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# Winners and Losers in the Communications Sector: An Examination of Digital Television Regulation in the United Kingdom

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## INTRODUCTION

Commercial pressures have weakened the adoption of regulatory measures designed to safeguard the interests of the public in the communications sector. Regulators have been drawn into leaving aside the protection of citizenship interests and adopting a perception of the public exclusively as economic actors. In the absence of "heightened public interest requirements,"[1] the safeguarding of citizenship-related concerns is nothing more than an ongoing Sisyphean struggle. Any attempt to protect these interests is rolling into the "abyss of unbridled commercialism."[2]

Professor Anthony Varona has asserted that the United States is witnessing an "increased commodification of viewers"[3] in a legal context in which the market players seem to set the rules of the game. This article assesses the extent to which a similar phenomenon is taking place within the context of the United Kingdom. I will focus on the regulation of digital television (DTV) infrastructure. I intend to demonstrate that the concerns identified by Professor Varona in relation to

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1. Anthony E. Varona, *Changing Channels and Bridging Divides: The Failure and Redemption of American Broadcast Television Regulation*, 6 MINN. J.L. SCI. & TECH. 1, 91 (2004).

2. Mike Feintuck, *Walking the High-Wire: The UK's Draft Communications Bill*, 9 EUR. PUB. L. 105, 122 (2003).

3. Varona, *supra* note 1, at 66.

programming permeate the entire DTV supply chain. Regulation of DTV infrastructure involves both an economic and a public policy dimension, and protection of citizenship interests should not be limited to content-related issues. In fact, ensuring digital broadcasters' access to DTV's infrastructure is instrumental in ensuring public access to information.[4]

This article focuses on the United Kingdom's Communications Act of 2003.[5] Part I concentrates on noneconomic aspects the United Kingdom's regulation of DTV infrastructure, particularly tools for protecting citizenship concerns associated with the communications sector. Part II is concerned with the extent to which the Act protects consumer-related interest implicit in the economic aspects of DTV infrastructure. This part refers mainly to technical and competition-related concerns, placing particular emphasis on the issue of interoperability and access to bottlenecks.[6] This article concludes that although the Act responds to the technical aspects of DTV infrastructure, it has failed to adequately address public policy concerns within the communications sector. In a fashion similar to Professor Varona's criticism of American communications law, I attribute this deplorable *status quo* to the influence exercised by market

4. Christopher T. Marsden, for example, notes that three factors are necessary in order to ensure pluralism and diversity in the media sector: ownership rules to guarantee a diversity of market players, the "reinvention of public service broadcasting" to ensure the public has access to information and access to bottlenecks. Christopher T. Marsden, *Pluralism in the Multi-Channel Market, Suggestions for Regulatory Scrutiny*, 4 INT'L. J. COMM. L. & POL'Y. 1, 14-15 (2000).

5. Communications Act, 2003, c. 21 (Eng.), *available at* http://www.legislation.hmso.gov.uk/acts/acts2003/20030021.htm (last visited Apr. 18, 2005). The Communications Act implements the 2002 Directives on electronic communications in the United Kingdom. Among the major changes in the regulation of electronic communications is the removal of the requirement of individual licensing of telecommunication systems. This article is concerned with interoperability and access-related aspects in the regulation of bottlenecks in digital television. For an analysis of the new framework, see generally John Cassels, *Communications Bill – The Vital Facts*, 12 UTIL. L. REV. 90 (2001); Marly Didizian & Vanessa Shield, *The Communications Bill – Completing the Picture*, 8 COMPUTER & TELECOMM. L. REV. 167 (2002); Feintuck, *supra* note 2; Graeme Maguire & Jason Romer, *An Overview of the Draft United Kingdom Communications Bill*, 8 COMPUTER & TELECOMM. L. REV. 136 (2002).

6. Bottlenecks are points of strategic control in the DTV supply chain. *See generally* Dermot Nolan, *Bottlenecks in Pay Television, Impact on Market Developments in Europe*, 21 TELECOMM. POL'Y. 597 (1997).

players over regulators. This article emphasizes the need for regulation based on a clear notion of the "public interest," incorporating not only economic but also social interests.

## I. SHAKY GROUND FOR PROTECTING CITIZENSHIP INTERESTS IN THE COMMUNICATIONS SECTOR?

The Communications Act failed to adequately address the public policy implications of bottlenecks.[7] The bottlenecks debate cannot be limited to purely economic matters. The debate also involves a range of noneconomic citizenship-related interests in pluralism and diversity in the communications market. In his analysis of American law, Professor Varona has argued that "[o]ver the last twenty-five years, the FCC has repealed almost all of its substantive public interest regulations, relying instead on marketplace forces in the individual television markets . . . to guide broadcasters' decisions concerning the nature and content of all of their programming."[8] Regulation of infrastructure has followed a similar path. Rather than balancing the public's noneconomic interests with market-related concerns, regulators have fraternized with commercial players and minimized legal references to "the public interest" in the communications sector.[9] On both sides of the Atlantic, market-oriented policies

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7. For further reference to the "public policy" implications of the bottlenecks challenge, see Nikos Nikolinakos, *The New Legal Framework for Digital Gateways: The Complementary Nature of Competition Law and Sector Specific Regulation*, 21 EUR. COMPETITION L. REV. 408, 408 (2000).

> [M]arket players who control the bottlenecks in question will have the commercial incentive to extend their power to the provision of content. This can be done, for instance, when gatekeepers block or limit consumer access via their set-top boxes to certain programme services. Therefore, the bottleneck issue must be tackled not only because of its anti-competitive effects but also because of certain public policy priorities, for instance the preservation of pluralism.

*Id*. at 408.

8. Varona, *supra* note 1, at 5.

9. The term "public interest" implies opposition to private interests. In his interpretation of the "public interest," Harm Schepel refers to the definition advanced in *Librandi v. Cuttica*, 1998 ECR I – 5955: "the interests of the collectivity had to prevail over the private interests of individual operators." Harm Schepel, *Delegation of Regulatory Powers to Private Parties Under EC Competition Law: Towards a Procedural Public Interest Test*, 39 COMMON MKT. L. REV. 31, 49 (2002). Schepel emphasizes that "[t]he appropriate distinction is between decisions taken in the advancement of the collective good and decisions taken in the pursuit of narrow private interests." *Id*. *See generally* MIKE FEINTUCK, MEDIA REGULATION, PUBLIC INTEREST AND THE LAW (1999).

have become the norm and have undermined the legal protection of citizenship interests.

Within the United Kingdom, the Draft Communications Bill developed a "light touch" regulatory approach,[10] based on the view that regulatory intervention should occur only if needed.[11] The Joint Committee on the Draft Communications Bill criticized this approach:

> We support the duty on OFCOM [the Office of Communications] to have regard to the principles that regulatory activities should be "'proportionate, consistent and targeted only at cases in which action is needed.'" We recommend that these principles, rather than an undefined commitment to "'light touch'" regulation, should govern the provisions of the final Bill regarding regulatory burdens.[12]

Although the Communications Act omitted the reference to "light touch" regulation,[13] it maintained the trend toward reducing regulatory intervention.[14] According to the Act,

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10. Dep't of Trade and Indus., 2002 Draft Communications Bill, cl. 5(1)(a)(b), *available at* http://www.communicationsbill.gov.uk/pdf/clauses_part1.pdf (last visited Apr. 17, 2005). "Duties to secure light touch regulation: (1) OFCOM shall keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve (a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary."

11. *Id*. cl. 3(2)(a).

12. Report of the Joint Committee on the Draft Communications Bill, Session 2001-02, HL Paper 169-1, HC 876-1, 23-24 [hereinafter Puttnam Report]; *see also* Feintuck, *supra* note 2, at 118 ("The Puttnam Report identifies the obligation to engage in 'light touch' regulation as a potential obstacle to Ofcom's effective operation—a term which might be thrown back in Ofcom's face on any occasion when it attempts tough or firm regulatory intervention."). The Communications Act establishes OFCOM as the single regulator for the communications sector. OFCOM unites the functions of the Office of Telecommunications (Oftel), Independent Television Commission (ITC), Broadcasting Standards Commission (BSC), Radio Communications Agency, and Radio Authority. For the transfer of jurisdictions to the new regulator, see The Office of Communications Act 2002 (Commencement No. 3) and Communications Act 2003 (Commencement No. 2) Order 2003, (2003) SI 3142 (C. 125), *available at* http://www.legislation.hmso.gov.uk/si/si2003/20033142.htm. *See generally* Stuart Weinstein, *OFCOM, Information Convergence and the Never Ending Drizzle of Electric Rain*, 8 INT'L J. COMM. L. & POL'Y 1 (2004).

13. *See* Communications Act, 2003, c. 21, § 6 (Eng.) (referring to the "duties to review regulatory burdens").

14. References to "light touch" regulation may have been eliminated from the Communications Act, but not from the language of regulators and of the Government. Lord Currie, for example, referred to "light touch" in relation to the functions of OFCOM in his speech to the Guardian Media Lecture: "we will seek to regulate only where regulation is necessary, and will then look for the least intrusive method possible to achieve our policy goals and public

"OFCOM must have regard, in all cases, to . . . the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed."[15] Similarly, under European Union law, OFCOM bears a duty to "encourage . . . the provision of network access and service interoperability."[16] The choice of the term "encourage" rather than "ensure," places more weight on the will of the market players rather than on the regulators. It advances the tendency toward "light touch" rather than active regulatory intervention for bottlenecks in digital television. A similar approach has been adopted in the 2002 European Union Directives.[17] The Communications Act reflects the regulatory attitude advanced at the European level.

The Communications Act is intended as a deregulatory instrument. The new measure "has proposed a far more deregulatory and liberalising regime than" many observers had expected.[18] "[O]verall, the buzz word for this brave new world is 'deregulation.' To its advocates, less regulation will permit the creation of British media giants capable of competing on a world stage . . . ."[19] This deregulatory posture, however, sacrifices the interest of the public, which can be adequately protected only by active regulatory intervention.[20] The recent

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duties." OFCOM Chairman David Currie, Speech to the Radio Festival of the Guardian Media Lecture (Jul. 7, 2003) [hereinafter Currie Speech], *available at* http://www.ofcom.org.uk/media-office/speeches_presentations (last visited Apr. 19, 2005).

15. Communications Act, 2003, c. 21, § 3(3)(a) (Eng.).

16. *Id.* § 4(7).

17. *See* Council Directive 2002/19/EC, 2002 O.J. (L 108) [hereinafter Access Directive], *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/ l_10820020424en00070020.pdf; Council Directive 2002/20/EC, 2002 O.J. (L 108) [hereinafter Authorisation Directive], *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00210032.pdf; Council Directive 2002/21/EC, 2002 O.J. (L 108) [hereinafter Framework Directive], *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00330050.pdf; Council Directive 2002/22/EC, 2002 O.J. (L 108) [hereinafter Universal Service Directive], *available at* http://europa.eu.int/eur-lex/pri/en/oj/dat/2002/l_108/l_10820020424en00510077.pdf.

18. Maguire & Rower, *supra* note 5, at 140.

19. Thomas Crane & Rico Calleja, *The Communications Bill – New Dawn or False Dawn?*, 7 COMM. L. 116, 116 (2002).

20. *See* Owen Gibson, *Peer Joins Communications Bill Protest*, THE GUARDIAN, Dec. 3, 2002 (expressing some peers' concern that the bill would fail to protect the public against commercial interests), *available at* http://media.guardian.co.uk/print/0,3858,4550456-107065,00.html.

measures at both the European and domestic level retreat from active regulatory intervention, favoring the application of general competition law. Comments on the 2002 Directives emphasize:

> A key principle underpinning the proposals is the need to move away from sector-specific ex-ante regulation towards greater reliance on the use of competition law in the communications sector. This can be seen as an attempt by the Commission to use competition law as a tool to address perceived weaknesses in the individual ex-ante regulatory regimes of the Member States.[21]

Similarly, OFCOM's requirement of promoting competition is perceived as part of the "duties for the purpose of fulfilling community obligations."[22] OFCOM will have concurrent powers with the Office of Fair Trading (OFT) in competition-related matters for the communications sector.[23] Graeme Maguire and Jason Rower identify the Government's intention that these matters will be exercised primarily by the communications regulator:

> The shift that is likely to result is that broadcasting competition issues, generally dealt with by the OFT at present will, in the future, fall within OFCOM's ambit. The Government also expects that as sector specific regulation is rolled back, so OFCOM will be able to rely increasingly on general competition powers as opposed to sector-specific regulations.[24]

Lord Currie links the notion of "light touch" regulation with the prospect if the withdrawal of regulatory intervention in competitive markets.[25] Nevertheless, regulation must not be perceived as temporary, until the market is competitive.[26] In

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21. Theresa Gourlay & Julia Hemmings, *Proposed Directives on Access and Authorisation of Electronic Communications Networks and Services*, 7 COMPUTER & TELECOMM. L. REV. 199, 200 (2001).

22. Communications Act, 2003, c. 21, § 4(3) (Eng.).

23. Maguire & Romer, *supra* note 5, at 138.

24. *Id*.

25. "Staying with the notion of 'light touch' for a moment, we intend that in due course the development of competition will mean that there will be areas of regulation from which we can withdraw altogether." Currie Speech, *supra* note 14.

26. A similar debate was advanced in relation to private utilities in that regulation is "a matter of 'holding the fort' until competition arrives." COSMO GRAHAM, REGULATING PUBLIC UTILITIES: A CONSTITUTIONAL APPROACH 152 (Hart Pub'g, 2000). Referring to the 1983 *Littlechild Report*, Graham argued that "the Report assumes that regulation is a temporary phenomenon and that competition will develop speedily so that regulation is no longer needed." *Id.* at 151. Graham wrote that, in fact, the arrival of competition did not mean that regulation withered away. "What we can see is an increasing emphasis on issues of competition policy and consumer protection, and a concern with

Cosmo Graham's terms, "the regulators will have responsibility for ensuring that companies meet their social obligations, which may be defined in a variety of different ways . . . . So, overall, although the form and instruments of regulation are changing, the activity is not likely to wither away."[27]

An effective approach for controlling the communications sector must comprise both competition and sector-specific regulation.[28] Competition authorities perceive the public exclusively as consumers, balancing their interests with the interest of market players. On the other hand, an active regulatory approach favors the perception of the public not just as economic actors, but also as citizens. Furthermore, this approach comes alongside the need to emphasize the interest of the public over commercial interests.

Initially, the Draft Bill advanced a set of regulatory objectives that ignored the public's noneconomic interests.[29] This was also reflected in the access and interoperability

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their inter-relationship." *Id.* at 189.

27. *Id*. at 194. "[I]t would thus seem clear that regulation will have a considerable place in the new media environment; arguments that it will wither away are based on grossly simplistic assumptions as to the reasons for regulation and an over-optimism as to the likely openness of future market structures." David Goldberg et al., *Conclusions*, *in* REGULATING THE CHANGING MEDIA: A COMPARATIVE STUDY 307 (David Goldberg et al. eds., Oxford Univ. Press 1998).

28. Regulation must be maintained in order to safeguard the interest of citizens and consumers:

> There is a clear role for *ex ante* sector specific regulation which can establish regulatory outcomes that are certain as industry players invest in new services and technologies. . . . [I]n such a rapidly developing sector, in some cases anti-competitive positions could become entrenched before *ex post* competition regulation has addressed the issues fully.

BRITISH BROAD. CORP., RESPONSE TO EU CONVERGENCE WORKING DOCUMENT (SEC (98) 1284), DETAILED RESPONSE TO QUESTIONS § 1.27 (Nov. 1998) [hereinafter BBC'S RESPONSE], *available at* http://europa.eu.int/ISPO/convergencegp/workdoc/bbc.html. Similarly, Lord Puttnam argues that "[w]e must . . . dispel the current fantasy that should unacceptable levels of ownership emerge, regulators can move swiftly to put the genie back in the bottle." 648 Parl. Deb., H.L. (5th ser.) 1432 (daily ed. June 5, 2003) (statement of Lord Puttnam) [hereinafter Puttnam Statement], *available at* http://www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds03/text/3060501.htm; *see also* Andrew Murray & Colin Scott, *Controlling the New Media: Hybrid Responses to New Forms of Power*, 65 MOD. L. REV. 491 (2002).

29. One of OFCOM's objectives is "to further the interests of the persons who are customers for the services and facilities in relation to which OFCOM have functions." 2002 Draft Communications Bill, *supra* note 10, cl. 3(1)(a).

provisions. Clause 4(8) gave priority to competition concerns, and treated consumer-related interests as afterthoughts.[30] The Draft Bill, as well as the 2002 Directives,[31] did not place sufficient emphasis on the noneconomic "public policy" dimension of regulating bottlenecks in digital television.

The Puttnam Report, which contains the recommendations of the Joint Committee of the House of Lords and the House of Commons for the scrutiny of the Draft Bill, has criticized the Communication Act's failure to give sufficient emphasis to the noneconomic interests. The report condemns failure to prioritize the interests of consumers in relation to the functions of OFCOM. "There is no indication in the Directive or the Draft Bill of priority between the five requirements, which relate to the promotion of competition, the development of the internal market and the promotion of the interests of citizens . . . ."[32] While welcoming the suggestion of the Joint Committee, the Government insisted that "the duties properly reflect the breadth of all OFCOM's responsibilities, both economic and cultural, and follow the proposition set out in the White Paper that each duty is of equal weight."[33]

Section 3 of the Communications Act, however, states that "[i]t shall be the principal duty of OFCOM, in carrying out its

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30. Similarly, the conditions advanced in clause 41(5) of the Bill are designed to "ensur[e] a level of network access and interoperability that will promote efficiency, sustainable competition and benefit to consumers." *See* Puttnam Report, *supra* note 12, at 45.

31. The actual provisions of the Bill need to be contrasted with the Government's comments on these measures. "In all of these changes, the interests of citizens come first, whether as consumers, as viewers and listeners, or as participants in democracy." Press Notice, U.K. Department of Trade & Indus. & Dep't for Culture, Media & Sport (DTI–DCMS), Draft Bill Overhauls Legal Framework for Communications Industry (May 7, 2002), *available at* http://www.communicationsbill.gov.uk/press_notices.html.

32. Puttnam Report, *supra* note 12, at 9-10. Similarly, in relation to the privatized utilities, Graham notes that "[t]he legislation does not . . . provide guidance in prioritising the various interests . . . . The regulators have tended to place most emphasis on their economic duties, in particular, the duty to promote competition, arguing that this is in the consumers' long term interests**."** GRAHAM, *supra* note 26, at 32. He adds that "it would be equally tenable to see even in the existing legislation as requiring a balanced approach to the issues of economic and social obligations." *Id*.

33. DEP'T OF TRADE AND INDUS. & DEP'T OF CULTURE, MEDIA AND SPORT, GOVERNMENT'S RESPONSE TO THE REPORT OF THE JOINT COMMITTEE ON THE DRAFT COMMUNICATIONS BILL, 2002, Cm 5646, at 3, *available at* http://www.communicationsbill.gov.uk. The Bill identifies OFCOM's duty: "to further the interests of consumers in relevant markets, where appropriate by promoting competition." Communications Act, 2003, c. 21, § 3(1)(b) (Eng.).

functions, to promote the interest of citizens and consumers in the communications market."[34] Nevertheless, it is essential to ensure that this primacy given to the interest of the public is adequately reflected in practice and that regulators do not yield to the pressures posed by commercial interests.[35]

The references in the Act to citizens' interests are scarce.[36] The competition-oriented approach reflected in the Draft Bill's access and interoperability provisions for bottlenecks remained unaffected in the Act.[37] The present regulatory system manifests a tendency toward economic as opposed to social regulation.[38] Similarly, in the context of utility privatization, regulators were mainly entrusted with economic duties, and social concerns were of a merely secondary nature.[39] Cosmo Graham has called for an acknowledgement of social concerns, in addition to the economic aims pursued by the regulators:[40] "there is no obstacle, conceptually, in thinking about access to utility services in terms of individual rights, in the sense of an entitlement as part of citizenship."[41]

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34. *See* Communications Act, 2003, c. 21, § 3(1) (Eng.).

35. Regulators' lack of enthusiasm concerning the amendments to section 3 is illustrative of this danger. *See, e.g.,* Julia Day, *OFCOM Boss Voices Fear Over Media Bill*, THE GUARDIAN, July 8, 2003 (stating that, according to Lord Currie, "the Puttnam amendment places more emphasis on the wider cultural interest of the citizen, rather than the commercial interests of the consumer, which would 'create long term difficulties' for the new regulator"), *available at* http://media.guardian.co.uk/print/0,3858,4707983-111156,00.html.

36. References to citizens are included only three times in the Communications Act, under sections 3(1), 3(14), and 4. *See* Communications Act, 2003, c. 21, §§ 3-4 (Eng.).

37. For example, the wording in section 4(8) of the Communications Act, 2003, c. 21, § 4(8) (Eng.) under the duties to fulfill Community obligations, remained the same as put forward by clause 4(7) of the 2002 Draft Communications Bill, where promotion of competition was given a much stronger emphasis than the need to ensure the benefit of "customers."

38. *See generally* Paul S. Crampton & Brian A. Facey, *Revisiting Regulation and Deregulation Through the Lens of Competition Policy; Getting the Balance Right*, 25 WORLD COMPETITION 25 (2002) (discussing various theories of regulation).

39. *See* GRAHAM, *supra* note 26, at 142.

40. "Over the years . . . there has been the increasing importance of quality of service matters which has brought along with it greater consideration of social matters." *Id.* at 143.

41. *Id.*; *see also* Goldberg et al., *supra* note 27, at 301 ("[The] argument for regulation . . . does not concern itself with the existence of limits on the operation of markets . . . but assumes that markets will marginalize some sort of programming and . . . in the long run diminish consumer choice."). The market players with the potential for affecting this "marginalization" are the bottleneck's control. This proves once again that the bottleneck challenge

Unfortunately, the Act fails to acknowledge the public policy dimension of the bottlenecks challenge. In the context of utility privatization, critics decried a perception of the public as "simply consumers of commodities."[42] Privatization on this model represented "an attempt to break through old problems by re-conceptualizing the relationship between individuals and the state organs as one whereby the individual is a consumer of public services, rather than a citizen of a political community."[43] The Act's references to the public mainly in terms of consumers, customers, or end users further reinforces the treatment of the public as economic actors as opposed to citizens.[44]

There is a need to restore democratic regulatory rationales[45] and to interpret the "public interest" so that it reflects not only economic but also social interests.[46] Similar to the situation that Anthony Varona has identified within American law,[47] the British framework relies on a vague notion of "the public interest":

> In failing to explore adequately what might be termed in this sense 'the public interest', the government has failed to establish much needed more solid foundations for regulatory intervention in the modern era . . . . [A]n opportunity has been missed to set up a safety net of constitutional principle, to come into play if the balance pole proves insufficient in keeping the regulatory endeavor on its narrow and difficult traverse of the high-wire.[48]

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involves more than just economic concerns.

42. GRAHAM, *supra* note 26, at 87.

43. *Id.* Graham comments further that "[c]haracterising the recipients of utility services as consumers does not provide a magical solution to policy problems." *Id.* at 88.

44. "[I]t may be that 'citizen interests' should have ranked alongside, or even above, 'consumer interests', and, as was suggested in the process of pre-legislative scrutiny, . . . 'effective regulation' should be as important as lightness of touch." Feintuck, *supra* note 2, at 113. In the context of the privatized utilities, Graham notes that "the regulators do have social obligations which may well pull in opposite directions from the economic obligations, notably the duty to promote competition . . . these social obligations should be seen as rights for consumers, or, more accurately, rights for citizens." GRAHAM, *supra* note 26, at 32.

45. This would require what Graham calls "going back to the fundamentals." GRAHAM, *supra* note 26, at 198. He notes further that "[i]t may be that we have now gone as far as we can by evolutionary change and, instead we have to turn our attention to first principles for the first time in many years." *Id.*

46. *Id.* at 32.

47. Varona, *supra* note 1, at 4, 52, 56, 69.

48. Feintuck, *supra* note 2, at 108; *see also* Varona, *supra* note 1, at 8

Following the pressure faced by the Draft Bill in the House of Lords, the public interest requirement for newspaper mergers has been extended to mergers in the broadcasting sector.[49] This is seen as a counterbalance to the deregulatory approach in the new legal framework for electronic communications.[50] In Lord Puttnam's terms, the public interest test is seen as "a powerful player in behalf of the citizen."[51] The effectiveness of this test will depend on OFCOM's commitment to protecting citizens' interests.[52] Furthermore, the government will retain the final say over mergers. "[T]he problem is where the ultimate decision lies . . . . At three separate points in the objection process, it is up to the secretary of state for trade and industry (whose first priority is not the public interest) to make a decision."[53] The

("The FCC's proceeding on new public interest duties is still open, with no new public interest requirements on the horizon.").

49. For the public interest requirement in relation to newspaper mergers, see Communications Act, 2003, c. 21, §§ 375-377 (Eng.). The extension of the public interest requirement to mergers in the broadcasting sector appears in sections 378-380. *Id*. §§ 378-380 (Eng.). The public interest amendments are part of the Enterprise Act, Chapter 2. Enterprise Act, 2002, c. 40 (Eng.); *see* Graeme Young & Martin Myers, *The Future Regulation of Media Mergers*, 15 ENT. L. R. 129, 129 (2004); Owen Gibson, *Media Bill Set to Become Law Within a Fortnight*, THE GUARDIAN, July 7, 2003, *available at* http://media.guardian.co.uk/print/0,3858,47075833-10765,00.html. The newspaper and the broadcasting sectors are among the few exceptions in which the government still has the final say in over mergers. In the majority of merger cases, the 2002 Enterprise Act transferred the responsibility from ministers to the OFT and the Competition Commission. *See* Shaun Goodman., *Steady as She Goes: The Enterprise Act 2002 Charts a Familiar Course for UK Merger Control*, 8 EUR. COMPETITION L. REV. 321, 331-46 (2003); Cosmo Graham, *The Enterprise Act 2002 and Competition Law*, 67 MOD. L. REV. 273, 278, 280 (2004).

50. *See generally* Young & Myers, *supra* note 49 (discussing the impact of public interest requirements on media mergers).

51. Puttnam Statement, *supra* note 28, at 1433; *see also Curbing Media Mergers*, THE GUARDIAN, July 1, 2003, *available at* http://media.guardian.co.uk/print/ 0,3858,4702541-107065,00.html (summarizing that "[a]ll the clause requires is that the media mergers should be subjected to a plurality test, defined as commitment to 'a balanced and impartial presentation of news and comment.'").

52. "A lot will depend on how OFCOM, which under chairman Lord Currie has promised to retain a 'light touch', chooses to interpret the public interest rules." Owen Gibson, *Cross-Media Ownership*, THE GUARDIAN, July 8, 2003, *available at* http://media.guardian.co.uk/print/0,3858,4707781-10765,00.html.

53. Steven Barnett, *Westminster Sells Media Sown the River*, THE GUARDIAN, July 14, 2003, *available at* http://media.guardian.co.uk/print/0,3858,4712245-105333,00.html.

secretary will decide whether OFCOM should assess the public interest implications of a proposed merger.[54] The government is not bound to follow the recommendations of OFCOM or the Competition Commission.[55] This commercially oriented approach for interpreting the public interest is characteristic of a "market-obsessed government . . . vulnerable to the pressure from media barons."[56]

Unfortunately, the current framework reflects a perception of the public interest based on "economic rationale[s] of wealth maximization, to the exclusion of democratic imperatives."[57] The law leaves citizenship-related interests vulnerable to commercial pressures.[58] The public interest must be distinguished from purely economic ends, and it must include a range of noneconomic interests. "[T]here has been greater stress on ensuring that the benefits of competition are shared equally and a general recognition that there are some, ill-defined, social obligations . . . these social obligations could be seen as citizens' rights."[59]

Regulation needs to be based on clear objectives, and must be designed to safeguard the interest of the public, perceived as both citizens and consumers. [60] Effective regulation demands "reflection on the standards and principles which govern how the media, and those who regulate them, operate."[61] It is more and more difficult to guarantee diversity, pluralism, and access if the public is described in impersonal terms such as "customers" or "end users." In this context, the new measures

54. *Id*.

55. *Id.*

56. *Id.*

57. MIKE FEINTUCK, "THE PUBLIC INTEREST" IN REGULATION 26 (2004).

58. *Id*. In addition, in relation to privatized utilities, Graham has acknowledged how the 1998 Human Rights Act and the influence exercised by the European Union have spurred the "growing importance of citizenship issues." GRAHAM, *supra* note 26, at 129.

59. GRAHAM, *supra* note 26, at 4.

60. "[I]n the absence of the adoption of citizenship, or arguably some other clear rationale, fundamental and systematic reform of the regulatory regime, and therefore effective and rational regulation, will remain depressingly unlikely." Mike Feintuck, *Regulating the Media Revolution: In Search of the Public Interest*, 3 J. INFO. L. & TECH. 15, § 4 (1997), *available at* http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/. Similarly, "regulation of digital broadcasting needs to be built on the objectives established for the analogue world." DAVID A. LEVY, EUROPE'S DIGITAL REVOLUTION, BROADCASTING REGULATION, THE EU AND THE NATION STATE 109 (1999).

61. Feintuck, *supra* note 2, at 108.

have been described as "missed opportunities for the government to consider from first principles what can be argued to be the real essence of media regulation: the task of defending democratic and citizenship concerns."[62]

The Act's perception of the public as mainly comprising economic actors leads us to question whether there is any room left for citizenship rationales in the regulation of digital television infrastructure. Although the Act acknowledges the desire to preserve pluralism and diversity in the communications sector, these arguments arise only in the context of content regulation and do not affect the regulation of market structure or broadcaster behavior.[63] The British government has made it clear that although these measures are "highly deregulatory," "broadcasting content will be protected" "at every stage of deregulation."[64] The government acknowledges the pluralism and diversity debate in relation to content, but it ignores the "public policy" implications of behavioral and structural regulation.

In order to ensure citizenship access to information, the Act's special provisions for public service broadcasters (PSBs)[65] concentrate mainly on the imposition of "must carry" obligations[66] under section 64 of the Communication Act.[67]

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62. *Id*.

63. *See* Communications Act, 2003, c. 21, § 3(2)(c) (Eng.).

64. Owen Gibson, *Jowell Gets New Powers on Sky Carriage,* THE GUARDIAN, Nov. 20, 2002, *available at* http://media.guardian.co.uk/Print/0,3858,4550610,00.html.

65. *See* Georgina Born, & Tony Prosser, *Culture and Commercialism: Citizenship, Public Service Broadcasting and the BBC's Fair Trading Obligations*, 64 MOD. L. REV. 657, 661-64 (2001) (discussing the issue of PSBs); Martin Cave, et. al., *Regulating the BBC*, 28 TELECOMM. POL'Y 249, 262 (2004).

66. *See* Marsden, *supra* note 4, at 23. "Must carry" obligations are justified on the grounds that "there is a fundamental public interest in certain channels being universally available." OFTEL, THE PRICING OF CONDITIONAL ACCESS SERVICES AND RELATED ISSUES: A CONSULTATION DOCUMENT ISSUED BY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS 15 (May 8, 2002) [hereinafter OFTEL, PRICING OF CONDITIONAL ACCESS], *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/cast0502.htm (last visited Apr. 19, 2005).

67. Communications Act, 2003, c. 21, § 64(1) (Eng.). *See* OFTEL, THE GENERAL CONDITIONS OF ENTITLEMENT, A CONSULTATION ISSUED BY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS ON THE DRAFT GENERAL CONDITIONS OF ENTITLEMENT TO PROVIDE ELECTRONIC COMMUNICATIONS NETWORKS AND ELECTRONIC COMMUNICATIONS SERVICES 12 (May 22, 2002) [hereinafter OFTEL, ENTITLEMENT], *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/licensing/

Nevertheless, commercial pressures weakened the effectiveness of these provisions. After strong lobbying from BSkyB, one of the United Kingdom's largest digital television platform operators, the Act failed to impose "must carry" obligations on satellite providers.[68] This concession represents a departure from the initial plan of applying must-carry obligations to all delivery platforms.[69] The measure has been justified on grounds that the requirement of fair, reasonable, and nondiscriminatory access imposed on Conditional Access providers is sufficient to assist PSBs in negotiations with satellite platform operators.[70] This mechanism may prove insufficient, leaving PSBs in a vulnerable bargaining position,[71]

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2002/enti0502.htm. (last visited Apr. 19, 2005). "'[M]ust carry' obligations, or obligations requiring certain channels or programmes to be provided to the public, may be imposed on broadcasting network operators where those networks are the principal means for a significant number of end users to receive radio and television." *Id*.

68. *See* Marly Didizian & Jason Romer, *The Communications Bill – The Place of the BBC*, 9 COMPUTER & TELECOMM. L. REV. 95, 98 (2003); Owen Gibson, *Davies Hits out over Satellite Coverage*, THE GUARDIAN, Nov. 25, 2002, *available at* http://media.guardian.co.uk/broadcast/story/0,7493,847416,00.html. Gibson notes that "the culture secretary, Tessa Jowell, included a clause requiring the BBC and other public service channels to be offered for broadcast across all platforms, including satellite, and removed a clause included in the draft bill requiring Sky to broadcast the channels." *Id*.

69. The White Paper refers to the carriage of Public Service television channels on all delivery platforms. *See* DTI – DCMS, A NEW FUTURE FOR COMMUNICATIONS, COMMUNICATIONS WHITE PAPER 27. A similar approach was adopted in the draft Bill. Cassels, *supra* note 5, at 92 ("[A] policy statement issued with the draft Bill has indicated that the Government believes that BSkyB should, after switchover, be required to carry the public service channels at a cost."). Must carry obligations were addressed in clause 49 of the draft Bill.

70. *See* Didizian & Romer, *supra* note 68, at 98-99. The conditions applicable to the providers of Conditional Access services are contained in Communications Act, 2003, c. 21, § 45 (Eng.).

71. "'Must carry' across all platforms is an essential *quid pro quo* for imposing 'must offer' on PSBs. Without it, the ability of PSBs to negotiate carriage on satellite at fair and reasonable terms will be severely undermined." Memorandum from Carlton Communications Plc, to House of Commons, Select Committee on Culture, Media and Sport, Minutes of Evidence (Feb. 8, 2001) [hereinafter Memorandum], *available at* http://www.publications.parliament.uk/pa/cm200001/cmselect/cmcumeds/161/1020808.
htm. "Must offer" obligations are contained in sections 272-273 of the Communications Act and apply to "distribution over every appropriate network." Communications Act, 2003, c. 21, § 272 (Eng.). Prior to the Act, PSBs were under no obligation to offer their services on any digital platform. The only obligation applied in relation to analogue terrestrial. *See* OFTEL,

because "what was fair and reasonable in relation to broadcasters may not be sufficient in relation to PSBs with universal reach obligations and which, therefore, cannot walk away from negotiations if the terms offered are unsatisfactory."[72] Furthermore, the position of public service broadcasters is not aided by the fact that "fair, reasonable and non-discriminatory" access is not clearly defined in the Act.

Access to these services proves vital in ensuring a plurality of market players in the communications sector.[73] Access to bottlenecks is also instrumental in ensuring citizens' access to information. The imposition of "must carry" obligations constitutes merely one tool for ensuring pluralism and diversity in the communications sector. Must-carry should be accompanied by effective regulation of bottlenecks and ownership.[74] Unfortunately, current law fails to include a public policy element in regulatory measures relating to digital television infrastructure.[75] Regulation must advance more

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PRICING OF CONDITIONAL ACCESS, *supra* note 66, at 15.

72. Didizian & Romer, *supra* note 68, at 99. "[S]pecial consideration" should be given to "the public service nature of a channel when setting prices for access to the satellite." Memorandum, *supra* note 71, § 4. In discussing the price that is required from PSBs for Conditional Access services, Oftel agreed that PSBs should pay a "commercially negotiated rate, . . . including a contribution towards common costs." OFTEL, PRICING OF CONDITIONAL ACCESS, *supra* note 66, at 13. This charge represents "both the incremental cost of the provision of service and a reasonable contribution to common costs." OFTEL, PRICING OF CONDITIONAL ACCESS, *supra* note 66, at 13. Nevertheless, PSBs are charged a lesser tariff for Conditional Access services than their commercial counterparts. *See generally* Emily Bell, *BBC Breaks Free from Sky*, THE GUARDIAN, Mar. 17, 2003 (discussing the BBC's decision to remove its services from the BSkyB encryption system and broadcast from the Astra 2 satellite covering the United Kingdom), *available at* http://media.guardian.co.uk/mediaguardian/ story/0,7558,915403,00.html. The BBC will still pay BSkyB a sum "to develop a system that will allow viewers to choose the correct regional version of the BBC's TV channel." Owen Gibson, *BBC and BSkyB Settle Satellite Dispute*, THE GUARDIAN, June 13, 2003, *available at* http://media.guardian.co.uk/broadcast/story/0,7493,977149,00.html.

73. "Without access to technology to enable this, it would be difficult for broadcasters to take full advantage of digital television and radio, to the detriment of choice for end users and to the detriment of variety and innovation in the industry." OFCOM, STATEMENT ON CODE ON ELECTRONIC PROGRAMME GUIDES 4 (2004) [hereinafter OFCOM STATEMENT], *available at* http://www.ofcom.org.uk/consult/ condocs/epg/(last visited Apr. 19, 2005).

74. Marsden, *supra* note 4, at 38.

75. *See* Nikolinakos, *supra* note 7, at 412 (pointing towards the "existence of certain public policy objectives – such as the preservation of pluralism and consumer choice – which cannot be safeguarded solely by the application of

than purely economic interests. "If [the] argument for regulation takes as its starting point the maximisation of individual consumer choice, a second argument starts from the need to promote a particular type of society with particular forms of democratic procedures."[76]

Apart from section 3, the Act refers to citizenship-related interests only under the "duties for the purpose of fulfilling Community obligations."[77] Therefore, the citizenship dimension is accommodated under the wider context of European Union law. The law of the European Union may be better able to accommodate the democratic interests in the regulation of the technical aspects of digital television.[78] The big media players can no longer be confined within strict national boundaries. "[T]he synergistic strength of cross-media empires" poses a "threat to democratic values."[79]

The member states of the European Union appear unwilling to give away too much power in relation to the

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competition law."). Interoperability and open standards need to be guaranteed in order to ensure that the public is not tied to a particular technology. *See* LEVY, *supra* note 60, at 149. Nevertheless, beside these concerns, it is necessary to ensure that the interests of the public are given primacy over commercial interests, and that the concept of the public is perceived as having both consumer and citizenship elements.

76. Goldberg et al., *supra* note 27, at 301. Similarly, David Levy states: "the arguments for the pure competition-based approach appear weak. The fact that broadcasting regulation is subject to political intervention simply reflects the political importance of this sector. The assumption that a simple structural change – whereby broadcasting regulation would be transferred to a competition authority – would reduce the incentive for such intervention, is a naïve one." LEVY, *supra* note 60, at 154.

77. Communications Act, 2003, c. 21, § 4(5) (Eng.) In addition, according to Article 17 of the Treaty establishing the European Community:

> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Treaty Establishing the European Community, Mar. 25, 1957, art. 17, O.J. (C 325) 44 (2002), *available at* http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/pdf/ 12002E_EN.pdf (last visited Apr. 17, 2005).

78. I assume that within the current communications sector, we must choose between either allowing unaccountable market players to make the rules of the game and supporting a supranational response within a democratic framework. *See* Jean K. Chalaby & Glen Segell, *The Broadcasting Media in the Age of Risk. The Advent of Digital Television*, 1 NEW MEDIA & SOC'Y 351, 355-57 (1999).

79. Feintuck, *supra* note 2, at 122.

communications sector. Given questions of competence and subsidiarity, it is perhaps inevitable that the Union should have a limited degree of influence over matters which, being more or less related to culture, are regarded as the proper concern of the member states.[80] Both the 2002 Directives and the Act illustrate that the regulation of the digital revolution still has a significant national dimension. Nevertheless, the Act specifies certain duties in the context of fulfilling community obligations, including the requirement to "contribute to the development of the European internal market."[81]

The growth of media empires beyond national borders poses significant challenges to national control of their power.[82] Unfortunately, it often seems that market forces shape regulation, rather than regulation shaping the market: "In the process of regulating any industry, the companies which are regulated will have an interest in influencing the decisions of the regulators and will spend a substantial amount of time and

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80. *See id.* at 111.

81. Communications Act, 2003, c. 21, § 4(4) (Eng.) Other obligations imposed for "fulfilling Community obligations" include the duty to "promote competition" in section 4(3), to safeguard the interest of European citizens in section 4(5), to encourage network access, and to interoperability in section 4(7) and ensure compliance with standards in section 4(9). Communications Act, 2003, c. 21, §§ 4(3), 4(5), 4(7), 4(9) (Eng.). These duties need to be interpreted in accordance with article 8(2) of the Directive 2002/21/EC of the European Parliament and of the Council:

> The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*: (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality; (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure, and promoting innovation; and (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources.

Framework Directive, *supra* note 17, at art. 8(2), 2002 O.J. (L 108) at 42.

82. "[T]he crucial topic of regulation is the problem of use and abuse of power." LEVY, *supra* note 60, at 145. The need to control this power of the market is entrenched on the influential role by the media in society. As David Levy states,

> [T]he true rationale of broadcasting regulation lies in the uniquely influential role of a medium which helps form public opinion, provides a forum for public debate and discussion, and - in places where regulation has not intervened to prevent it - offers a unique source of commercial and political power for private media owners.

*Id*. at 144.

money trying to influence their decisions."[83] The power shift from the public sphere into private hands has increased the vulnerability of the public to commercial manipulation. Only the European Union stands a fair chance of effectively controlling the power of big market players and of setting a framework for ensuring the protection of citizenship-related interests.[84] Once the "public policy" dimension of the bottlenecks challenge is acknowledged at the European Union level, a similar sensitivity to democratic concerns will be reflected in the policies adopted at the level of the member states. Unfortunately, these interests are not adequately reflected in the 2002 Directives or the Act. So far, instead of ensuring the best deal for the public, the regulatory approach reveals a tendency toward guaranteeing the best deal for big market players. The same words Anthony Varona used to describe American communications law, can be used in the European context to argue that "economic and marketplace demands" have transformed the protection of public interest considerations in the communications sector into a "commercial impossibility."[85]

## II. THE BEST DEAL FOR CONSUMERS?

This section aims to demonstrate that while the Communications Act failed to acknowledge the "public policy" dimension of regulating digital television infrastructure, it filled most of the gaps in the economic regulation of bottlenecks. However, it remains to be questioned whether the economic regulation of DTV infrastructure has genuinely advanced the interest of consumers in mind.

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83. GRAHAM, *supra* note 26, at 87. Similarly, Lawrence Tshuma argues, "[s]ome of the private sector networks raise fundamental issues regarding democratic accountability . . . . Without co-ordination, issues falling within the regulatory grey zone between networks are likely to escape effective regulation." Lawrence Tshuma, *Hierarchies and Government Versus Networks and Governance: Competing Regulatory Paradigms in Global Economic Regulation*, 9 SOC. & LEGAL STUD. 115, 136-37 (2000). Anthony Varona reaches a similar conclusion in relation to the United States: "[T]here is little doubt that the FCC has been 'captured' by the broadcast industry." Varona, *supra* note 1, at 82.

84. *See generally* Alison Harcourt, *Engineering Europeanization: The Role of the European Institutions in Shaping National Media Regulation*, 9 J. EUR. PUB. POL'Y 736 (2002) (discussing Europeanization with different policy instruments and intersecting agendas in the regulation of the communications sector).

85. Varona, *supra* note 1, at 9.

The regulation of digital television infrastructure suffered from the flawed implementation of the 1995 Advanced Television Standards (ATS) Directive.[86] Regulation under the Communications Act was therefore necessary to address issues of access to services and networks. "[U]nless service providers can get easy access through networks and gateways, and consumers can receive the greatest possible range of services through a single delivery system, there is a very real risk that huge possibilities offered by convergence will not be realised."[87]

Prior to recent regulatory instruments at both the European[88] and the British level,[89] critics emphasized the need for "a common framework for the regulation of gateways which control access over telecommunications networks."[90] The ATS Directive failed to cover interactive services offered via the Set Top Box (STB).[91] The Directive also failed to define the terms "digital television services" and "broadcasters."[92] The European

86. The British system for regulating CASs was based on the conditional access services class license, which stems from the Advanced Television Services Regulations, 1996 and the Advanced Television Services (Amendment) Regulations 1996, which in turn implemented the Advanced Television Standards Directive (Directive 95/47/EC as repealed by Directive 2002/21/EC). *See* OFTEL, TERMS OF SUPPLY OF CONDITIONAL ACCESS: OFTEL GUIDELINES 4 (Oct. 22, 2002) [hereinafter OFTEL, TERMS OF SUPPLY], *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/2002/cagu1002.htm (last visited Apr. 19, 2005).

87. BBC'S RESPONSE, *supra* note 28, at § 1B(2).

88. *See* Access Directive, *supra* note 17; Authorisation Directive, *supra* note 17; Framework Directive, *supra* note 17; Universal Service Directive, *supra* note 17.

89. The Communications Act 2003 received royal assent on July 17, 2003. Press Notice, Department for Culture, Media and Sport, The Communications Bill Gets Royal Assent (Jul. 7, 2003), *at* http://www.culture.gov.uk/global/press_notices/default.htm (last visited Apr. 19, 2005).

90. OFTEL, RESPONSE TO THE EUROPEAN COMMISSION'S WORKING DOCUMENT SUMMARISING THE RESULTS OF THE PUBLIC CONSULTATION ON THE GREEN PAPER ON CONVERGENCE OF THE TELECOMMUNICATIONS, MEDIA AND INFORMATION TECHNOLOGY SECTORS Annex A (Nov., 1998) [hereinafter OFTEL, RESPONSE], *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/broadcasting/ eu1198.htm (last visited Apr. 19, 2005).

91. *Id.*

92. OFTEL, DIGITAL TELEVISION AND INTERACTIVE SERVICES: ENSURING ACCESS ON FAIR, REASONABLE AND NON-DISCRIMINATORY TERMS § 3.11 (Mar., 1998) [hereinafter OFTEL, DIGITAL], *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/1995_98/broadcasting/dig398.htm. (last visited Apr. 19, 2005).

Union's 2002 Directives are designed to expand the regulation of networks and gateways in digital television. For example, the Access and Interconnection Directive adopts a "horizontal approach" in regulating electronic communication networks and services, representing "a move from the sectoral organization of the regulation of infrastructure."[93] The new measures for regulating the communications sector provide a coordinated response to the challenges posed by convergence.[94] These measures are designed to be technology-neutral: "[they] will cover all types of networks and services, hence the change in terminology from 'telecommunications' to 'communications.'"[95] Under the current measures, providers are classified as "providers of electronic communications networks," "electronic communications services," and "associated facilities."[96] These regulations' enhanced scope may lead to the regulation of previously unregulated networks and services, particularly in new technology areas."[97]

Initially, British law remedied this problem by adopting regulatory measures covering "access control services." Under this approach, Oftel[98] avoided the tying of regulation to a particular technology by promoting "regulations based on the commercial process rather than on the technical definition of services."[99] The Act, by its adoption of measures designed to

93. Nikolinakos, *supra* note 7, at 411.

94. OFTEL, FREQUENTLY ASKED QUESTIONS (FAQS) BY INTERNET PROVIDERS ABOUT THE NEW REGULATORY FRAMEWORK, Version 1:0 3 (Mar. 24, 2003), *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/ispfaq0303.htm (last visited Apr. 19, 2005).

95. Simon Taylor, *The EU Electronic Communications Package: Competition-Based Regulation for the Digital Age*, 12 UTIL. L. REV. 83, 83 (2002).

96. For a more detailed discussion see OFTEL, FREQUENTLY ASKED QUESTIONS, *supra* note 94, at 3.

97. Taylor, *supra* note 95, at 83.

98. The duties of Oftel have been taken over by OFCOM starting December 29, 2003. *See* http://www.itc.org.uk/divisions/econ_div/epg_code.asp?section (last visited Mar. 4, 2005).

99. OFTEL, RESPONSE, *supra* note 90, Annex A. In relation to the undefined notion of "television services" in the *ATS Directive*, Oftel states that these terms must not be addressed "in an unduly restrictive way." OFTEL, THE REGULATION OF CONDITIONAL ACCESS FOR DIGITAL TELEVISION SERVICES ¶ A6, *available at* http://www.ofcom.org.uk/static/archive/oftel/ind_info/broadcasting/conacc.htm (last visited Mar. 4, 2005).

regulate electronic communications networks, services, and associated facilities, illustrates the need for generic rules.[100] Therefore, the issue of access must be perceived from a cross-sectoral perspective: "a consistent set of regulatory rules and principles should apply to any proprietary technological devices which may be used to restrict access, irrespective of the types of services carried via them."[101] The Act advances a "new framework for the regulation of electronic communication services and services."[102] This framework covers, inter alia, "TV-based digital interactive services and associated networks,"[103] reflecting a "move towards a more horizontal approach" to the issue of access.[104]

The ATS Directive was characterized by an overemphasis on the regulation of Conditional Access Systems (CASs) at the expense of other bottlenecks in digital television, such as electronic program guides (EPGs)[105] and application program interfaces (APIs).[106] Critics demanded an extension of the access-related conditions to include receivers.[107] In its interpretation of the access requirements for Conditional Access Systems (CASs), Oftel included receivers, based on the view that "[t]here is clearly limited value in regulating access to [CASs] . . . if this is negated by control of other gateways.

100. OFTEL, RESPONSE, *supra* note 90, at § 1.3.

101. Nikolinakos, *supra* note 7, at 411.

102. Communications Act, 2003, c.21, Explanatory Notes, § 5 (Eng.), *available at* http://www.legislation.hmso.gov.uk/acts/en2003/2003en21.htm (last visited Apr. 22, 2005). The Puttnam Report notes: "[G]iven the key importance of access-related conditions to the future of regulation, the provisions of the draft Bill provide a new unified framework for such regulation have attracted surprisingly little comment." Puttnam Report, *supra* note 12, at 45.

103. *See* Taylor, *supra* note 95, at 88.

104. Nikolinakos, *supra* note 7, at 411.

105. These allow television viewers to search for available programs. *See*, *e.g.*, ETVCookbook: ETV Glossary (revised Mar. 25, 2003), *at* http://etvcookbook.org/glossary/ (last visited Apr. 19, 2005).

106. API is "a set of programming tools that pre-define functions and routines affording convenience to developers by grouping common programming material into blocks." *Id.*

107. EPGs and APIs are classified as receivers in the DTV supply chain. *See* Martin Cave & Campbell Cowie, *Not only Conditional Access. Towards a Better Regulatory Approach to Digital TV* (Aug. 8, 2002) (on file with author). For a discussion of the call for extending the scope of access conditions to include these bottlenecks see Nikolinakos, *supra* note 7, at 411. Nikos Nikolinakos identifies the need for regulating "all existing and potential gateway technologies" as well as for "provid[ing] a broader framework for access both to networks and gateways". *Id.*

This has enabled the UK to take a broad interpretation of technical services. . . ."[108] Oftel regulated EPGs "in so far as their provision is a provision for a Conditional Access Service."[109] The regulator was concerned with ensuring that these services reflect mainly the needs of the consumers and that competition is not restricted, prevented, or distorted.[110] By going beyond what was required in the ATS Directive, Oftel "created Europe's most detailed regulatory framework for [CASs], and (together with the broadcasting regulator, the [ITC]) what was at that time the only set of guidelines anywhere in Europe on the operation of [EPGs]."[111]

The approach adopted in the 2002 Directives on electronic communications includes APIs and EPGs "if justified," leaving the member states a strong voice in such matters.[112] Prior to the publication of the Directive, it was stated that "[i]t is too early in the development of digital interactive services market to determine whether regulatory intervention in the supply of APIs and EPGs is required."[113] The European Union emphasized that before the imposition of such requirements, it is necessary to encourage market players to adopt open standards.[114]

The Communications Act refers specifically to the

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108. OFTEL, RESPONSE, *supra* note 90, Annex A.

109. Oftel classifies EPGs as part of CASs "in so far as [they] control[] access by viewers to television services." Commission Decision of 15 September 1999 Relating to a Proceeding Under Article 81 of the EC Treaty, 1999 O.J. (L 312) 8, *available at* http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexdoc!prod!CELEXnumdoc&lg=EN&numdoc=31999D0781&model=lex.

110. OFTEL, ITC CODE OF CONDUCT ON ELECTRONIC PROGRAMME GUIDES ¶ 3 (1997), *available at* http://www.ofcom.org.uk/static/archive/itc/itc_publications/codes_guidance/electronic_programme_guide/epg_code.asp.html (last visited Apr. 19, 2005).

111. LEVY, *supra* note 60, at 100; *see also* OVUM, STUDY ON THE DEVELOPMENT OF COMPETITION FOR ELECTRONIC COMMUNICATIONS ACCESS NETWORKS AND SERVICES: A REPORT TO THE EUROPEAN COMMISSION, INFORMATION SOCIETY DIRECTORATE, ON THE REGULATION OF CONDITIONAL ACCESS SYSTEMS AND RELATED FACILITIES 4 fig.1.1 n.1 (2001) [hereinafter OVUM] ("The market for CAS may be defined to include associated facilities such as API and EPG, and/or to include access control systems for broadband interactive services.").

112. OVUM, *supra* note 111, at 3; *see also* Framework Directive, *supra* note 17, at recital 18, 2002 O.J. (L. 108) at 35.

113. OVUM, *supra* note 111, at 3.

114. *Id.*

regulation of APIs[115] and EPGs.[116] EPGs are classified, alongside CASs, as "associated facilities."[117] Nevertheless, under the new measures, EPGs are regulated separately and not as part of the CASs, as was the approach prior to the Act.[118] In regulating receivers, OFCOM may impose obligations on the controllers of these technologies, in order to ensure

> (a) that persons are able to have access to such programme services provided in digital form, as OFCOM may determine; and (b) that the facility for using those interfaces or guides is provided on terms which- (i) are fair and reasonable; and (ii) do not involve, or tend to give rise to any undue discrimination against any person or description of persons.[119]

Therefore, the Act extends the requirement of "fair, reasonable and non-discriminatory" access to EPGs and APIs, going further than what is required in the 2002 European Directives.[120]

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115. The API is defined in the Communications Act 2003 as "a facility for allowing software to make use, in connection with any of the matters mentioned in subsection (4), of facilities contained in other software." Communications Act, 2003, c. 21, § 74(3) (Eng.). The matters discussed in subsection 4 include:

> (a) allowing a person to have access to programme services; (b) allowing a person, other than a communications provider or a person who makes associated facilities available, to make use of an electronic communications network by means of which a programme service is broadcast or otherwise transmitted; (c) allowing a person to become the end-user of a description of public electronic communications service.

*Id*. § 74(4).

116. Section 74(3) of the Act defines an EPG as:

> a facility by means of which a person has access to any service which consists of: (a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes included in any one or more programme services; and (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide.

*Id*. § 74(3).

117. *See id.* § 32(3) (defining associated facilities). The explanatory notes refer to "a facility which is available for use[,] in association with an electronic communications network or service[,] in order to make the provision of that network or service (or other services) possible, or to support the provision of other services." *Id.* at explanatory notes § 87.

118. In July 2003, Oftel noted that "EPG services are subject to their own conditions under the continuation notice regime and will be also when the new regulations are in place." OFTEL, THE REGULATION OF CONDITIONAL ACCESS: SETTING REGULATORY CONDITIONS 7 (July 24, 2003), *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/date_order/2003_pubs.htm (last visited Apr. 19, 2005).

119. Communications Act, 2003, c. 21, § 74(2) (Eng.).

120. *See* Framework Directive, *supra* note 17, at recital 30, 2002 O.J. (L

In July 2004, OFCOM issued a code of practice for EPG providers.[121] This instrument is based on sections 310 and 311 of the Communications Act[122] and requires EPG operators to enable the use of these facilities by people with hearing or visual impairments and to give appropriate prominence to PSBs in the EPG listings.[123] The Code is also concerned with ensuring "fair and effective competition"[124] and calls for any agreements between EPG providers and broadcasters to be conducted on "fair, reasonable and non-discriminatory terms."[125] However, critics point out that in reality, the Code places more emphasis on "non-discrimination" and is concerned to a lesser extent with ensuring "fair and reasonable" treatment.[126] The BBC expresses disappointment that under the current framework, the EPG operator unilaterally decides the "architecture" of the EPGs. For example, the categories under which channels are listed are often designed to suit "in house" services, while discriminating against mixed-genre public service channels.[127] Yet, OFCOM rejected calls for intervening in the manner in which EPG operators exercise their power[128] by arguing that "it would [not] be appropriate for O[FCOM] to prescribe what these policies should be, since this would constrain the approaches that EPG providers could

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108) at 37; Access Directive, *supra* note 17, at recital 10, 2002 O.J. (L 108) at 8.

121. *See* OFCOM, STATEMENT, *supra note* 73. The adoption of the Code was preceded by a consultation process launched in January 2004. *See* Press Release, OFCOM, The Regulation of Electronic Programme Guides (Jan. 16, 2004), *available at* http://www.ofcom.org.uk/media_office/news_archive/nr1_20040116 (last visited Apr. 19, 2005).

122. According to § 310 of the Communications Act, "[i]t shall be the duty of OFCOM to draw up, and from time to time to review and revise, a code giving guidance as to the practices to be followed in the provision of electronic programme guides." Communications Act, 2003, c. 21 § 310(1) (Eng). See discussion in Crane & Calleja, *supra* note 19, *at* 116-21.

123. *See* OFCOM, STATEMENT, *supra* note 73, at 6.

124. *Id*.

125. *Id*. at 8.

126. *See* BRITISH BROAD. CORP., CONSULTATION ON THE REGULATION OF ELECTRONIC PROGRAMME GUIDES. THE BBC RESPONSE ¶ 7 (2004) [hereinafter BBC CONSULTATION], *available at* http://www.ofcom.org.uk/consultations/responses/epc/ responses/bbc.pdf (last visited Apr. 19, 2005).

127. *Id.* ¶ 8.

128. As argued by the BBC, "without a willingness on Ofcom's part to monitor how vertically-integrated EPG operators exercise their control of those gateways, then that control may be exercised in a manner which mitigates against fair and effective competition." *Id.* ¶ 11.

adopt."[129]

Furthermore, although the Code requires that "appropriate prominence" be given to public service channels, OFCOM refrains from providing any further guidance as to the meaning of these terms. In the comments to the draft Code, the BBC invoked Parliament's intent that public service broadcasters be given "greater prominence" in the EPG listings than their commercial counterparts.[130] The amendments to the draft Code on this issue are limited to a mere request that the EPG operators publish a statement on how they will comply with the requirement for appropriate prominence.[131] This provision fails to respond to the BBC's concerns that "the interpretation of Parliament's intent" has been left to EPG providers.[132]

In relation to access provisions for CASs,[133] the Act states that it is the duty of OFCOM to ensure that access-related conditions[134]

> (a) [a]re applied to every person who provides a conditional access system in relation to a protected programme service; and (b) that those conditions make all such provision as is required by [virtue of] Part I of Annex I to the Access Directive (conditions relating to access to digital [television and radio] services.[135]

The issue of access to networks can be approached from a technological and a competitive perspective. The technological approach refers, inter alia, to issues of access, interoperability, and standardization.[136] On the other hand, the competition-based approach refers to the requirement of ensuring access on a "fair, reasonable and non-discriminatory basis."[137] Sections 45[138] and 73 to 76 of the Act allow OFCOM to impose access-

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129. OFCOM, STATEMENT, *supra* note 73, at 20.

130. BBC CONSULTATION, *supra* note 126, ¶ 6.

131. OFCOM, STATEMENT, *supra* note 73, at 6.

132. BBC CONSULTATION, *supra* note 126, ¶ 6.

133. A CAS is defined in § 75(3) of the Communications Act as: "any system, facility, arrangements or technical measure under or by means of which access to programme services requires: (a) a subscription to the service or to a service that includes that service; or (b) an authorisation to view it, or to listen to it, on a particular occasion." Communications Act, 2003, c. 21 § 75(3) (Eng.).

134. *See id*. § 73(2) (describing access related conditions).

135. *Id*. § 75(2); *see also id*. § 47(2) (referring to the tests for setting or modifying conditions).

136. Specific reference is made to the need for SMP operators to comply with international standards. *Id*. § 75(1).

137. *Id*. § 74(2).

138. Under section 45, OFCOM has the power to set general conditions

related conditions,[139] applicable especially to networks or associated facilities providers that control access to networks by other market players.[140] Further conditions concerning network access are contained in section 87 of the Act.[141] These conditions are necessary in order to impose a form of control on providers of network services, once they are no longer subjected to the obligations of an individual license for telecommunication systems: "[T]hese licence conditions will be replaced by a combination of general conditions applicable to all communications providers (or all communication providers of a particular type) and specific conditions to be set and applied to individual communications providers."[142] The conditions concerning Conditional Access providers may be applied irrespective of the degree of market power.[143] This is

(sections 45(3), 51, 52, 57, 58 and 64), universal service conditions (sections 45(4) and 67), access related conditions (sections 45(6) and 77), and SMP conditions (sections 45(7) and 87-92). Communications Act, 2003, c. 21 (Eng.). For an analysis of these conditions, see Nick Pimlott, *Future Regulation of the Communications Industry Still in the Balance*, 8 TOLLEY'S COMM. L. 247 (2003). General conditions can be imposed on anyone who provides electronic communications networks and services. Communications Act, 2003, c. 21 § 46(2) (Eng.). Access-related conditions can be imposed on any person who "control[s] network access" or "provides an electronic communications network, or makes associated facilities available." *Id.* §§ 74(1), 46(6). Access-related conditions are not imposed solely on providers having SMP. Pimlott notes that "the intended scope [of these conditions] is not clear" and that "seizing this uncertainty, the [Act] takes the broadest possible approach." Pimlott, *supra*, at 247.

139. Based on Annex I, *Access Directive* implemented by section 45 of the Communications Act, the domestic regulator drafted major conditions on the issue of access, referring, *inter alia*, to the provision of access on fair, reasonable, and nondiscriminatory terms. *See* OFTEL, THE FUTURE REGULATION OF CONDITIONAL ACCESS: A CONSULTATION ISSUED BY THE DIRECTOR GENERAL OF TELECOMMUNICATIONS 14 (June 5, 2003) [hereinafter OFTEL, FUTURE REGULATION], *at* http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/ca0603.htm (last visited Apr. 19, 2005). Further conditions refer to "transcontrol," obligation "to keep separate financial accounts," and "publication of charges, terms and conditions." *Id*. at 14-16.

140. *See* Puttnam Report, *supra* note 12, at 45. In October 2002, Oftel put forth the revised set of access guidelines for CA services. *See* OFTEL, TERMS OF SUPPLY, *supra* note 86.

141. *See* Communications Act, 2003, c. 21 § 74 (Eng.).

142. *See* OFTEL, FREQUENTLY ASKED QUESTIONS, *supra* note 94, ¶ 1.4.

143. OFTEL, FUTURE REGULATION, *supra* note 139, at 10; *see also* OFTEL, FREQUENTLY ASKED QUESTIONS (FAQS) BY SERVICE PROVIDERS ABOUT THE NEW REGULATORY FRAMEWORK Version 2, at 9 (Mar. 24, 2003) [hereinafter OFTEL, SERVICE PROVIDERS], *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/

justified on the basis that "market power" is not necessarily the sole basis for *ex ante* regulation.[144] Access to CASs is crucial in ensuring "choice to the end users" and a plurality of competitors in the communications market.[145] Nevertheless, based on recital 6 of the *Access Directive*, national regulators can remove these conditions from operators that do not possess Significant Market Power (SMP).[146]

Control of a gateway presumes a position of dominance, calling for market power determination and market definition according to European Union guidelines. Determination of SMP is based on an assessment of dominance[147] in the relevant market.[148] The guidelines refer to the ability of an undertaking to act independently of competitors and consumers.[149] The guidelines also consider the exercising of joint dominance[150] and the increase of power within a market due to a dominant position in a "closely related market."[151]

The issue of market definition poses particular concerns for the communications sector.[152] OFCOM's approach to market

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eu_directives/2003/spfaq0503.htm (last visited Apr. 19, 2005).

144. *See* OFTEL, FUTURE REGULATION, *supra* note 139, at 10 (stating that "competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television" (citation omitted)).

145. *See id*. at 14 (explaining conditions).

146. *See id*. at 11; *see also* Communications Act, 2003, c.21, §§ 45(5), 73 (Eng.); OFTEL, SERVICE PROVIDERS, *supra* note 143, at 9 (noting the rationale of recital 6 *Access Directive*, pointing out that "there may be large differences in negotiating power between providers and . . . some providers depend on infrastructure provided by other providers to deliver their services," and calling for "proportionate access obligations on providers that control access to end-users").

147. *See* OFTEL, DIGITAL, *supra* note 92, § 3.1 (noting that examples of abuse of a dominant position by bottlenecks controllers include "exploitative pricing for use of the gateway or behaviour leading to the distortion, restriction or prevention of competition in a related market").

148. *See* Communications Act, 2003, c.21, § 78(1) (Eng.) ("[A] person shall be taken to have significant market power in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market.").

149. *See id*. § 78(3); *see also* Case C-27/76, United Brands Co. v. Comm'n, 1978 E.C.R. 207, [1978] 3 C.M.L.R. 83 (1978).

150. *See* Communications Act, 2003, ch. 21, § 78(3) (Eng.) ("A person is to be taken to enjoy a position of dominance of a market if he is one of a number of persons who enjoy such a position in combination with each other.").

151. *See id*. § 78(4); *see also* Case C-333/94, Tetra Pak Int'l SA v. Comm'n, 1996 E.C.R. I-5951.

152. *See* E. Jane Carter, *Market Definition in the Broadcasting Sector*, 24 WORLD COMPETITION 93, 93 (2001); *see also* Communications Act, 2003, c.21, § 79 (Eng.) (addressing the issue of market definition).

definition is based on European guidelines. The 2002 Directives allow the European Commission to veto market definitions adopted by member states:

> A particularly controversial feature of the EU regime is the power granted to the European Commission to block NRA [national regulatory authority] decisions on market definition or the designating of operators with SMP [significant marker power], where these would damage the internal market or infringe Community Law. The [Act] should therefore be read in this context.[153]

The European Union plays a prominent role in setting the framework to be followed within member states. In the regulation of digital television gateways, all the member states are confronted with common problems. The Union represents the most appropriate level for addressing these issues, illustrating the need for the supranational coordination in the regulation of bottlenecks.

Under the Act, OFCOM may impose on enterprises possessing SMP conditions related to access to networks and associated facilities.[154] This power affects providers of public electronic communication networks and controllers of associated facilities.[155] Special consideration is given to viable alternatives,[156] the "feasibility" of providing network access, the investment made by the network/facility controller,[157] the long-term effect that the imposition or the failure to impose access-related conditions may have on competition, intellectual property rights,[158] and the necessity of ensuring the provision

153. Crane & Calleja, *supra* note 19, at 117.

154. *See* Communications Act, 2003, c.21, § 87(3) (Eng.); *see also* Mike Feintuck, *The UK Broadcasting Act 1996: A Holding Operation?*, 3 EUROPEAN PUB. L. 201, 212 (1997) (arguing that the 1996 Broadcasting Act "fail[ed], significantly, to integrate fully consideration of control of gateways into the general control of cross-media holdings").

155. *See* Communications Act, 2003, c.21, § 87(2) (Eng.).

156. *See* Case C-7/79, Oscar Bronner v. Mediaprint, 1998 E.C.R. I-7791, 4 C.M.L.R. 112 (1999).

157. *See* Nikolinakos, *supra* note 7, at 410 (expressing the concern that the TV Standards Directive may discourage innovation); *see also* OFFICE OF FAIR TRADING, E-COMMERCE AND ITS IMPLICATIONS FOR COMPETITION POLICY 2 (Aug. 2000) (noting that network effects "occur where a system becomes more useful to its participants, the more participants it has"), *available at* http://www.oft.gov.uk/nr/rdonlyres/c58cf2cf-8e9d-496a-b989-8ff1be9de863/0/oft308.pdf; Neil Gandal, *Compatibility, Standardization, and Network Effects: Some Policy Implications*, 18 OXFORD REV. ECON. POL'Y 80, 80 (2002) (discussing network effects).

158. *See* Frank Wooldridge, *The Essential Facilities Doctrine and Magill II: the Decision of the ECJ in Oscar Bronner*, 2 INTELL. PROP. Q. 256, 261 (1999) (discussing the decision in *Magill II* regarding the essential facilities doctrine

of electronic communications services.[159] This latter point may be related to the "public policy" implications of bottlenecks regulation and the need to ensure pluralism and diversity in the communications sector. The Act reforms the definition of SMP, adopting an interpretation based on the competitive concept of dominance:[160]

> SMP conditions will be imposed on communications providers that make available associated facilities, where they are found to have a dominant position on the market. These conditions will include access to dominant networks, controls on pricing or charges for such access, provision of carrier pre-select facilities, retail price controls, and provision of leased lines.[161]

Commentators have identified the "tension" that may be triggered by the adoption of the same SMP test for both regulation and competition issues, as "the latter is dynamic and evolves, whereas the former is designed to establish more predictable rule framework on which investment decisions may be based."[162] Instead of creating flexibility, the new measures will lead to uncertainty.[163]

Regarding the imposition of competition-related conditions, the 1995 ATS Directive required the imposition of access on a "fair, reasonable and non-discriminatory basis," without defining these terms:[164] "the task of defining 'fair, reasonable and non-discriminatory' has provided to be an arduous one, especially in a context in which conditional access services are employed not only for a variety of entertainment services but

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and copyright law).

159. *See* Communications Act, 2003, c.21, § 87(4) (Eng.) (listing the factors OFCOM must take into account when determining what conditions should be set in a particular case).

160. Taylor, *supra* note 95, at 89 ("The introduction of a significant market power threshold based on the competition law concept of dominance will also avoid the inconsistency between EC competition law and regulation, which is a feature of the current rules.").

161. Crane & Calleja, *supra* note 19, at 117; *see generally* OFTEL, PRICING OF CONDITIONAL ACCESS, *supra* note 66 (containing consultations on the issue of price control); OFTEL, TERMS OF SUPPLY, *supra* note 86, at 3.

162. *See* Taylor, *supra* note 95, at 87.

163. *See id.*

164. *See* OFTEL, PRICING OF CONDITIONAL ACCESS, *supra* note 66, at 9 (giving Oftel's interpretation of these terms); *see also* Press Release, Oftel, Oftel Confirms Conditional Access Policy: Oftel Publishes Decision on ITV Complaint (Oct. 22, 2002), *available at* http://www.ofcom.org.uk/static/archive/oftel/press/releases/2002/ pr61_02.htm (last visited Apr. 19, 2005).

also in the provision of interactive services."[165]

The Act's requirement for providing access on a fair, reasonable, and non-discriminatory basis reflects the same wording and the same ambiguity as the 2002 Directives.[166] Within the United Kingdom, reliance has been placed on Oftel's guidelines for defining these standards. The fair and reasonable requirement has been interpreted as referring to the avoidance of "unreasonable charges."[167] Oftel assesses whether access is conferred on terms that are "consistent" with what would be reasonably expected in a competitive market.[168] Concerning the "non-discriminatory" requirement, Oftel addresses, *inter alia*, whether the conditions for granting access would lead to a "material adverse effect on competition."[169] These conditions have particular relevance for the regulation of vertically integrated operators.[170] Nevertheless, Oftel observes that the requirement for "non-discriminatory access" should not be interpreted as meaning "no differentiation at all."[171] Differences in the provision of Conditional Access services are acceptable, as long as they are "objectively justifiable, for example, by differences in the underlying costs of supplying services to different undertakings."[172]

The guidelines will generally be followed by the Director General of Telecommunications. Nevertheless, "the Director General cannot legally fetter his discretion in advance, and therefore he retains the ability to depart from the guidelines where the circumstances warrant it." [173] As a result, these

165. Cave & Cowie, *supra* note 107.

166. *See* Communications Act, 2003, c.21, §§ 74(2), 87(5)(a) (Eng.); *see also id*. § 87(6)(a) (referring to nondiscrimination in the provision of access to networks and facilities); *id*. § 87(6)(b)-(e) (referring to the transparency requirement that facility controllers must honor in setting the terms and conditions for access to networks and facilities).

167. Cave & Cowie, *supra* note 107.

168. *See* OFTEL, TERMS OF SUPPLY, *supra* note 86, at 7.

169. *Id*. at 3 (stating that "comparable prices should be offered to comparable users, for comparable services, at comparable terms").

170. *See id*. at 8 ("[A]n important aim of a non-discriminatory condition is to ensure that a vertically integrated supplier does not treat itself in way that benefits itself . . . in such a way as to have a material effect on competition."); *see also id*. at 6 (asserting that in assessing pricing matters, Oftel intervenes only if the negotiation between undertakings fails to reach a "fair, reasonable and non-discriminatory" result).

171. OFTEL, FUTURE REGULATION, *supra* note 139, at 16.

172. *Id.*

173. OFTEL, TERMS OF SUPPLY, *supra* note 86**,** at 5; *see also* KENNETH

provisions do not have binding force: "These guidelines represent Oftel's current view on the way it would interpret its responsibilities and exercise its discretion under current legislation. They do not form part of the current statutory provisions and so do not affect the scope of the legislation."[174] The failure of the European Union to define what constitutes "fair, reasonable and non-discriminatory" access has passed this task on to the member states. Individual states have made divergent interpretations of these provisions, moving further away from harmonization in the approach for regulating bottlenecks controllers. In the United Kingdom, more certainty would have been provided by an explicit definition in the Act regarding standards for the provision of "fair, reasonable and non-discriminatory access."

Prior to the 2002 regulatory measures, one significant criticism of the United Kingdom's regulatory approach to bottlenecks was the lack of adequate measures to address the issue of interoperability. For example, the BBC noted that the Advanced Television Standards Directive should be updated to include "interoperability between [CASs], including the API and the EPG, . . . either through use of common and open standards, or that where proprietary standards are used, key standards and interfaces are declared and publicly available on fair, reasonable and non-discriminatory terms."[175]

Effective access to networks can be guaranteed only by ensuring open standards or interoperability[176] between proprietary technology, as the telecommunications market has demonstrated.[177] Open access provisions refer to the

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CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 26 (University of Illinois Press, 1971) (noting that administrative discretion must be confined, structured, and checked).

174. OFTEL, TERMS OF SUPPLY, *supra* note 86, at 5.

175. BBC'S RESPONSE, *supra* note 28, at §§ 1B(3), (4). The research deals with interoperability between technical specifications in order to avoid bottlenecks.

176. *See* Communications Act, 2003, c.21, § 151 (Eng.) (defining "service interoperability" as "interoperability between different electronic communications services").

177. *See* BBC'S RESPONSE, *supra* note 28, § 1(A)1 ("The successful development of a comparative market . . . has developed on a distribution spine on all users, published standards, [and] an interconnect regime."); *see also* Taylor, *supra* note 95, at 87.

> In order for an interactive service provider . . . to ensure that its content is displayed and accessed on the TV in the manner intended (and selected by the user via the EPG (Electronic Programme

requirement of "[making] facilities and/or services available to another undertaking, on regulated terms, for the purpose of providing communications services."[178] The 2002 Oftel guidelines on open access impose, *inter alia*, obligations on undertakings possessing significant market power "to offer access to their encryption systems to third-party broadcasters, thereby allowing those broadcasters to supply their TV channels to consumers."[179] Similarly, the issue of interoperability proves essential to avoiding establishing bottlenecks in the DTV supply chain:

> The lack of interoperable and open standards for components/software in the set top box creates gateway issues. Without interoperability between platforms, once a consumer has bought the hardware required to receive digital television, they are tied into that particular platform, facing a considerable capital outlay to switch to an alternative.[180]

Competing CASs and receivers maintain the existence of bottlenecks in the DTV supply chain:[181] "This could make it costly . . . for interactive retailers on one platform to replicate their home shopping service on another because they would need to rewrite their own APIs to match those of the second platform."[182] The 2002 Directives and the Communications Act encourage the adoption of voluntary standards by the

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> Guide)[)], its own API must be compatible with the API built in the middleware (operating system) and hardware (set top box) used by the interactive services platform).

*Id*.

178. OFTEL, OPEN ACCESS: DELIVERING EFFECTIVE COMPETITION IN COMMUNICATION MARKETS 2 (Apr. 2001), *available at* http://www.ofcom.org.uk/static/archive/oftel/publications/broadcasting/index.htm (last visited Apr. 19, 2005).

179. *Id*. at 2; *see also* OFTEL, ENTITLEMENT, *supra* note 67, at 7.

180. BBC'S RESPONSE, *supra* note 28, § 1(B)(1).

181. *See* Taylor, *supra* note 95, at 88 ("[B]arriers to competition could still arise in member states (such as the United Kingdom), where competing digital platforms use different conditional access systems and various API standards."); *see also* Feintuck, *supra* note 154, at 206. The preference for standards developed by the industry was also manifested in relation to the 1996 Broadcasting Act. Feintuck notes that:

> Conspicuous by their absence from the primary legislation on broadcasting are detailed measures concerning . . . the control of conditional access systems (CASs) or receiver decoding equipment. This, states Gibbons, reflects the Government's wish not to intervene in market activity which will itself, in time, result in the emergence of an industry standard).

*Id*.

182. Taylor, *supra* note 95, at 88.

industry.[183] Furthermore, the 2004 review conducted by the Commission concluded that for the time being, there is no compelling need for mandatory standards.[184] This preference for the voluntary adoption of standards is based on the view that "[to] 'encourage' rather than 'mandate' the open API, provide[s] for appropriate remuneration to be paid for the information required to ensure interoperability with proprietary APIs."[185] Nevertheless, this approach is unlikely to succeed, as vertically integrated players have an interest in the maintenance of proprietary standards.[186] "[U]nder these circumstances, requirements for open access cannot sensibly be left to self regulation. Instead, regulation is required to establish open access principles in advance of the development of services or technology."[187] In maintaining proprietary standards, bottlenecks controllers ensure, among other things, that consumers are tied to their services. As market players have "too much at stake" in the preservation of these proprietary standards, regulators will likely have to resort to the imposition of standards.[188] Such an approach would be justified on the basis of safeguarding interoperability and freedom of choice[189] and would acknowledge that besides the economic dimension, issues of standardization and interoperability also implicate public policy favoring plurality and diversity. Until then, however, Anthony Varona's

183. *See* OFTEL, ENTITLEMENT, *supra* note 67, at 7 (noting that the issue of standardization is addressed in Art. 17, Framework Directive and conditions 3 and 18, Annex A, Authorisation Directive); *see also* Communications Act, 2003, c.21, §§ 4(9), 4(10), 51(1)(g) (Eng.) (discussing standards); Taylor, *supra* note 95, at 87 (noting that "[a]nother agreed change to the Framework Directive is designed to promote the free flow of information, cultural diversity and media pluralism by encouraging the adoption of an open [API]" and characterizing an open API as "conform[ing] to a standard or specification adopted by the European standards organisations").

184. *See* Communication from the European Commission of the European Communities, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions on Interoperability of Digital Interactive Television Services, SEC (2002) 1028 (July 30, 2004) (recommending further review in 2005).

185. Taylor, *supra* note 95, at 88.

186. *See* Gandal, *supra* note 157, at 84.

187. BBC'S RESPONSE, *supra* note 28, § 1(A)3.

188. *See id.*; LEVY, *supra* note 60, at 64 (arguing that "the very existence of such proprietary systems increases the risk that their operators might abuse their positions as gatekeepers").

189. *See* Taylor, *supra* note 95 at 88.

assessment of a regulatory framework in which the market players make the rules of the game will continue to apply to the United Kingdom: "[I]t is not surprising that the broadcast lobby has become one of the most obvious 'textbook' examples of an industry 'capturing' its regulators."[190]

## CONCLUSION: "HISTORY IS WRITTEN BY THE WINNERS"[191]

Communications markets are not in fact shaped by regulation. Rather, regulation seems to be shaped by commercial interests at the expense of the public. The Communications Act remedied only technical flaws in the traditional system for regulating bottlenecks in digital television. Fundamental problems such as a lack of efficient protection for citizens and consumers in the regulation of digital television infrastructure are still present. An adequate regulatory response requires an acknowledgment of the "public policy" implications of bottlenecks. The problem of bottlenecks implicates a broad range of noneconomic interests including the public's definition not just as consumers but also as citizens.

We are witnessing a gradual transformation of the public from active citizens into passive consumers. Anthony Varona has said in the United States, "[i]nertia, not democratic participation, is what modern commercial television seems to best promote."[192] Professor Varona identifies a communications sector in which the interest of advertisers takes precedence over public-related concerns. Rather than balancing the interest of the public with commercial interests, the Act's solution is to prioritize the interest of the public, by placing on OFCOM the "primary duty" of safeguarding citizenship and consumer interests. Whether such a solution could be adapted in the United States is likely to trigger an endless debate.[193] What is certain, however, is that such an

190. Varona, *supra* note 1, at 115.

191. Remark attributed to Alex Haley, Creative Quotations: Quotations for Creative Thinking, *available at* http://www.creativequotations.com/one/1422a.htm (last visited Apr. 17, 2005).

192. Varona, *supra* note 1, at 65.

193. *See id*. at 52-54. Varona states:

> Although the FCC's seven decades-old struggle to define the public interest standard can be attributed in part to the shifts in political winds and regulatory philosophies, as well as the vagueness of its legislative origins, the fundamental cause of the FCC's difficulty and the doctrine's failure is its inherent tension with the First

approach will only work if it permeates the entire DTV supply chain, rather than being limited to the consumer end.

Democratic regulatory rationales address not only content but also structural and behavioral regulation. Unfortunately, the Act considers pluralism and diversity implications only in relation to content. It does not give enough emphasis to the public policy implications of the bottlenecks challenge. Furthermore, the Act reveals a tendency toward economic regulation, as opposed to social regulation. It is therefore necessary to return to democratic regulatory rationales and to interpret the "public interest" along these lines. Furthermore, regulation needs to be based on clear objectives in order to protect adequately the interests of citizens and consumers.

Although the Act does refer to the primary duty of the regulator to safeguard the interests of citizens and consumers, the Act generally favors a departure from active regulatory intervention, towards the application of competition law. A competition-based approach to the regulation of bottlenecks is concerned with balancing the interest of consumers with commercial interests, and the public is viewed exclusively as economic actors. Furthermore, *ex post* measures may come too late to affect already well-established market players. In this context, the analogy of "chasing the receding bus" can be applied with full force.[194]

More effective protection of the public's interest rests in active regulatory intervention, which reflects the "public policy" concerns associated with the bottlenecks challenge. In relation to access and interoperability issues, the Act generally refers to the public by using impersonal terms such as "consumers," "customers" or "end users." In an era of rapid technological advances in which the regulatory realm has become dominated by market-related interests, it is legitimate to ask: when did we stop being citizens?

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> Amendment . . . . At its essence then, this tension is one between two conflicting interpretations of the First Amendment. On the one hand, there is the perspective that the First Amendment is the notion of the "free marketplace of ideas" that must be protected from all government restriction and influence . . . . A related but somewhat conflicting free speech theory is associated with James Madison . . . . [T]he Madisonian perspective was not principally interested in keeping the "marketplace of ideas" free from government interference, but was concerned with ensuring that all voices were present and heard in the marketplace.

194. *See generally* Mike Elliot, *Chasing the Receding Bus: The Broadcasting Act of 1980*, 44 MODERN L. REV. 683 (1981).

## STATUTORY APPENDIX

### SELECTED PROVISIONS OF THE COMMUNICATIONS ACT, 2003, C.21 (ENG.)

#### DEFINITIONS AND OTHER GENERAL PROVISIONS

**§ 32(1):** "In this Act 'electronic communications network' means- (a) a transmission system for the conveyance, by the use of electrical, magnetic or electro-magnetic energy, of signals of any description; and (b) such of the following as are used, by the person providing the system and in association with it, for the conveyance of the signals- (i) apparatus comprised in the system; (ii) apparatus used for the switching or routing of the signals; and (iii) software and stored data."

**§ 32(2):** "'electronic communications service' means a service consisting in, or having as its principal feature, the conveyance by means of an electronic communications network of signals, except in so far as it is a content service."

**§ 32(3):** "'associated facility' means a facility which- (a) is available for use in association with the use of an electronic communications network or electronic communications service (whether or not one provided by the person making the facility available); and (b) is so available for the purpose of- (i) making the provision of that network or service possible; (ii) making possible the provision of other services provided by means of that network or service; or (iii) supporting the provision of such other services."

**§ 74(3):** "In this section . . . 'electronic programme guide' means a facility by means of which a person has access to any service which consists of- (a) the listing or promotion, or both the listing and the promotion, of some or all of the programmes included in any one or more programme services; and (b) a facility for obtaining access, in whole or in part, to the programme service or services listed or promoted in the guide."

**§ 74(3):** "'application programme interface' means a facility for allowing software to make use, in connection with any of the matters mentioned in subsection (4), of facilities contained in other software."

**§ 74(4):** "The matters mentioned in subsection (3) . . . are- (a) allowing a person to have access to programme services; (b) allowing a person, other than a communications provider or a person who makes associated facilities available, to make use of an electronic communications network by means of which a programme service is broadcast or otherwise transmitted; (c) allowing a person to become the end-user of a description of public electronic communications service."

**§ 75(3):** "In this section 'conditional access system' means any system, facility, arrangements or technical measure under or by means of which access to programme services requires- (a) a subscription to the service or to a service that includes that service; or (b) an authorisation to view it, or to listen to it, on a particular occasion; . . . ."

**§ 78(1):** "For the purposes of this Chapter a person shall be taken to have significant market power in relation to a market if he enjoys a position which amounts to or is equivalent to dominance of the market."

**§ 78(3):** "A person is to be taken to enjoy a position of dominance of a market if he is one of a number of persons who enjoy such a position in combination with each other."

**§ 78(4):** "A person or combination of persons may also be taken to enjoy a position of dominance of a market by reason wholly or partly of his or their position in a closely related market if the links between the two markets allow the market power held in the closely related market to be used in a way that influences the other market so as to strengthen the position in the other market of that person or combination of persons."

FUNCTIONS OF OFCOM

**§ 3(1)(a),(b):** "It shall be the principal duty of OFCOM, in carrying out their functions- (a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition."

**§ 3(2)(c):** "OFCOM are required to secure in the carrying out of their functions . . . the availability . . . of a wide range of television . . . services which (taken as a whole) are both of high quality and calculated to appeal to a variety of tastes and interests."

**§ 3(3)(a):** "OFCOM must have regard, . . . to- . . . the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; . . . ."

**§ 4(3):** "The first Community requirement is a requirement to promote competition- . . . ."

**§ 4(4):** "The second Community requirement is a requirement to secure that OFCOM's activities contribute to the development of the European internal market."

**§ 4(5):** "The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union . . . ."

**§ 4(7):** "The fifth Community requirement is a requirement to encourage, to such extent as OFCOM consider appropriate for the purpose mentioned in subsection (8), the provision of network access and service interoperability."

**§ 6(1)(a),(b):** "Duties to review regulatory burdens . . . OFCOM must keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve- (a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary."

DUTIES TO REVIEW REGULATORY BURDENS

**§ 45(2):** "A condition set by OFCOM under this section must be either- (a) a general condition; or (b) a condition of one of the following descriptions- (i) a universal service condition; (ii) an access-related condition; (iii) a privileged supplier condition; (iv) a significant market power condition (an 'SMP condition')."

**§ 47(2):** "[The] [t]est for setting or modifying conditions . . . is that the condition or modification is- (a) objectively justifiable

in relation to the networks, services, facilities, apparatus or directories to which it relates; (b) not such as to discriminate unduly against particular persons or against a particular description of persons; (c) proportionate to what the condition or modification is intended to achieve; and (d) in relation to what it is intended to achieve, transparent."

**§ 64(1):** "Must-carry obligations . . . General conditions may include conditions making any provision that OFCOM consider appropriate for securing that particular services are broadcast or otherwise transmitted by means of the electronic communications networks described in the conditions."

**§ 73(2):** "Access-related conditions may include conditions . . . for the purpose of securing- (a) efficiency on the part of communications providers and persons making associated facilities available; (b) sustainable competition between them; and (c) the greatest possible benefit for the end-users of public electronic communications services."

**§ 74(2):** "The conditions that may be set by virtue of section 73(2) also include such conditions . . . necessary for securing- (a) that persons are able to have access to such programme services provided in digital form as OFCOM may determine; and (b) that the facility for using those interfaces or guides is provided on terms which- (i) are fair and reasonable; and (ii) do not involve, or tend to give rise to, any undue discrimination against any person or description of persons."

**§ 75(2):** "It shall be the duty of OFCOM to ensure- (a) that access-related conditions are applied to every person who provides a conditional access system in relation to a protected programme service; . . . ."

**§ 87(3):** "This section authorises SMP conditions requiring the dominant provider to give such entitlements as OFCOM may from time to time direct as respects- (a) the provision of network access to the relevant network; (b) the use of the relevant network; and (c) the availability of the relevant facilities."

**§ 87(4):** "In determining what conditions authorised by subsection (3) to set in a particular case, OFCOM must take

into account, in particular, the following factors- (a) the technical and economic viability, . . . (b) the feasibility of the provision of the proposed network access; (c) the investment made by the person initially providing or making available the network . . . (d) the need to secure effective competition in the long term; (e) any rights to intellectual property that are relevant . . . and (f) the desirability of securing that electronic communications services are provided that are available throughout the member States."

REGULATORY PROVISIONS

**§ 310(1):** "It shall be the duty of OFCOM to draw up, and from time to time to review and revise, a code giving guidance as to the practices to be followed in the provision of electronic programme guides."

SELECTED PROVISIONS OF THE 2002 DRAFT COMMUNICATIONS BILL

FUNCTIONS OF OFCOM

**cl. (3)(1)(a):** "It shall be the duty of OFCOM . . . to further the interests of the persons who are customers for the services and facilities in relation to which OFCOM have functions."

**cl. 3(2)(a):** "In performing their duties . . . OFCOM shall have regard, in particular, to . . . the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; . . . ."

**cl. 5(1)(a),(b):** "OFCOM shall keep the carrying out of their functions under review with a view to securing that regulation by OFCOM does not involve-(a) the imposition of burdens which are unnecessary; or (b) the maintenance of burdens which have become unnecessary."

SELECTED PROVISIONS OF THE COUNCIL DIRECTIVE 2002/19/EC, 2002 O.J. (L 108) [*ACCESS DIRECTIVE*]

**Recital 10:** "Competition rules alone may not be sufficient to ensure cultural diversity and media pluralism in the area of digital television."

**Art. 5(1):** "National regulatory authorities shall, acting in pursuit of the objectives set out in Article 8 of Directive 2002/21/EC (Framework Directive), encourage and where appropriate ensure . . . adequate access and interconnection, and interoperability of services, exercising their responsibility in a way that promotes efficiency, sustainable competition, and gives the maximum benefit to end-users. In particular, without prejudice to measures that may be taken regarding undertakings with significant market power in accordance with Article 8, national regulatory authorities shall be able to impose: . . . (b) to the extent that is necessary to ensure accessibility for end-users to digital . . . television broadcasting services specified by the Member State, obligations on operators to provide access to the other facilities referred to in Annex I, Part II on fair, reasonable and non-discriminatory terms."

**Annex I; Part II:** "Other facilities to which conditions may be applied under Article 5(1)(b): (a) Access to application program interfaces (APIs); (b) Access to electronic programme guides (EPGs)."

SELECTED PROVISIONS OF THE COUNCIL DIRECTIVE 2002/21/EC, 2002 O.J. (L 108) [*FRAMEWORK DIRECTIVE*]

**Recital 30:** "Standardisation should remain primarily a market-driven process. However there may still be situations where it is appropriate to require compliance with specified standards at Community level to ensure interoperability in the single market. "

**Art. 8(2):** "The national regulatory authorities shall promote competition in the provision of electronic communications networks, electronic communications services and associated facilities and services by *inter alia*: (a) ensuring that users, including disabled users, derive maximum benefit in terms of choice, price, and quality; (b) ensuring that there is no distortion or restriction of competition in the electronic communications sector; (c) encouraging efficient investment in infrastructure, and promoting innovation; and (d) encouraging efficient use and ensuring the effective management of radio frequencies and numbering resources."