

Chapter 4: Achieving objectives in a market of multiple outlets

4.1 The trends outlined in preceding sections indicate the possibility of moving away from detailed licensing to a regime based more generally on sector exercise of strong competition powers. However, a number of issues – both economic and social – will need measures beyond the scope of competition law. These are discussed in more detail below, but include gateway, or bottleneck, control; universal access; public service broadcasting; and some aspects of consumer protection.

4.2 The current regime generally requires a licence to authorise provision of a service or operation of a system. The continuing need for sector-specific regulation suggests that some form of licensed provision, either specific or general, will be required. As a result of advancing technology, there are also now operators providing telecommunications services who do not run a system, and who do not require licences to provide those services. There is a need to consider how they should be regulated. However, a service should be subject to specific regulatory, or licence, conditions only where that is necessary to achieve the specific public policy objectives discussed above.

Coherence of competition regulation across the sectors

4.3 The Competition Bill, if enacted in its current form, provides a basis for coherent treatment of competition issues across all sectors. It would prohibit anti-competitive agreements and abuse of dominant position. The Bill provides for concurrent exercise of its powers by sector regulators in the sectors where those regulators already have powers concurrently with the DGFT under the Fair Trading and Competition Acts. In the communications sector, this applies only to telecommunications, although the ITC has significant competition powers in relation to broadcast services.

4.4 The Government sees a clear need to ensure the powers of this Bill are available to underpin the regulatory structure to be established for the converging sectors. The new prohibitions will be applied consistently across the converging sectors, whether the new powers are applied by the DGT or the DGFT. The complexity and coverage of the converging market is such that a coherent exercise of the general competition powers is essential. Closer co-operation between the regulators and competition authorities which deal with the converging sectors is an important first step in this direction. In the medium term, consideration will also need to be given to whether any adjustment is needed to the present scope of concurrent powers to be exercised by the DGT under the Competition Bill.

Question 4

Will any adjustment be needed to the scope of concurrent powers to be exercised by the DGT under the Competition Bill?

Sector-specific regulation

4.5 There will be a continuing need for sector-specific regulation in a number of areas. However, such regulation should be the minimum necessary to achieve the policy goals specified in Chapter 2. A European framework has been set up for the regulation of

telecommunications, and a series of harmonising directives have been adopted. This section considers what regulation might be needed, and how it might be implemented and monitored, in the context of these EC telecommunications directives.

Gateway or bottleneck control

4.6 A number of services provide essential intermediation between the supplier of content and the consumer. For example:

Conditional Access (CA) is the means by which service providers can ensure they are paid for their services, so all pay-TV services rely upon it. CA is provided by technology which may be in costly consumer equipment. Since the consumer faces considerable costs to move to different equipment, the conditional access provider can in effect control service providers' access to the customer.

In the multi-channel future, consumers will make their programme choices through an *Electronic Programme Guide (EPG)*. Where the operator of an EPG is also a provider of programme services, there is potential to gain advantage by restricting access to the EPG for competitor programme services.

It would often be uneconomic to duplicate these facilities, but those who control them have considerable potential market power. These gateways are an instance of developments which justify ex-ante regulation.

4.7 The operator of a gateway can exert significant influence on the markets for services provided to the consumer. This is of particular concern when the gateway operator also has interests in those other markets. A gateway technology which is first to the market will tend to become a de-facto standard. However, the critical influence of gateway control can often be exerted before an abuse of dominant position occurs; as in the case of conditional access, all the key contracts and relationships will have to be drawn up before the market for digital services is in operation. In this way the prospective gateway operator can exert considerable influence on prospective competition in developing markets. In the context of digital television, a particular concern would arise if such gateway control were to apply not only to set top boxes but also to the integrated digital television sets which are likely in the future to become the standard replacement product for all viewers.

4.8 For these reasons, the Government has regulated the provision of conditional access to digital television broadcasts, and is in the process of generalising this to cover provision of access control to all digital services wherever there would be significant opportunity for bottleneck control. Provisions of this type will continue to be necessary.

Access and universal service

4.9 Access to advanced digital services at affordable cost implies widespread availability of competing services and of the networks used to deliver them. The Government remains committed to encouraging competition and investment in *both networks and services* throughout the country.

4.10 Competition for the provision of broadband network capability, and hence for provision of new services, may be limited in some areas, particularly those not within a cable television franchise. The Government is keen to encourage innovative applications for use of available radio spectrum alongside the provision already expected from digital, terrestrial and satellite television and will be consulting on this later this year.

4.11 Convergence might be regarded as complete when all networks are able to carry all content. And with the removal of remaining, limited privileges to carry entertainment exclusively by particular means of delivery, there is little argument for requiring operators to build out networks according to a pre-agreed programme of milestones. However, exceptions to this may be justified, for example:

- first, dominant providers of local network access might be subject to a defined build obligation should they begin to upgrade parts of their networks for broader-band provision
- secondly, where scarce resources such as radio spectrum are allocated to an operator, then build milestones to ensure effective use of the resource would be appropriate.

4.12 As part of its effort to minimise social exclusion, the Government seeks to secure the availability of a certain level of service to all citizens. Setting the level of universal service provision is properly a matter for Government; it is the regulators' duty then to secure the delivery of that provision.

4.13 The Revised Voice Telephony Directive (98/10/EC) is concerned with ensuring the availability of good quality fixed public telephone services, and has the set of services to which all users should have access at an affordable price, and to which a universal service funding mechanism can be applied. A universal service funding mechanism can be justified only where the relevant services cannot be commercially provided. Currently, universal service is defined chiefly in terms of voice telephony and associated services (such as access to directory services and emergency organisations). In the future, it is possible to imagine that the definition of universal service in EC terms might be widened to include a selection of digital services.

Question 5

What digital services should be available to all at an affordable price?

Interoperability and interconnection

4.14 Operating the new technologies will demand considerable technical expertise and substantial investment in technology and marketing. Established leaders in broadcasting, telecommunications and information technology will have significant advantages, and will be well placed to extend their influence across the converging sectors. Some of them will be in a position to control access to key technologies such as encryption, electronic programme guides, conditional access and the application programme interface. The consumer interest is in competition and choice on the basis of the services conveyed. Concentration of market power or even dominance in providing the intermediate technology is not necessarily against the public interest, but abusing such dominance would be. Providers of intermediate technology may be more likely to gain market power if incompatible technologies are used to control bottlenecks in network systems.

4.15 For real competition to emerge in the provision of services, reasonable access to key technologies must be assured for all potential market players. Providers of 'gateways' and allied technologies must be able to manage them in such a way as to receive a fair return on their considerable investment. Denying access to the services offered by competitors, or imposing discriminatory conditions, must nevertheless be prevented. Such issues are already dealt with through licence provisions aimed at dealing with bottleneck effects arising from the provision of such access control services. The provisions of the Competition Bill, currently before Parliament, will prohibit the abuse of a dominant position or anti-competitive agreements, while not proscribing particular market structures.

4.16 In general, the Government would expect interconnection of networks to be an obligation falling on all those with a significant degree of market power in local network access. This would apply irrespective of the network technologies involved.

4.17 Interoperability should be facilitated by the provision of open interface specifications. Powers to require publication of network interfaces, allowing other operators to obtain sufficient information to interconnect and interoperate with the facilities or services of another operator should be available within the regulatory framework. Such powers are already present in parts of the existing framework. This might be provided for through voluntary agreement, an extension of existing regulation, or reliance on the competition law regime to deal with abuses of dominance.

4.18 In general, the Government believes that the development of substantive standards for the operation of systems and services should be led by the market. Innovation is clearly a key component of competitiveness in this fast moving and increasingly global arena. Industry-led standards-making, such as that demonstrated by the Digital Video Broadcasting (DVB) project for digital television transmission standards, has already proved itself flexible, adaptable and responsive in the face of fast moving market conditions. Regulators should not normally seek to impose standardisation, except in the area of requiring the provision of interface specifications (standards) to enable interconnection interoperability.

4.19 Digital television is one application where interoperability will be particularly important. Consumers should be able to switch between different service providers using different networks without unnecessary cost or inconvenience. Otherwise, the take-up of digital television as a whole is likely to be adversely affected. DVB standards provide the framework for such interoperability, but they are not sufficient in themselves to ensure that the necessary arrangements are in place. The ITC is therefore using its powers under the 1996 Broadcasting Act to specify particular variants of DVB transmission standards for use by its licensees, and is working with OFTEL to ensure maximum interoperability for digital services between the cable, satellite and terrestrial platforms.

Consumer protection

4.20 In most areas, the general law already provides protection for consumers of digital services, just as it does for consumers of any other kind of service, although there is also some sector-specific regulation in telecoms. Aside from the issues of full technology neutrality and international transactions, the legal framework already provides for consumer protection. This extends to issues with a specifically electronic, or digital bias, such as data protection, where general legislation already exists.

4.21 Questions relating to taste, decency, fairness and impartiality in broadcasting are dealt with in the codes of regulators, as is the use of harmful or misleading information in broadcast advertising. All of these have a basis in the Broadcasting Acts. The future approach to these issues is discussed below. However, the Government would welcome views on whether there are other areas where sector-specific consumer protection measures might be considered helpful.

Access to radio spectrum

4.22 The radio spectrum is a finite resource on which there are many competing and growing demands. The introduction of digital technology will enable it to be used more intensively. In particular, the Government is currently considering the development of digital broadcasting and the possibility of analogue switch-off on terms that will allow more broadcasting services using less spectrum. This would free spectrum for other valuable services, bringing major benefits to the economy and jobs. The Government is currently conducting a wide consultation on arrangements. However, unless it is managed effectively, restrictions on access will mean that the opportunities offered by the Information Age will not be fully realised. Spectrum management will therefore be important to the development of the converging sectors.

4.23 Spectrum management involves balancing the needs of commercial and non-commercial interests; ensuring access to spectrum for a wide range of radio-based services and applications; and ensuring compliance with the UK's international obligations. It is essential that the national spectrum manager is independent of vested interests, and impartial between users. The Government proposes that core spectrum management functions, including the strategic national management of the radio spectrum, should remain the responsibility of a public sector body. The Radiocommunications Agency of the DTI currently fulfils this role and is directly responsible to Ministers and, through them, accountable to Parliament. There are no plans to change the status of the Agency.

4.24 Other core spectrum management functions are:

- national and international co-ordination of frequency use and maintaining a national frequency database
- ensuring access to spectrum for defence, national security and essential services
- international representation
- the exercise of powers in the Wireless Telegraphy Act 1998 on spectrum pricing, strategic research management and policy development, and awarding grants to promote spectrum efficiency
- oversight of private sector Spectrum Management Organisations (SMOs)
- enforcement

4.25 The Government intends to retain these functions in the hands of the Agency. However, the assignment of individual licences within allocations of spectrum could be devolved to regulatory bodies or private sector organisations, where this offers more efficient management of the spectrum or a better service to licensees. This is already the case in some sectors, including broadcasting.

4.26 Licences to provide services in the converging sectors are not expected to mandate a particular form of delivery mechanism. Consumers may wish to have freedom to choose between wired and wireless technologies. However, in practice, some services, such as mobile communications, can only be provided through radio. In other cases, the use of radio enables new networks to be rolled out relatively quickly and economically. The availability of spectrum is therefore a key factor in regulatory and competition policy in the converging sectors.

4.27 For this reason, it could be advantageous to integrate licensing services and access to spectrum within the converging sectors. This would avoid the need for the holder of a communications licence to obtain a separate licence from a different authority in order to be able to access the spectrum it needs to provide the service. One-stop shopping would reduce uncertainty and lighten the regulatory burden. One possibility would be for the new communications regulatory framework to include responsibility for issuing spectrum licences for national public communications systems, within blocks of spectrum which have been allocated by the national spectrum manager. The Government seeks views on this approach and the division of responsibilities between the spectrum manager and the communications regulatory framework.

4.28 The Wireless Telegraphy Act 1998 provides new market-based spectrum management tools to achieve spectrum management objectives, for example by providing incentives to invest in more spectrum-efficient digital technology. The new regime is in the process of being phased in over a period of years. The Government made clear during the passage of the Act that this could be a first step in a process of reform and that it saw considerable attractions in the introduction of spectrum trading. This would complement and reinforce the effects of spectrum pricing under the Act by providing an opportunity for spectrum to be transferred to those who value it most highly. There would be a further incentive to use spectrum more efficiently since licensees would be able to sell any surplus spectrum. This could offer important advantages in terms of optimising spectrum use and enhancing economic benefits for businesses and consumers, as well as job opportunities. The Government will be consulting further on spectrum trading.

Question 6

While spectrum will always remain a finite resource, digital technology will allow it to be used more effectively. Increasingly, consumers and suppliers may want to choose between wired and wireless technologies, and broadcast and on-demand delivery. In view of this:

- a) Should the statutory basis for licensing telecommunications, broadcasting and spectrum usage be brought more into alignment?
- b) If a closer alignment of licensing is desirable or necessary, should the prime basis of licensing be according to the services involved (as now in some aspects of broadcast licensing), the systems/apparatus employed (as now in telecoms), or some other basis (including possible variants of these approaches which have tended to define regulatory approaches according to method of delivery)?

Electronic commerce

4.29 The Government has adopted four general principles which inform its approach to dealing with issues raised by electronic commerce, both domestically and in international negotiations:

- Technology neutrality, so that the existing law should apply on-line as well as off-line. Except in a few cases where this is not possible, this is already the case in the UK. It means that in general each person is responsible for their own conscious acts and omissions. This is the fundamental principle when determining liability
- International co-operation is required between governments in negotiating international agreements such as the OECD Agreement on taxation, and between regulatory authorities on enforcement
- User empowerment and education should be encouraged. Technology makes it difficult for the State to protect citizens, so citizens must be able to protect themselves, for example from unregulated investment sites or potentially offensive content, eg by using cryptographic and authentication products
- There is an important role for responsible self-regulation as a flexible alternative to government regulation in some cases. A good example is the Internet Watch Foundation (IWF). However, we must keep an open mind on the possible need for future regulation.

4.30 The Government will be issuing a separate policy statement later in the year on electronic commerce. This will bring together in a single document details of the Government's approaches to the individual issues raised by electronic commerce such as consumer protection, protection for intellectual property rights, privacy, taxation issues and information security in the on-line world.

Regulating content

4.31 The broad policy objectives for broadcasting and the media are not invalidated by the changes described in Chapters 1 and 2. The Government will continue to seek to ensure that the services which the media deliver offer choice, diversity of content, plurality of voice and high quality.

4.32 This is not to imply that regulation should remain unchanged. The Government endorses the general principle – set out in the European Commission's Green Paper on Convergence – that the level of regulation should be no greater than is necessary to achieve clearly-defined policy goals.

4.33 The trends we have discussed in previous chapters indicate a move from distinct segments of service provision based on delivery platform towards a continuum of services, each available on a variety of platforms. At one end, a segment with much the same characteristics as today's universal public service broadcasting is likely to persist for the foreseeable future. At the other end, a diverse and dynamic market of pay-TV, niche, on-demand and interactive services.

4.34 In this environment, policy objectives need to be pursued using methods which take account of the different characteristics of each segment. While the case for ensuring acceptability of content, for example, remains strong, it will typically need to be applied through a variety of measures and, at least in those newer service areas, with a lighter touch, while ensuring there is consistency in the way it is applied across the various types of services.

Plurality, diversity and choice

4.35 As long as some media retain their widespread impact and influence, there is a continuing case for specific ownership controls to promote plurality and diversity in those media. Competition in markets will contribute towards plurality and diversity in provision but it will not, of itself, guarantee these objectives. Developments in the media market may over time lead to different, more integrated, measures of concentration within it, with associated revised controls. It is also possible that greatly increased variety of 'voice' in the digital and converging environment may at some future stage allow greater reliance on ordinary competition law, as strengthened by the Competition Bill.

4.36 However, for some time to come, the case for particular controls on the still dominant terrestrial broadcasting media and on their combination with newspapers remains. These controls provide regulatory certainty, while allowing considerable flexibility to deal with market developments. They were debated fully and recently in the passage of the Broadcasting Act 1996. The Government does not intend to reopen the operation of these controls in this review.

Positive content controls

4.37 As to the future of positive programming requirements, the Government's view is that, while competition can contribute to the achievement of quality, plurality and diversity, it is not sufficient by itself. In particular, public service broadcasting will be required to secure these aims.

4.38 It is possible that a market supplied by a large number of sources will of itself, over time, widen the extent of access to new services, and provide the quality and variety of content which the public expects. Commercial imperatives may lead to the creation of both generalist and niche offerings catering for a wide range of interests, and create a demand for high quality original productions. In that event, it would be hard to justify continuing positive programming requirements for commercial broadcasters.

4.39 However, that is not the only possible outcome. Total broadcasting hours will inevitably expand more rapidly than will viewing and listening. Revenue streams may grow at a modest rate, leading broadcasters to concentrate on those forms of programming most likely to attract large audiences and generate substantial revenue. This may or may not generate a programming mix which meets these policy objectives.

4.40 Policy must be reassessed realistically in the light of the reality which emerges in the market. In so far as positive programming requirements remain necessary, they should be set at a level and delivered in a way which minimises market distortion and allows providers as far as possible to compete on equal terms.

4.41 The public will continue to have high expectations of terrestrial broadcasters with open access to a mass audience and the use of the public resource of the frequency spectrum. Such broadcasters enjoy a number advantages over others whose access to audience is more constrained. Placing positive requirements on those whose services are not so readily accessible by the consumer would be inappropriate.

4.42 However, as market conditions alter, this balance may need to change, and the regulatory approach must have the flexibility to respond as necessary.

Public service provision

4.43 Public service broadcasting will retain an important role in the multi-channel future. However, there will more than ever be a need for a clear definition of the role, aims and scope of public service broadcasting, which will have a greater need to differentiate itself from the plethora of commercial service providers.

4.44 Increasing fragmentation of the services will mean that the public faces a bewildering and possibly confusing choice. Many of the new services will offer a view of the world which is partial (perhaps in both senses of the word), and their programming will be determined by commercial factors. Public service broadcasting cannot be seen merely as filling in gaps. Its positive role will be more important than ever.

4.45 From the customer's point of view, established public service broadcasters will offer a point of reference: a source of reliable, impartial information and comment; of varied and wide-ranging programmes; and of programming which addresses the concerns of all sections of society.

4.46 An essential attribute of public service broadcasting is its inclusiveness. It offers unrestricted access to all. It is uniquely well placed to help ensure that the benefits of the information society are available to the whole population. If it is to do this effectively, then public service broadcasting must be free to innovate and to move into new activities such as internet service provision (eg BBC Online), multimedia and cable and satellite broadcasting.

4.47 There is emphatically still a place for public service provision which clearly follows a remit designed to ensure inclusive, high quality services. The Government will look to the BBC, Channel 4 and S4C to pursue their distinctive public service remits as public corporations in the multi-channel, multi-service future. Channel 5 has a distinctive role, as does ITV as, in many respects, a public service commercial broadcaster, with strong regional, diversity and quality requirements.

Question 7

What positive programming requirements will be needed in future? How should their scope be determined? Should they be confined to the public service broadcasting corporations?

Negative content controls

4.48 Beyond the public service providers, the primary mechanism for ongoing content control is based ultimately on application of established law. The basic principles of negative content controls are already settled in, for example, the Obscene Publications Act 1959, Protection of Children Act 1978 (as amended), and the Broadcasting Act 1990. The issue is how these should be given effect in content-based services in the converging sectors.

4.49 We discuss this below, taking two broad categories of service to act as illustrations. However, the Government would welcome views as to what the best approach to segmenting services for differing regulatory treatment should be.

General services

4.50 Some services will always be universally available and freely accessible. Today this segment is represented by television and radio services broadcast free-to-air for general reception. Here public expectation about standards of taste and decency are at their highest. There seems to be a continuing case for licensing, bringing conditions over and above the provisions of general law, giving effect to those general provisions by specific measures appropriate to audience expectations.

4.51 An increasing number of broadcast channels provided on a commercial basis will be accessed only on the basis of choice. Channels provided on a subscription basis may nevertheless be readily accessed by any member of the customer's household, including children. Consequently the case for retaining some additional licensing provisions for both free-to-air and subscription-based services which are provided for general, or universal, reception throughout the UK, is likely to remain strong.

Selective services

4.52 The growth in service provision will make it impossible to extend existing licensing controls to all forms of service delivery: the regulatory burden on both operators and on regulators with necessarily finite resources would be intolerable. In particular, where specific regulation of newer services is required, it should proceed with a lighter touch. Contrasting with freely available and subscription services provided for general or universal reception throughout the UK, there will be many new services which can only be accessed specifically at the request of the consumer, often after payment of a fee. Such 'selective' services might properly not be subject to specific controls at all, but would of course be subject to the general law. This is likely, however, to depend to some extent upon the effectiveness of the controls in place to prevent access to these services by young people.

4.53 In parallel with controls on the broadcast media, there are both statutory and non-statutory controls on cinema films, video works and computer games, which operate principally for the protection of young people. The British Board of Film Classification (BBFC) is responsible for age classification of films on a voluntary basis and fulfils the statutory requirements of the Video Recordings Act 1984 in respect of videos and computer games. There is a statutory requirement that videos should be classified more restrictively than cinema films because they are seen in the home. Anomalies already exist in relation to regulation of videos and broadcast material where broadcasters tend to follow their own guidelines; these are likely to intensify as subscription channels and selective services increase.

Question 8

Given the Government's aim of consistent regulation of content in the telecommunications, broadcasting and IT sectors:

- a) The Government believes as a general principle that similar material should be subject to similar standards. What is your view? Should the enforcement of those standards nevertheless differ according to the basis on which content is accessed by the public? Should different standards apply to the public service broadcasting corporations? What circumstances warrant which special consumer protection measures against offensive material?
- b) Is some consolidation of the present UK regulatory regimes in this area therefore necessary?
- c) How, in the future, do you see the balance between statutory regulation, self-regulation by the industry and increased control by the end user as means of achieving consumer protection?
- d) In relation to content transmitted by extraterritorial means, eg the Internet, what are the essential parameters to be dealt with through international concordats? In securing adherence to UK law, what essential parameters should be dealt with through ex-ante/ex-post monitoring and action by industry bodies such as the Internet Watch Foundation (described at annex C)?