

Rt Hon Jeremy Hunt  
Secretary of State for Culture, Olympics, Media  
and Sport  
DCMS  
2-4 Cockspur Street  
London  
SW1Y 5DH



4<sup>th</sup> July 2011

## Open Letter from the Secretary of State for Culture, Olympics Media and Sport on a Communications Review for the Digital Age: Response of Nominet UK

Dear Mr Hunt,

We welcome the opportunity to respond to the recent open letter on a Communications Review for the Digital Age. Nominet UK is the not-for-profit organisation which administers the 'dot UK' domain space. Nominet's constitution explicitly requires that we operate for the public benefit. We interpret this in particular as being a duty to promote the overall health and security of the 'Dot UK' internet space and as such our response to the Open Letter focuses on its likely impact on the UK internet industry and those who rely upon it. Our response to the open letter has been discussed and agreed by the Nominet Board with that starting point in mind.

Not all of the issues that concern the internet industry in relation to regulatory reform can easily be answered in response to the questions set out in the Open Letter. So our response is divided into two parts. First, we make some general comments on the scope and focus of the Government's Review. Second, we seek to address those specific questions raised by Government on which Nominet considers itself an appropriate commentator.

### **Part 1: What should be the focus of reform?**

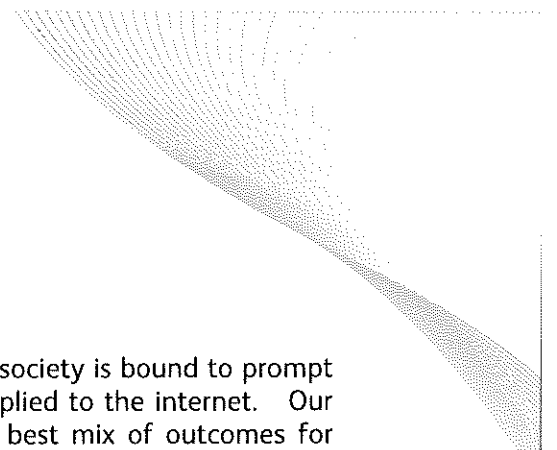
The internet featured hardly at all in the 2003 Communications Act.

However, in 2003 the internet was less central to the lives of consumers and the activities of businesses than it is today. According to the Office of National Statistics<sup>1</sup> between January and March 2003, an estimated 11.7 m households in the UK could access internet from home (47% of households). 60% of adults had accessed the Internet at some point. For comparison by 2010<sup>2</sup>, 38 million UK adults were internet users, of whom 30m accessed every day or almost every day. This was equal to 19.2m households (73%) and an increase of 5m since 2006. In 2003, the eCommerce market was developing fast but had yet to develop the critical mass which it has today. Social media was also in its infancy. Internet businesses were then still relatively minor components of the overall economy.

<sup>1</sup> <http://www.statistics.gov.uk/pdfdir/int0703.pdf>

<sup>2</sup> <http://www.statistics.gov.uk/pdfdir/iahinr0810.pdf>





In our view, this transformation to an internet-centric economy and society is bound to prompt the question of what degree of regulatory supervision should be applied to the internet. Our view remains that that a lightly regulated internet will deliver the best mix of outcomes for society as a whole. Nevertheless, it seems to us important to recognise the transformative role of the internet and to place this at the centre of the regulatory reform process this time around. A positive and proactive shaping of public policy around the internet is far preferable to the steady encroachment of regulation of the internet over time through a series of ad hoc processes and debates.

#### *The internet and the growth agenda*

Nominet strongly endorses the view that in the current economic climate, public policy and regulation should be oriented towards the Government's Plan for Growth. We consider that policy should recognise the *centrality of the internet* as an enabler for growth in a whole array of significant downstream markets.

This is true not solely in relation to the content sector, which is singled out specifically in the open letter as a source of future growth. In our view it is equally important to take into account the potential for the internet to enable many industries who are either users of the internet or consumers of services delivered over the internet, to improve productivity and competitiveness.

The internet's powerful contribution to economic growth has been well-stated in a number of important recent studies. Of these the most striking is that recently published by McKinsey<sup>3</sup>, which showed that in the UK, the internet contributes 5.4% of overall GDP – a higher proportion than any other country surveyed except Sweden. Moreover, in the period 2004-2009, the internet's contribution to UK GDP growth was 21% - third in the list of countries surveyed.

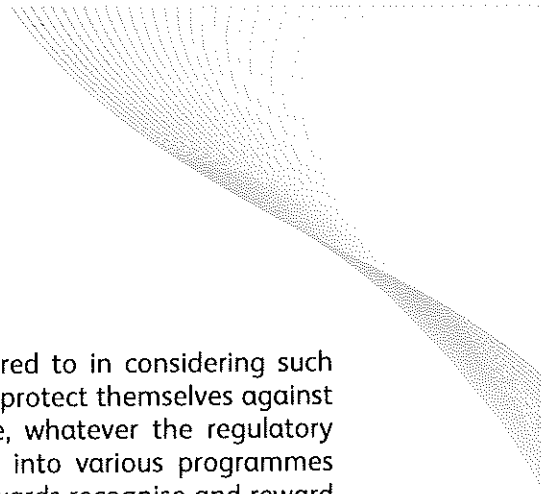
The openness of the internet to innovation allows entirely new industries – for example social media - to develop very rapidly. And it also allows SMEs to compete on a level playing field with incumbent businesses. Again, this finding is corroborated by the McKinsey report, which highlights the above-average adoption of internet by SMEs in the UK which is fuelling that sector's growth and competitiveness. The true beneficiaries of a far-sighted communications policy may not be in a position to respond to this consultation – they may not even exist yet.

It is important to reflect this long-term economic benefit of an open internet to create new industries and sponsor SME-led growth in a debate which may in other respects be dominated by the views of large firms in already established industries.

#### *The need to make the internet a secure and trusted space*

Light-touch regulation of the internet has paved the way for rapid expansion and growth of the industry. But we recognise that there are continued calls from various quarters for regulation of the internet to address specific problems. These range from concerns about misuse of the internet for criminal purposes to worries that the free flow of information and ideas across the internet can allow harmful material to be directed towards vulnerable groups.

<sup>3</sup> [http://www.mckinsey.com/mgi/publications/internet\\_matters/index.asp](http://www.mckinsey.com/mgi/publications/internet_matters/index.asp)



Nominet believes that certain important principles should be adhered to in considering such calls. First, we believe that empowering consumers and end-users to protect themselves against harms and abuses will continue to play a critically important role, whatever the regulatory settlement. In the case of Nominet, we are channelling funding into various programmes designed to encourage safer use of the internet, and our Nominet Awards recognise and reward best practice in such schemes.

Second, we strongly support the principle that the internet industry should work together and with public agencies to address criminal behaviour on the internet, whether this be in the form of attacks on the integrity of the internet itself (eg malware distribution) or the perpetration of fraud, sale of counterfeit goods or distribution of illegal goods, services or content. Nominet is already examining with our stakeholders one such issue, relating to the suspension of domain names associated with criminal abuse.

Third, it is undesirable not just from an industry perspective but from a societal perspective if internet firms become routinely involved in making complex decisions about censoring content on the internet. We believe such censorship should be undertaken in a way which ensures democratic accountability.

Finally, in line with best practice around the world, decisions taken concerning the future shape and development of the internet should wherever possible be taken using the bottom-up 'multi-stakeholder' model. The Government has actively promoted this model in the debates on global internet governance, and we believe that the model is equally valid in a domestic context.

#### *Legislation as part of a broader strategic approach to communications policy*

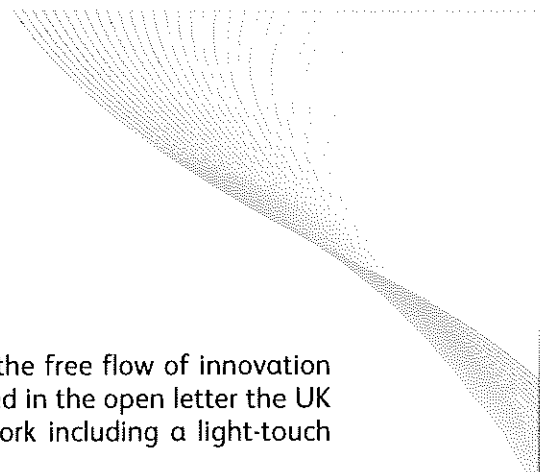
From our perspective, the issues covered by a reform of communications regulation represent only a sub-set of the regulatory questions affecting the internet and internet businesses, let alone wider government policies or agenda which would form part of a coherent 'internet-centric' growth policy. It would be extremely helpful if, as the Government takes forward this work, it can demonstrate how a regulatory reform agenda will operate within a broader 'internet-centric' policy framework that takes these other important elements of policy into account.

Nominet's position in the global internet eco-system makes us acutely aware that many of the key regulatory issues themselves straddle national boundaries. We welcome that the Open Letter explicitly raises the question of how the government should address spectrum issues in Europe. Many of the issues which are critical for the internet industry are already the subject of EU legislation, some of which (for example the eCommerce Directive) looks likely to be revisited within a similar timescale to this Review. We therefore believe the Government might usefully consult on its broad strategic approach to the reform of all relevant EU legislation in the forthcoming period.

#### **Part II: Specific responses to questions raised in the Open Letter**

***Q1: What could a healthier communications market look like? How can the right balance be struck between investment, competition and services in a changing technological environment?***

***Q4. What barriers can be removed to facilitate greater exports and inward investment and make the UK more globally competitive in digital communications?***



As we have noted, the single most important issue here is ensuring the free flow of innovation and new business formation facilitated by an open internet. As noted in the open letter the UK is well placed on key indicators, reflecting a healthy policy framework including a light-touch approach to internet regulation.

We are concerned that some respondents will use this question as an opportunity to call for a major extension of the boundary of regulation, with the specific aim of protecting existing models threatened by the advent of competition via the internet. The natural demise of obsolete business models is something that the Government should not seek to retard.

***Q2. What action can be taken to facilitate greater innovation and growth across the wider competition regime, and how can deregulation help achieve this?***

The advent of internet-based businesses presents some specific challenges to UK competition regime which in turn have implications for the future conduct of competition policy and in particular the question of where the boundary between competition law and sector regulation should lie.

A defining feature of the internet economy is that firms can both grow and decline very rapidly. The pattern of competition is characterized by waves of product innovation that can render an existing market participant's apparently strong position acutely vulnerable in a short period of time. An examination of the fortunes of the first really successful commercial search firm, Alta Vista, and the firm which dominated the US dial-up internet market, AOL, neatly illustrate this competitive paradigm.

Rapid, dynamic change presents a problem for competition authorities in that by the time an investigation has been completed and due process exhausted the findings may already have been rendered irrelevant. At the practical level, competition authorities will also struggle to define markets in a way which is sufficiently dynamic to reflect the possibility of further competitive entry, and thus be prone to identifying enduring monopolies where in fact none exist.

The trans-national nature of the internet also means that the correct definition of an economic market may be one that crosses more than one competition authority's jurisdiction. This creates further procedural complications which again can militate against rapid and effective intervention.

One possible response to this is to hand greater responsibility to sector regulators, who are seen as 'nearer the market' than competition authorities. However, sector regulation has developed over time from a tradition of exposing state monopolies –normally utilities of some sort - to the forces of competition, and where no such competition is possible, mimicking its effects through consumer protection measures including price controls. The standard toolkit of sector regulation is therefore grossly unsuitable for rapidly evolving and expanding markets characterized by high levels of innovation and disruption. And, as regulatory supervision usually takes the form of regulating prices (or in some other way passing monopoly rents to the consumer), this tends to damage the very incentives required to attract further waves of innovation and investment.

This analysis has three implications.

- First, both competition authorities and regulators need to adopt a precautionary principle which avoids premature intervention in internet-centric markets, given the scope for innovation to compete away short-term positions of market power.
- Second, if interventions prove necessary, they should be in the form of broad behavioural rules which in particular seek to avoid the erection of barriers to further innovation or market entry – rather than, for instance, price regulation.
- Third, the footprint of sectoral regulation should not be expanded beyond the key set of non-replicable physical assets already covered by EU rules on telecoms and spectrum.

**Q3, Qs 5-9, Q11.**

These questions relate primarily to areas outside of Nominet's competence, so we leave it for others to address them.

**Q10. Are there disproportionate regulatory barriers to investment in content? If so, what are they and how can increased investment in UK content production be encouraged?**

**Q12. What barriers are there to innovation in new digital media sectors, including video games, telemedicine, local television and education?**

We would like to comment on one important element of the answer to both these questions; the need to establish clarity on the traffic management measures that networks can impose on all the types of service listed in the two questions.

The need for regulation in this area remains unproven, and the precautionary principle outlined in the previous question response should apply. Nonetheless, it is possible that some form of legislation may ultimately prove necessary.

Nominet believes that some forms of traffic management are essential to ensure that consumers continue to be able to access the internet and use services across it. The controversial question is that of 'managed services' in which the platform operator receives a wholesale fee for guaranteed, prioritised quality of service.

In our view, services including advanced video gaming, high quality IPTV and telemedicine will require such managed services to be made available, if service quality is to be of a standard acceptable to users. At the same time, we strongly recognise the concerns expressed by many that the advent of managed services could actually *raise* barriers to market entry and innovation if, for instance, it involves the allocation of capacity in favour of established media brands at the expense of smaller entrants.

Such a concern could be alleviated by the establishment of general non-discriminatory principles applying to all providers. Accompanied by consumer transparency measures, such a regime would prevent extreme forms of discrimination that might harm the interests of end-users, for instance the blocking of lawful content or applications to protect existing business models. This represents the broad consensus approach amongst all public authorities around the world that have examined this issue, including the USA, Canada, Japan, Norway, and most recently

Singapore and the Netherlands. It should be noted that all have taken action in the context of an economic policy explicitly focusing on maintaining internet growth and innovation.

Legislation currently contains no obvious mechanism to allow such general non-discrimination rules to be applied. It is possible that responsible self-regulation by the industry will preclude the need for intervention. But this is an area that the Government should certainly be prepared to legislate for if necessary, given the long-term importance of the underlying issues.

***Q13. Where has self- and co-regulation worked successfully and what can be learnt from specific approaches? Where specific approaches haven't worked, how can the framework of content regulation be made sufficiently coherent and not create barriers to growth, but at the same time protect citizens and enable consumer confidence?***

From an internet perspective, it is worth noting that the key drivers for self-regulation have been:

- That it allows a more flexible and 'near market' fine-tuning of approaches which may be particularly appropriate to a rapidly growing and highly dynamic sector;
- That self-regulation has generally allowed for action to be taken which pragmatically avoids very difficult legal issues such as jurisdictional questions.

Self-regulation remains a valid and effective model to address certain issues. But though the goodwill of the sector to address issues of public concern can be taken as read, there is increasing awareness of internet users and privacy and consumer rights advocates that private actors, operating under a 'self-regulatory' umbrella, may take actions which (they argue) infringe 'fundamental rights' such as the right to free speech and the right to a fair hearing. Clearly, the more tricky and contentious the issues – and the more they involve balancing different public policy objectives – the less useful a pure self-regulatory approach becomes.

Each argument for a more proactive role for the industry needs to be carefully examined on its own merits. Without taking a view on specific cases, Nominet believes a general argument can be made that if the Government considers that there are additional tasks which it wants the internet industry to take on in support of public policy objectives, it may be more appropriate to take appropriate powers of Ministerial direction – subject of course to appropriate safeguards - rather than rely on pure industry self-regulation on the one hand, or formal, top-down and across the board regulation of the internet on the other. Such an approach seems most likely to deliver a continued, 'light touch' regime for the internet in the UK, whilst ensuring that actions required to be taken are done so in a way which is both effective and accountable.

Where it remains desirable to retain a self-regulation approach, this might be accompanied by the adoption of a multi-stakeholder model. Nominet has adopted such an approach, common in the wider world of internet governance, for our own purpose of developing Dot UK policy. The multi-stakeholder model ensures that all stakeholders – not least government and regulators – have a stake in the self-regulatory process, and that this is therefore conducted in a transparent and accountable fashion.

Yours sincerely,

A handwritten signature in black ink, appearing to be 'A. Blowers', with a long horizontal stroke extending to the right.

Alex Blowers  
Director of Legal & Policy