ofcom has instead chosen to rely on competition law and the de facto pricing constraints imposed by competition from Virgin Media, and by TalkTalk Group and other unbundlers for current generation broadband based on ADSL2+. This has encouraged BT Group to deploy NGA to two thirds of UK

premises by the end of 2015 and BT Retail to launch Infinity at existing BT Retail Broadband price points, stimulating its adoption by customers. With respect to the 'final third', the government has made available an £830 million subsidy for high speed broadband where high speed provision would otherwise be uneconomic. Local councils are currently in the process of bidding for this funding.

These remedies, like all others, have some disadvantages. For example, VULA is an active product, making it more difficult for service providers to differentiate services based on it, and BT Retail's pricing for Infinity makes it difficult for other service providers to compete on price. The remedies also have some way to run in their implementation, for example, pricing and processes for PIA. However, in our view, there are no obviously better alternative approaches, and introducing legislation would be likely to confuse and hinder the implementation of the existing approach. There is also a risk that more aggressive intervention would distort the market, for example by disadvantaging unbundlers, or encouraging overinvestment in a technology for which demand and economic benefits remain uncertain.

Spectrum

The spectrum auction currently being consulted on by Ofcom is the most important since the 3G auctions in April 2000, and its outcome is likely to play a key role in defining the competitive landscape of the UK mobile market for at least the next decade. The spectrum consists of high quality 800MHz spectrum which is valuable for coverage, and a large quantity of 2.6GHz spectrum which can be used for high traffic concentration areas, with both blocks of spectrum harmonised with the rest of Europe for equipment compatibility.

While the auction is therefore highly important, it does not require further government intervention at this stage, especially at the legislative level. Ofcom is some way through the full process, and while the details of the auctions structure are easy to argue with and debate, the general approach – an auction structure modified to provide a degree of competitive balance between the current four mobile network operators – is much harder to argue with from a neutral observer's standpoint. The mobile operators are of course arguing their individual corners with great vigour, but this reflects the importance of the issue, not the reasonableness of Ofcom's proposals. Indeed, any interruption to the process at this stage would risk delaying 3.5G/4G enhanced network roll outs, to the detriment of all mobile users.

There are other spectrum issues which are not fully resolved, such as the use of the 'white space' spectrum which sits between the actively used blocks of terrestrial TV transmission spectrum and is available for alternative use in limited geographic areas, and the ongoing process to free up spectrum held but sparingly used by government departments. These issues are of long term importance, but not as crucial over the next 5 to 10 years, not least because any spectrum with no European-wide harmonisation will struggle to have a major impact on the mobile industry due to the lack of affordable handset and device equipment available.

Net Neutrality

Net neutrality is a fairly nebulous concept, and easier to define in terms of its many potential breaches than its observance. In broad terms, there is a public interest to ensure that providers of internet access to consumer end users (ISPs) treat all providers of lawful internet content and/or services roughly equally, i.e. purely on the basis of the technical nature and volume of their traffic levels as opposed to their business model, corporate structure, political leanings etc.

While this is a noble sentiment, there are a number of reasons for it not to be enshrined in legislation:

- There are a number of existing regulatory routes to deal with particularly egregious breaches of net neutrality – chiefly consumer protection routes (if an ISP markets a product as internet access, it should include access to all of the internet), and competition law routes (the ISPs have a monopoly on their own customers' inbound traffic, thus could be regulated as telecoms operators are on their interconnect policies and rates).
- The ISPs are not currently breaching net neutrality (at least in broad terms), nor are they likely to, as it is not in their commercial interests to do so. Although concentrated, the UK broadband market remains highly competitive, so any ISP blocking access to a popular website would be likely to experience negative publicity and hostile advertising sufficient to reduce its market share over time.
- Actual enforcement is problematic in practice. While online content/service providers are currently treated equally in broad terms, regulations to enforce strict impartiality would be extremely costly to implement: ISPs do not have direct relationships with the vast majority of content providers, and the majority of internet infrastructure does not have the capability to keep a careful track of traffic flows. Implementing a strict set of interconnect requirements would slow down and cost up the internet in the UK, hardly the aim of government.

There are some industry commentators who go further than we have in defining net neutrality, arguing that consumers have a right to full unlimited access to the internet for a flat fee, with no traffic management (as employed by fixed broadband providers) or tiered volume-capped data plans (as employed by mobile operators) allowed. We regard this as being commercially naïve; incremental data traffic does have a non-zero cost to the operators (and much higher on mobile than on fixed), and to force a flat rate unmanaged tariff structure would simply result in higher costs for the vast majority to the benefit of a very small number of intensive users.

Television content and public sector broadcaster licence structure

All three themes mentioned in the Secretary of State's open letter raise issues in relation to television. Concerning innovation and value to the consumer, we believe the focus should be on establishing a level playing field between the broadcast television and internet distribution platforms. There are a number of content and copyright issues that merit attention. In particular, in an age of growing convergence between these platforms, it cannot be appropriate that the same content displayed on the TV screen is subject to different content rules depending on whether the source is a TV broadcaster or an internet web site. In principle, the same rules should apply irrespective of the source and delivery

pathway, though we note below the particular complication of audiovisual content provided by a newspaper publisher. In the interests of facilitating greater innovation and growth across the wider competition regime, we think consideration should be given to framework rules that assist users in being able to access content over multiple devices.

Today, the UK is noted for the highest outlay per capita on domestically originated TV content in the world. This achievement owes a great deal to the establishment of a stable and enduring public service broadcast framework, which has encouraged content investment for the long term, with a balance between the publicly funded BBC and the commercial PSB national services, along with quota and other provisions for a thriving independent production sector. Of course, the present PSB model was designed in an age of analogue privilege, which will shortly disappear altogether and there has already been a great deal of public consultation about the design of a future public service broadcast structure in the digital age.

In our view, the core issue is how best to preserve a stable broadcast framework in a digital future that capitalizes on the potential of device proliferation, convergence and connectivity. The issue is complicated by the fact that the Channel 3, 4 and 5 broadcast licences fall due for renewal/retendering at the end of 2014 (i.e. shortly before the likely enactment of a new Communications Bill), by which time there could even be a Channel 6, while the BBC Charter terminates at the end of 2016. This is already a period of great regulatory uncertainty and we think it vital that a new Communications Bill does not add to it unnecessarily.

Indeed, we believe it to be essential that both the future commercial PSB licence structure, including the scope of the licences (e.g. whether national or nation licences in the case of Channel 3), the associated privileges (in particular PSB obligations, transmission capacity assignments and EPG positions) and also the role of the independent production sector are clarified at the earliest opportunity. The focus has to be at all times on designing the "digital" PSB model in a way that, firstly, preserves the best of the old analogue model in terms of content creation, and secondly, assists the PSBs and independent production companies in being able to exploit the opportunities of the converged digital future.

In our view, the achievement of these goals requires long term regulatory certainty. Before entrusting any of the issues (whether content regulation, copyright rules, spectrum allocations, EPG positions), the question must always be asked whether the issues identified cannot be handled more quickly, more effectively and in a way that offers greater long term certainty with reference to existing regulatory and legislative instruments than by a major new piece of legislation. Although we see numerous issues within the television sector, we remain to be convinced by the need for a Communications Bill to address them. We emphasize again, the overriding need is for greater long term regulatory certainty and resorting to new legislation to tackle the issues should only occur where judged to be absolutely necessary.

Print

The Secretary of State's letter appears not to mention the possible need for substantial strengthening of competition and plurality regulation, as well as cross-media ownership rules. Separate to this issue, online newspapers represent a thorny issue when the content format itself shifts from text to audiovisual, as this shift would imply the content is closer to a traditional news broadcast than to a physical newspaper. However, this issue needs to be understood in context. Most countries have long maintained and continue to maintain minimal regulation of their national newspaper sector. A vigorous and disputatious free press is almost universally seen as both messy yet also a vital part of democracy. In the UK, policy makers have long believed that a self-regulatory body, the Press Complaints Commission, is best placed to maintain reasonable editorial standards. Nevertheless, despite the PCC having a majority of independent members it is often criticized for being weak and not tough enough on poor standards of newspaper behaviour. Though there is force in this view, the replacement of the PCC by a statutory regulator would threaten editorial independence, a factor that needs to be placed at the centre of any such debate. We consider moves to strengthen the PCC would be a substantially better option.

Nevertheless, the migration by newspaper publishers from physical distribution onto the internet is accelerating. While we consider it entirely sensible that the same self-regulatory approach used by the PCC will continue to be employed in respect of textual material on the internet, we recognise that the difficulty arises when video material is married to written reporting. On the one hand, there is the argument that an interview carried out on camera is substantially the same as one reported in text and therefore a video on a newspaper website should be subject to press, not TV, regulation. On the other hand, Europe (and indeed the UK before these matters became subject to EU regulation) has always seen audiovisual material as requiring more direct regulation than press comment and reporting. So as newspapers move into more TV-like presentation of material on their web sites, it was inevitable that they would begin to fall under audiovisual regulation.

However, the EU rules on TV-like material carried on the internet were enshrined in UK law and a relatively relaxed regulatory regime was established. Broadly speaking we think the approach was right. Indeed, the scope for the UK to substantially change the way it regulates newspaper web sites is limited by the need to conform to the EU directive. In all, we see no need to press for change.

Regulatory structure/Ofcom

The continued existence of Ofcom has been questioned. There have been accusations of political cliques in senior management, poor judgement regarding broadcast content, high salaries, outsized, bureaucratic structure and slow and subjective decision taking.

We regard a certain amount of controversy and delay as inevitable. For example, the mobile operators do not have the same degree of incentive as BT to compromise with the regulator, and issues concerning the propriety of broadcast content tend to involve a high degree of subjectivity, and provoke strong views from media commentators.

In terms of making changes, we believe the key issue is how much better the alternatives would be and the disruption that a major reorganisation would involve. We would make the following points:

- TV, broadband, telephony, wireless and wireline technologies continue to converge. As a result, a converged regulator should be better able to regulate the different communications markets as they converge, in particular because specialists in different fields share a common reporting structure. We believe this results in regulatory thinking being 'joined up' much lower down the managerial hierarchy than would be the case with separate regulators, when inter-regulator rivalry can also come into play
- A converged regulator faces a huge workload, ranging from ruling on complaints about broadcast content through spectrum auctions and contributing to competition investigations to the development of regulations in new areas such as online copyright. This requires a sizeable number of well-qualified staff
- Ofcom's current approach of using former management consultants and other similarly qualified individuals to manage regulatory processes is in our view the best way of ensuring the most objective decisions. The coherence of these decisions is vital, not only to achieve the best balance of outcomes, but to avoid the judiciary becoming the de facto regulator, a situation which would lead to increased delay, uncertainty, and a tendency for outcomes to be settled in favour of the litigant with the largest legal budget

We are unable to conceive of an alternative to Ofcom that would be likely to produce results sufficiently superior to justify the disruption that a major change would entail. Therefore we do not believe that it would be justified to legislate in this regard.

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