Regulating Communications: British Public Policy Responses to Convergence within the Digital Age

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Abstract: The British Labour government believes that Information Communication Technologies (ICTs) will facilitate future forms of production, services, and investment within the national and global economies. However, it remains unclear how the government can establish the appropriate national regulatory structures through which to supervise the virtual economy. The sector-specific definitions which have existed between the audiovisual and e-commerce industries are less appropriate and, with the expansion of distribution, audiovisual markets are assuming the characteristics of the telecommunications markets. This report will consider British public policy initiatives for the regulation of the converging ICTs and the audiovisual industries. It will pay attention to the Department of Culture, Media and Sport (DCMS) and the Department of Trade and Industry's (DTI) jointly produced 1998 Green Paper Regulating Communications: Approaching Convergence in the Information Age.

Résumé: Le parti travailliste britannique croit que les nouvelles technologies de l’information et de la communication (NTIC) aideront au développement de nouvelles formes de production, services et investissements au sein des économies nationale et globale. Il n’est pas encore clair, cependant, comment le gouvernement pourra établir des dispositifs réglementaires à l’échelle nationale qui permettront de surveiller l’économie virtuelle. À cet égard, il devient de moins en moins possible d’envisager l’audiovisuel et le commerce électronique comme étant des industries séparées. En effet, la distribution s’accroît tellement que les marchés de l’audiovisuel commencent à ressembler de plus en plus aux marchés de la télécommunication. Cet article prend en considération la politique publique britannique envers la réglementation des NTIC convergentes et des industries de l’audiovisuel. Il porte une attention particulière au livre vert produit conjointement en 1998 par le Department of Culture, Media and Sport et le Department of Trade and Industry, « Regulating Communications: Approaching Convergence in the Information Age » (« Réglementer les communications : aborder la convergence dans l’ère de l’information »).

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Introduction
The British government has stated that ICTs will become the centrepiece for future production, services, and investment within the national and global economies. In particular, the government has argued that new forms of electronic commerce (e-commerce) may promote a knowledge-driven economy which will be characterized by competitiveness, efficiency, and growth (Mandelson, 1998).

Yet it remains unclear how governments can establish and maintain the appropriate regulatory structures through which to supervise the virtual economy. The legislation governing e-commerce is subject to the complexities of the converging marketplace. The sector-specific definitions, which have existed in both the audiovisual and e-commerce industries, are becoming less appropriate. Previously, each sector was defined as a segregated market, protected by its own set of rules. However, with the expansion of the means of distribution, audiovisual markets will assume many of the characteristics of the telecommunications markets. Uncertainties have also become apparent when new kinds of services are established and it may be difficult to classify them under existing categories. Thus, due to the scope and character of the information technologies’ services, the current regulatory demarcations are being perceived as becoming irrelevant.

This study will consider how recent British public policy initiatives have responded to the complexities of regulating for the converging ICTs and the audiovisual industries. It will outline the changes which are effecting the communications marketplace and discuss the implications for regulation. In particular, it will pay attention to the Department of Culture, Media and Sport (DCMS) and the Department of Trade and Industry’s (DTI) jointly produced 1998 Green Paper Regulating Communications: Approaching Convergence in the Information Age (CM4022).1

The converging communications marketplace
The technological revolution is widening access to communications links, permitting the distribution of commercial and entertainment material, and advancing telephony along the same highways. Digital technologies allow for a combination of different types of information representation, such as text, audio, images, and video, thereby removing the distinctions between different types of information production and distribution. Further, a variety of digital platforms will provide a range of services to users. Therefore, emerging information and communications networks may allow users to enjoy a virtually unlimited access to information, education, and entertainment resources, and reform the means through which people communicate to one another.

This convergence of information and communications systems (telecommunications, broadcasting, computers) has led to new opportunities for investment and innovation as the take up of information services within the business and the domestic sphere has grown. Thus, the production, distribution, and use of information has become an important economic activity as information’s value as a commodity, which can be exchanged between service providers and consumers, has grown (European Commission, 1997).
The convergence of services within the audiovisual market place will effect the provision of broadcasting services. Previously, broadcasting has been defined as a segregated market, protected by its own set of rules and regulations. However, with the onset of digitization, the expansion in the number and diversity of channels of distribution will mean that broadcasting (and television in particular) will assume many of the characteristics of the telecommunication and personal computing markets.

So far, with a few exceptions (such as TimeWarner-AOL), the majority of media players have been defined by their means of distribution and have tended to be sector-specific. In the converging communications environment, such limited diversification may no longer be feasible as high-profile services, notably, the established free-to-air television channels, will decline in visibility and become part of a general mix of information goods. Audiovisual services may be defined through a standard industrial model in which service providers, with manufacturing and distribution bases, will supply commercial products to consumers.

The regulation of convergence: Issues and debates
These imperatives raise several issues concerning the regulation of information and communication services. Not least, there has been a belief expressed that through market liberalization that new forms of consumer demand will be addressed and a more individualistic approach to information will be necessitated. This is problematic due to the concentrated nature of ownership within the media and, increasingly, multi-media marketplace. Corporate diversification has led to an increase in the supply of channels and methods of dissemination. Simultaneously, it has produced fewer suppliers of information (Graham, 1998).

Further, concerns have arisen concerning the control of gateway access to these services. The common “front-end” for these converged services will be a software system known as the Electronic Programme Guide which will be part of the hardware Conditional Access System (e.g., a set-top box or card socket built into new digital television receivers). As the Electronic Programme Guide provides the new range of digital televisions with the equivalent of a computer operating system, it will take on the characteristics of a “browser” providing various paths for accessing the content sought by the user. This is especially important with regard to whether the service providers will have control over the Conditional Access System and determine the organization of the Electronic Programme Guides. In effect, consumer choice could be narrowed, rather than enhanced. As Andrew Graham (1998) comments, it is “fundamental to the theory of consumer choice, ... that consumers know and understand both the full list of items that are on sale and all the prices of these items. If consumers do not have this information they cannot choose rationally and firms, even where there are large numbers of them, are not really in competition with one another” (pp. 33-34).

Therefore, regulation will be concerned with developing effective mechanisms which will allow competition in supply and equitability in access to emerge in the digital environment. However, communication-based services are as important for their political as well as their economic worth. Due to the dangers of con-
centrated supply and possible gateway abuse, there are obvious dangers to the
democratic flow of information. It is therefore necessary for regulatory controls to
be developed within the converging communications market which will allow for
the efficient and equitable provision and consumption of services.

Current U.K. communication regulation

Within Britain, the converged sectors (telecommunications, information tech-
nology, and broadcasting) operate under different types of regulation. The Office
of Fair Trading (OFT) provides a general level of regulation to ensure fairness and
competitiveness. The telecommunication sector is characterized by a pro-compet-
itive regime (Oftel) which has encouraged new entrants and competition across
the full range of services. The U.K. Information Technology sector has seen the
abandonment of interventionist policies which sought a national champion in ICL
and, in the absence of state involvement, has experienced strong growth in some
areas (e.g., video games) and near-total decline in others (e.g., applications soft-
ware).

The broadcasting sector, in contrast, has been overseen by segregated regula-
tion. Due to the complexities and contradictions of the Thatcher and Major gov-
ernments’ late 1980s and early 1990s broadcasting policies (ironically, in which
deregulation was the aim) several regulators, with specific remits, exist. These
include the British Broadcasting Corporation (BBC) Board of Governors, the
Independent Television Commission (ITC), the Broadcasting Standards Commis-
sion (BSC), and the Radio Authority.

Undoubtedly, some distinctive sectoral regulation, dealing with specialized
gateway and infrastructure matters across the converging communication sector,
is essential for the realization of competition policy goals. In particular, sectoral
regulation provides for the development and application of specialist expertise in
a complex and fast-moving field. This allows for greater regulatory certainty for
both investors and consumers by establishing rules in advance and enabling easier
market entry for new actors, especially in those markets with powerful incum-
bents.

Sectoral regulation means that new entrants will not only be dependent on
competition policy, whose largely post-hoc natures means that redress may only
occur after the aspiring new entrant has foregone the opportunity to enter the
market, or already gone out of business. Moreover, in the view of Oftel, the U.K.
telecommunications regulator, reliance on general competition law works best in
highly developed markets. The existence of dominant players in the early stages of
a market’s development gives rise to the need for a specialist regulator to ensure
that behaviour and outcomes are pro-competitive.

However, consistency across different sectors requires that all sector-specific
regulation should be coherent. Broadcasting regulators have been accused of
unevenly applying and enforcing rules. The same or similar services, offered by
different service providers on different platforms, are subject to different, some-
times contradictory, regimes. For example, digital terrestrial television operates
under an essentially analogue licensing regime that could lead to market distor-
tions at the expense of both industry and consumers. Industry sceptics have main-
tained that, due to the inappropriateness of current broadcast regulatory
jurisdictions, there has been an inconsistent application of rules and sanctions in

Jurisdictional inconsistencies have led to the problems of “double” or “triple”
jeopardy in which regulators have reached conflicting conclusions or have applied
different sanctions with regard to the same issue. For commercial organizations,
this wastes time and resources and breeds confusion amongst the producers and
consumers alike. Further, the multiple structure of regulators has encouraged
“forum shopping” by competitors who seek to use regulation as a competitive
weapon to gain or maintain specific privileges, or to slow down competition.
These problems have been exacerbated by the regulators’ refusal to become more
transparent in performing their duties.

Moreover, with the exponential proliferation of channels and services,
current regulatory and licensing arrangements may become increasingly obsolete
as media corporations circumvent technical prescriptions and national regula-
tions. For instance, existing national regulatory obligations, such as content con-
trols, have been bypassed through distributing via the Internet.

Further, the convergence of audiovisual, telecommunications, and computing
industries brings into question the concepts of public service and universality. In
the digital environment, the conditions for social inclusion should be improved
on. To this end, there is the need to strengthen regulation in some areas.

As audiovisual industries converge, critical access issues (competition, con-
sumer choice, consumer protection, and a favourable climate for investment)
cannot be sacrificed. Similarly, the convergence of previously discreet services
means that new areas of regulation will make themselves present for audiovisual
regulatory bodies. For instance, conditional access and bundling rules involve a
level of interventions, such as the imposition of price controls and accounting
standards, that were features of telecommunication regulation but are new to
broadcasting. It will be necessary to ensure that the benefits of interoperability
which characterize telecommunications extend to all the converged sectors, and
that access rules for broadcasting extend to data and interactive services on televi-
sion.

Alternatively, content regulation, positive programming requirements, and
restrictions through licensing will prove more difficult to enforce as the digital
market becomes established. Traditionally, British broadcasting regulators have
striven to preserve open access and programming standards, most especially with
regard to control over content. These precepts have been placed under greater
pressure with the introduction of new forms of technological distribution (cable,
satellite, digital) which have allowed subscription-based services to flourish and
have undermined controls over content. As services can no longer be defined by
their specific platforms or methods of distribution, these trends will be exacer-
bated, and new or alternative conceptions for public service and universality will
be required. This is likely to lead to greater emphasis being placed on the need for
well-defined public services which, like the converged services in general, will be delivered via many different networks in a variety of forms.

Once again, it is becoming increasingly difficult to relate the scope and character of services to the categorizations and demarcations of current regulation. Regulation must be responsive to emerging market conditions and cannot be determined by historical arrangements. Regulation policy which relies on rigid structural demarcations between markets may become increasingly unsustainable. Moreover, sector-specific regulation may ultimately have to be replaced by a clear industrial policy in which competition will be maximized, access will be enhanced, and a more appropriate vision of public service will be articulated.

The 1998 green paper *Regulating Communications: Approaching Convergence in the Information Age*

In responding to these concerns, the 1998 Green Paper attempted a compromise between the traditions of public service and universality, the maintenance of sector-specific regulators, the demands of consumer usage, and the government’s desire to enhance competition within the information and communication sectors. Its co-authorship by the Department of Trade and Industry (DTI) and the Department of Culture, Media and Sport (DCMS) may indicate that the document was designed to appeal to several constituencies and political interests both from within government and the audiovisual industries.

The Green Paper argued that, despite the tremendous amount of activity which has characterized recent developments within the converging sectors, the pace of change is not uniform. Some practices have been rapidly transformed, whereas others remain unaffected. It stressed that the debate concerning the regulation of convergence often polarizes between two opposite positions. On one hand, some commentators have argued that there should be a radical restructuring of regulation in order for competitiveness to flourish. On the other, it has been suggested that the status quo will suffice as a mass market for the converged services had not yet grown to any significant extent (DTI & DCMS, 1998).

The government believed that this is a false division. Whilst technologies are converging, this does not mean that communications markets which employ them are becoming indistinguishable. Presently, for the majority of consumers, the converged services remain some way off as the mass markets for digital services do not exist and the different forms of technological distribution still tend to be sector-specific. Further, consumer demand may well be governed by how individuals and communities react to the new services and their behaviour and expectations will not change immediately. The government believed that convergence brought greater opportunities to the providers of services in the following ways:

- By encouraging economies of scope and scale across different areas of the business (e.g., production and distribution);
- By extending services from one medium to another as their technical capabilities become increasingly interchangeable; and
By allowing companies to undertake alliances, mergers, and significant investment to exploit these strategic opportunities (DTI & DCMS, 1998).

To achieve these ends, the Green Paper took an evolutionary approach to regulating the converging communications market. The document suggested that greater coherence will be required in economic regulation across all digital delivery media. To some extent, the foundations for such coherence had been established by the Competition Bill and the merger controls which existed under the provisions of the *Fair Trading Act*. The government intended through its general competition policies to prohibit anti-competitive agreements and to stem any abuse by dominant players within the communications markets. The Green Paper suggested that closer co-operation can be achieved between competition authorities—the Office of Fair Trade, the Director General of Telecommunications (DGT), and the Director-General of Fair Trading (DGFT)—and the sector-specific communications regulators.

The government argued that sector-based regulation was essential for gateway intermediation between suppliers and consumers of content. These include: Conditional Access, whereby service providers can ensure that they are paid for their services; and Electronic Programme Guides, through which consumers make their programming choices in a multi-channel future. The gateway operators could abuse their dominant position within the market for consumer services, most especially if they have cross-media interests. These controls could undermine access and universal services. Consequently, sectoral regulation, which combines economic and ethical concerns, was deemed to be appropriate to stem such a concentration of power.

The paper argued that the anomalies created by regulatory overlap could be overcome by providing more detailed regulations and through ensuring co-operation between different bodies with the establishment of a co-ordinating group. Where problems could not be solved within the current legislative framework, it would be necessary to amend legislation on a case-by-case basis in advance of possible wider change (DTI & DCMS, 1998).

This approach also underpinned the paper’s response to cultural and related regulation. In particular, the government argued that, within the short-term, incremental reforms would ensure that the principles of public access, universality, consumer redress, and the equitable and democratic distribution of information continue to be realized. In the longer term, it presented a number of possible regulatory outcomes:

- *Separate infrastructure and content regulators*. This could correspond to market segmentation and the distinct set of regulatory concerns which exist; for instance, open access and wide coverage on the one hand, quality and diversity elsewhere. It may, however, prove to be insufficiently flexible to cater for further convergence and consequent market integration.
Economic and content regulators. This model would provide an alternative split between separate bodies according to their regulatory function between economic and content issues. However, the structure would not avoid overlap. For instance, content regulation has important economic consequences including diversity of content and plurality of voice. Similarly, competition rules can have a vital impact on the structure of the industry through which content is provided.

A horizontal split. An overarching body could ensure a coherent and co-ordinated approach between either of the above set of regulatory divisions. However, whilst there is a clear need to remove regulatory overlaps and simplify the structure, different market segments will continue to persist and retain distinct characteristics for some time to come.

A single regulator. A further approach would be to create a single regulator or an umbrella regulatory authority. This would be able to take a broad view of the converging sectors, ensure a consistent approach to their regulation, and provide a flexible response to the emergence of new services. It could provide the breadth of scope and regulatory expertise as media and multimedia organizations diversify. However, questions persist about the accountability and bureaucratic nature of a single regulator. In particular, criticisms have suggested that such a body would prove to be unwieldy, opaque, and subject to clientelism (DTI & DCMS, 1998).

Conclusion
The U.K. government is not the only national government to encounter the debate about the control over communications in a globalizing world. The common tensions facing governments—between regulatory intervention to protect traditional concepts of regulation in the telecommunication and broadcast industries, and the appropriate balance between market liberalization, greater competition, and equity—have been defined in variety of ways across a wide number of states. However, it has been the purpose of this report to provide readers with an update on how the U.K. has taken a specific response to communication regulation. Therefore, in this conclusion, it will be necessary to address the implications of the 1998 Green Paper Regulating Communications: Approaching Convergence in the Information Age to the British communications marketplace.

The Green Paper was concerned with developing the appropriate regulatory structures through which producer and consumer demands could be satisfied. Alongside these market-led principles, it aimed to provide protection for current analogue-based broadcasters, to ensure plurality and diversity through invoking the Competition Bill, and to retain the concepts of public service and universality within a democratic environment. To this end, the paper suggested that it would be necessary to develop new regulatory structures from the existing regulators in an incremental manner rather than foster any dramatic restructuring of these institu-
tions (DTI & DCMS, 1998). The British government’s policies toward the converging communications marketplace can be characterized as providing a compromise between state protectionism and market-led economics. However, despite attempting to provide such a balance, it remains unclear whether this approach to the virtual economy and the audiovisual industries is workable.²

The Green Paper maintained that discreet regulatory agencies would have to act in a more secure and unified manner. Yet the institutional histories, interests, and cultures that these actors represent may mean that they will pursue different priorities rather than act coherently. For some audiovisual companies, the current structure of multiple regulation has increased uncertainty. Effectively, should already discredited forms of national or local regulation continue to be employed in an even more confusing and diverse international communications environment? Can these regulatory reforms ever be divorced from political or strategic interests as media and multimedia corporations pledge overt or tacit support for political parties or lobby for competitive gain?

With the blurring of boundaries between broadcasting, telecommunication, and computer industries, questions have been raised about the sector-specific nature of British communications regulation. In particular, it may be suggested that there should be a convergence of regulatory approaches and bodies, with the possible creation of a single communications regulator or “Ofcom.” For example, Richard Collins & Christina Murroni (1996) comment:

A regime based on sector-specific licensing of individual firms, detailed conditions of licence and detailed monitoring of performance is tantamount to de-regulation, if the industry has hundreds of licensees. The explosive growth in the number of firms providing services following liberalization means that sector-specific licensing cannot be retained. A second key feature of the UK regulatory regime, sector-specific regulation by an alphabet soup of regulatory agencies, is incompetent to deal with the challenges of the past—let alone the future. Instead, general principles for governing the media and communications sector should be defined by Parliament. Their detailed implementation and enforcement should be delegated to a single regulatory agency, Ofcom. (p. 183)³

The proposed legislation faces the problems which are associated with the international or global nature of the information and communication marketplace. Previous policy initiatives have been confronted by supranational corporations (for example, News Corporation) which have circumvented national rulings (often with the compliance of governments) to gain monopolistic control of specifically delivered services within the national marketplace whilst being nominally foreign-owned or transmitting from abroad. The global nature of ICTs (for instance, the World Wide Web) would appear to exacerbate this development, most especially with regard to the flow of content. Moreover, the European Commission has developed its own Green Paper on Convergence (European Commission, 1997) and it might be suggested that it would provide a more appropriate layer of regulatory oversight.
Finally, at a philosophical level, the British government’s approach appears to signify a considerable degree of confusion concerning the role of regulation in the provision of efficient and equitable forms of resource redistribution within the converging communications market. Within this context, a debate exists concerning the role of the nation state as a policy initiator for the expansion of the (global) information marketplace. From a libertarian perspective, ICTs have been defined by a broad range of political agents as the sphere in which competitive advantage will be attained through the retraction of state intervention. Alternatively, other viewpoints conceive of ICTs as being representative of sociopolitical as well as financial capital.

Ultimately, this study contends that the converging information and communications systems should be perceived as a means through which social inclusion and citizen empowerment might be encouraged. They must be harnessed for citizens’ benefit and may have profound influence in the future of our social, political, educational, and cultural experience. The new and existing mediums lower the entry costs for the creation and distribution of content, and offer the public with universal access to an ever-richer source of information. This dissemination of information must be equitable to allow members of the public to engage in the opportunities which are becoming available.

Therefore, national state policies and international co-operation between states, which are designed to promote a regulatory framework for investment and innovation, are vital for the protection of the public interest. As new public policy challenges arise, it will be necessary for states to ensure that information remains a general good for all citizens and not a commodity to be bought by those consumers who can afford to pay for it.

Notes
1. At the time of writing, the 2000 Communications White Paper was anticipated for December 12th, 2000, at the end of U.K. Parliamentary session, which would lead to a Communications Bill after the anticipated general election in 2001.
2. Since the publication of the Green Paper, the Department of Trade and Industry and the Department of Culture, Media and Sport received a wide variety of responses from various trade bodies and interested parties. Throughout the year 2000, the two departments invited a variety of experts to provide commentaries on the issues.
3. Throughout the protracted period between the Green and White Papers, governmental support for a single regulator or Ofcom has increased and, at the time of writing, it appears that such a body will be recommended within the Communications White Paper.

References

