THE EUROPEAN
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SOCIETY GROUP EURIM

FUTURE REGULATION
IN THE COMMUNICATIONS INDUSTRIES

Introduction

EURIM Briefing No 8, dated 31 October 1995, considered a number of political, commercial and social issues arising from the emergence of information and entertainment services delivered electronically. Such services were already sophisticated and almost universally available, but in EURIM's opinion ran a real risk of over regulation due to the large number of regulatory bodies involved in their preparation and dissemination.

Following from this work, it was proposed that EURIM study the regulatory environment in the United States, most notably the Federal Communications Commission (FCC), to see if this might provide the model for the future regulation of similar industries in the UK and Europe.

This Briefing Paper is concerned with the infrastructure and content of the communications industries (including access to content - the "Gateway"). These activities are at present regulated in the UK by OFTEL, the ITC, the Radiocommunications Agency, the Radio Authority, the Broadcasting Standards Authority, the Video Standards Authority, the regulatory aspects of the BBC and relevant areas covered by the Welsh and Scottish Offices as well as DTI, DNH and Home Office.

Outside its scope lie data covered by industry specific regulators, such as those who, for example, control insurance, medicine, betting, etc. In a grey area lie data arising as part of multimedia products. Clearly, overlapping regulators, such as the Data Protection Registrar, and self regulatory bodies, such as the Press Complaints Commission, need close and clear cut working procedures for interfacing with the communications industry regulators.

Summary of Conclusions

1. The regulatory structure in the UK is over complex and should be greatly simplified.

2. The powers of the regulators of the UK communications industry vary from regulator to regulator and the appeal procedures need review.

3. Regulatory structures is an area where UK experience has greatly influenced EU policy. There are major benefits from continuing to lead, rather than follow, policy formation in this area.

4. The new structure should be unitary, ie. bring under one roof all regulatory powers concerning the communications industry.

5. Ministerial responsibility for policy issues regarding the new structure should reside within a single Government Department and Secretary of State or within the Cabinet Office.

6. Content regulation should be a matter for Member States rather than Brussels.

7. Open public debate is needed on the objectives and structure of regulation and the accountability and powers of regulators.

Present UK Regulatory Regime

In revisiting the regulatory environment in the UK, EURIM found nothing to make it change its position from Briefing Number 8: there is a pressing need to review the regulatory structure to simplify and avoid duplication. To give just one example of the effect of the current complexity, shortly after the "Dunblane Massacre" a Government Minister trying to curb an offensive video game based upon shooting children in a playground, in a series of TV interviews consistently quoted the wrong regulatory body. EURIM believes that this is typical of the confusion that arises when there are too many cooks in the kitchen.

The Effects of Convergence

Technology Convergence

With the convergence of computing and tele-communications, the locations of data, their processing and dissemination can be seamless to the user. This will result in entirely new ways for consumers to receive and interact with multimedia services. The present UK regulatory regime is technology specific and will not readily handle these convergences. The rapid rate of change in the industry means that the regulatory regime needs to be informed and forward looking. It should not, for example, be constrained by artificial boundaries such as the transmission medium (terrestrial, copper, satellite).

Vertical Integration

Partly as a result of technology convergence, many content or service providers seek to add value by integrating their core business with that of dissemination, and vice versa. At the moment, such companies have to comply with several regulatory regimes managed by several Ministries with plenty of room for duplication, contradiction and omission.

The Aim of Regulation

In general, legislators introduce regulation with three aims:

1. Within a legislative framework, to write and implement the rules stimulating a competitive market;

2. Within a democratic consensus, to bring about social benefits more quickly than competitive markets may deliver and to protect cultural integrity where this might be endangered by market distortions.

3. To protect consumers from environmental, health and safety hazards.

There are those who argue that a truly competitive market will one day be achieved and that much of the regulators' present functions will thus disappear.

Assessment of Options

Criteria

EURIM has had wide-ranging debate on the criteria by which to judge the appropriateness of a regulatory environment and has formally analysed the roles of regulation. The results can be summarised as follows:

Essential criteria:

- Compatible with the EU regulatory environment. The UK, as a member of the European Union, must - for both legal and practical reasons - be a part of the wider European regulatory structure.
- Meets essential national security needs. Communications have a crucial national security role in peace and war which must be safeguarded.

Desirable criteria (set out in descending order of importance):

- Has scope and flexibility to meet future needs and to be technology independent.
- Is resistant to regulatory capture (i.e. does not give undue weight to those willing to spend large amounts on lobbying and legal actions).
- Has ability to protect individuals and consumers.
- Has ability to maximise individual and commercial freedoms and opportunities.
- Maximises the effectiveness of remedies.
- Is simpler, cheaper and quicker to understand, operate and comply with than the present environment.
- Has technical and industrial expertise across the communications industry.
- Can minimise regulation.

FCC Regime

The Federal Communications Commission (FCC) is an independent US Government Agency, directly responsible to Congress. It regulates and licenses interstate and international communications by radio, TV, wire, satellite and cable.

The FCC is directed by five Commissioners appointed by the President for a five year term. The President designates one Commissioner to serve as Chairperson. The FCC has six Operating Bureaux and seven Offices: The Bureaux cover: Cable Services, Common Carriers, Compliance and Information, International, Mass Media and Wireless Communications. The Offices provide services common across all Bureaux: Public Affairs, Legal, Plans and Policy, General Counsel, Engineering and Technology, Inspection and Managing Director.

Regulatory activity in the USA is not the sole preserve of the FCC. There is much State legislature and Utility Commissioner involvement as well as some power at the level of the municipality.

Although at first sight there is much to commend in the FCC structure and powers, there are undoubted weaknesses in the US regulatory arrangements, primarily the over dependence on litigation, exemplified by the battle in the courts over the 1996 Telecommunications Act, and the conflicting and complex interplay of Federal versus State authority. Whilst not a model that precisely fits the UK, its longevity and the effectiveness of the US communications industry suggest that there are useful lessons to be learnt from the FCC's unitary nature and the across-the-board technology capability.

The Alternatives

There are many alternatives to the present UK environment. They can be looked at from three directions:

1. The communications industry could be split not as now into broadcast and telecommunications but instead could be split between content and network. Content itself can be divided into oversight of the programme material, covering censorship and cultural integrity, and access to content by network providers - the "Gateway" problem exemplified by the debate about access to satellite TV services.
2. The number of regulatory authorities could be reduced to one (the "Unitary" approach), Alternatively, they could be divided into two broad areas (the "Twin Pillar approach), or left as now with many different bodies covering various aspects of the industry.

3. A third dimension to the analysis is the balance of regulatory power between Nation States and Brussels.

EURIM decided that some of the options were politically unacceptable, especially those which would give Brussels the power to control content. This left three broad options, each with a number of sub-options:

A Unitary Authority

All regulatory control affecting the communications industries would be brought under a single, unitary, authority. All aspects of content and networking would be brought together.

Sub-options revolve around the balance of power between Brussels and London. The majority of the views canvassed by EURIM favoured a strong role for the European Commission on network aspects whilst Nation States remained firmly in control of content from censorship and cultural integrity perspectives. The debate on access to content was more finely balanced, with arguments in favour of a Europe wide control of access because of the Europe wide reach of satellite broadcasting, matched by those in favour of subsidiarity.

The structure of a unitary authority could take various forms. For example, all 29 or so regulators (including the BBC's regulatory role, the ITC etc.) would be merged into a single new authority, perhaps called the United Kingdom Communications Commission, under a single Commissioner.

Another less radical possibility is that the unitary authority could embrace a core of regulatory powers, perhaps OFTEL, ITC, etc. with the other regulators (the BBC etc.) appointed as members of a Board Chaired by the UKCC Commissioner.

The UKCC should have at least the same independence from Government as, for example, Oftel. Although it could have political interfaces with several Ministries, it would be preferable if these were via a single Government Department and Secretary of State, or via the Cabinet Office.

Twin Pillar

In this solution, all regulatory powers are vested in two new bodies, one working with the Department of Trade & Industry (for delivery) and the other with the Department of National Heritage (for content). Each sweeps up all regulatory powers relating to its domain,

but access (the "Gateway") remains a problem.

Existing Arrangements

Some fine tuning of the existing plethora of regulators is conceivable, but all possibilities suffer from the same shortcomings: there remain too many regulators for a converged world.

Best Option

All options, except those that would give little or no authority in any regard to Brussels, meet the essential criteria. However, based upon an analysis of the Options against the desirable criteria, EURIM believes that the general trend for a good regulatory regime should be towards a unitary regime with authority over both content and transmission of electronically delivered information and entertainment services.

Such an arrangement would have major advantages over the existing multiplicity of regulators and over the "Twin Pillar" alternatives. A single national communications commission would:

- Offer a "one-stop shop" to both suppliers and consumers in the communications industry.
- Cover all aspects of technology and content and provide increased flexibility as they, and the mixes between, them change.
- Reduce the risk of duplication, conflict or omissions in the regulatory regime.

Role and Organisation of the UK Communications Commission

The role of the UKCC would be to regulate the UK communications industry in accordance with the aims of legislators. The Commission would assume the powers of the present regulators and have the same relationship to other relevant bodies (such as the Monopolies and Mergers Commission and the Office of Fair Trading) as the present regulators.
It should be added that compelling arguments were made for stronger competition laws in the UK. However, the wider connotations of this topic require separate review. So also do the well-presented claims that the present powers of regulators were uneven, and that

the route of appeal, through Judicial Reviews, was cumbersome.

The organisation of the UKCC could take a form similar to that of the FCC: a small number of nominated Commissioners with one nominated by the Prime Minister to serve as Chairperson for a fixed term of office.

The Board of the UKCC would comprise the Commissioners, Heads of Offices such as Legal and Technical, and Directors of domains such as Broadcasting, Networks etc. Domain Directors would have authority within their sphere so that the resulting corporate structure would resemble the Board of a holding company with Domain Directors as Chief Executives of autonomous operating units. Some felt that the Domain Directors should actually be the Commissioners, whilst others argued that some or all of the Commissioners should be non-executive Board members.

There was considerable support for including the regulation of the BBC in the new structure but the issue of BBC funding should be treated separately.

Way Forward

There are many areas requiring public debate, for example the need for regulatory authority and independence must be balanced against the need for consultation with and accountability to Government and Parliament.

The change to a unitary authority would involve considerable upheaval. There will no doubt be those who argue for a gradual approach. EURIM believes that a step by step approach would in the end be counter-productive since each regulatory player would firmly defend their territory and find good reasons for delay, supported by those who stand to be exposed to increased scrutiny or competition.

EURIM is convinced that the reform of the regulatory environment for the communications industry is a matter of considerable urgency, affecting a vital element of the UK economy. It is very much in our economic, political and social interest to lead the way rather than merely react to decisions made elsewhere.