

# The European Commission legislative proposals on electronic communications – the 2006 Review

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Prepared remarks – check against delivery

Let me remind you that is the twenty-fifth anniversary of IT'82, the year of information technology. That was the first major initiative by HMG to encourage the country at large to learn about computers and networks.

In those days Second Life<sup>1</sup> referred to elevation to the House of Lords.

## **Revising the telecommunications regulatory package**

The legislative proposals of the European Commission (EC) to revise the regulatory framework for telecommunications can be divided into two parts. The first is the tinkering with the machinery and the oiling of wheels, these originate from the technocrats of Unit B-1 of DG Information Society. Mr Peter Scott will speak to us later this morning. The second is the showier overlay of political proposals coming from Commissioner Reding and her cabinet, these have glittering but dangerously sharp edges and constitute the bleeding edge of regulatory policy.

You have to remember that Mrs Reding must compete with the other commissioners. She has to be seen to be achieving something substantive for Europe.

The position of HMG on the EC proposals is best characterized as you lot can harmonise in the British wake, we will press on ahead.

## **The successes and failures of the regulatory package**

Let me begin by disagreeing with the consensus that the 2002 directives have been a success. At best they are a qualified success in a qualified number of member

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<sup>1</sup> <http://www.secondlife.com/>

states. Many member states have shown limited interest in the directives, dragging their feet in implementation.

Having spent most of the last two years beyond Europe – and I do not mean in the UK – it has been remarkable how bits of the 2002 directives have turned up all over the world, even in the least developed countries. Consultants and operators have tried to pass off these fragments as global best practice usually entirely out of context. They almost never have an Impact Assessment (IA).

Today marks one year since the military coup in Fiji and the suspension of its Parliament.

Even in the South Pacific there are echoes of EU directives in some heavily over-engineered legislation “promulgated” by the military-led interim government of Fiji intended to open its small market to competition. A connection with the UK is maintained by the presence there of both Cable & Wireless and Vodafone.

The EU directives are generally irrelevant to the circumstances in emerging and developing economies – indeed they can often be positively harmful, especially if only adopted in fragments.

The EC and the member states have never bothered to explain the qualifications in the application of the directives in terms of market conditions. They have been too busy implementing them to tell others the story.

Too often I met people who are applying the directives as if they were divine writ, rather than messy compromises arrived at after protracted negotiations – often at dead of night – and in the knowledge that they will not be fully implemented and would, in any event, be reviewed after a few years.

The simple and unthinking application of the directives in Eastern Europe and in the Balkans is far from obvious. Many of these countries needed and still need simple measures to introduce and to increase competition – ad hoc initiatives based on their circumstances as happened in Western Europe in the 1980s and 1990s – not the heavy hand of the 2002 directives.

Applying the full set of EU directives in Malta and in Montenegro, countries of less than half a million people, qualifies as regulatory overkill. Scaleability and proportionality cut both ways.

### **Political independence**

Commissioner Reding has called for greater independence for regulators, in this she has found the support of OFCOM.

Ed Richards, the CEO of OFCOM, says that we need regulators that are “politically independent” accusing some of his continental counterparts of being beholden to governments and especially to state-owned operators. Yet he does not name the countries nor even give his criteria for independence so that we can work out the names of the guilty parties. So much for his independence.

As a former policy advisor to Tony Blair and also to Gordon Brown, Ed Richards might be thought to be the pot calling the kettle black.

The question is whether an incoming prime minister of another party would consider the present OFCOM leadership to be independent.

It would not be necessary to dismiss anyone publically. They could be asked quietly to go. At worst a new statute could be enacted splitting the functions of OFCOM and removing the jobs in that way.

Anyway, Ed Richards misses the point entirely.

Many governments stalled during the process of privatization. Unlike Mrs Thatcher, they were for turning and they did.

Nobody complained.

Nobody argued that it was vitally important to complete privatization. Yet we all knew the tensions and the temptations this perpetuated.

The real challenge is to get governments that still own shares in telephone companies to sell them.

Nobody would today argue that the state ownership of network operators is necessary or efficient.

Some member states see telecommunications operators as national champions. This is the *Colbertiste* argument used by President Chirac to oppose the acquisition by foreigners of Danone, a strategic French yoghurt producer.

The UK needs to say whether BT and Vodafone are national champions and how they are being treated and, more importantly, how the UK expects other countries to treat their national champions.

How should the EU treat national or European champions in telecommunications, finance, energy or even dairy products?

There is absolutely no agreement on the political independence of regulators. We need to say what sort of independence it is that we want and to make a case for it.

OFCOM is not a regulator or not only – it is also a policymaker. I see little prospect of other EU member states following the UK in devolving policy-making to a bureaucracy.

### **Political interference**

It seems that the Minister of State for Competitiveness<sup>2</sup> is seeking to interfere in the independent work of OFCOM by advocating action on Fibre to the Home (FTTH). What in his Star Trek terminology he likes to call Broadband: The Next Generation.<sup>3</sup>

This appears to be exactly the sort of short term political initiative or interference against which Ed Richards and Professor Lord Currie can be expected to take a firm stand.

I fully support the Minister and welcome his “interference”.

Provided the Minister acts within the framework of the directives – which he certainly appears to be doing – he is fully entitled to say that all UK citizens deserve better than their present “up to” 8 Megabits per second (terms and conditions may apply, please read the small print and consult a solicitor).<sup>4</sup> Not least since in Japan you can get 100 Megabits per second upstream and downstream for ¥4,000 per month (£17.50) and where DSL is old fashioned and in decline.<sup>5</sup>

I fully agree with the recent report from the House of Lords on economic regulators.<sup>6</sup> We need much better oversight of regulators.

That is true not only in the UK but in all EU member states.

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<sup>2</sup> Stephen Timms, MP, PC.

<sup>3</sup> <http://www.startrek.com/startrek/view/series/TNG/>

<sup>4</sup> National Statistics (2007) Internet connectivity: September 2007 (London, National Statistics).

<sup>5</sup> Yahoo BB light TV package (apartment). <http://bbpromo.yahoo.co.jp/promotion/hikari/>

<sup>6</sup> House of Lords (2007) Select Committee on Regulators: 1st Report of Session 2006–07: UK Economic Regulators. HL 189 (London, The Stationery Office Limited).

We need to ensure that the technocrats are kept firmly under control. They must be set demanding targets that are measured and their achievements assessed, including those of OFCOM.

To quote the late Harold Macmillan: "We have not overthrown the divine right of kings to fall down for the divine right of experts."<sup>7</sup>

Regulators must be measured against explicit targets set by democratically elected politicians.

### **The internal market**

Those of you with good memories will recall Lord Cockfield, the European Commissioner responsible, under Jacques Delors, for Internal Market, Tax Law and Customs. Despite nomination by a very Eurosceptic Tory Party he was a driving force for the creation of the Single European Act<sup>8</sup> which was to create the "internal market" by 1992.

There were to be no market barriers within the EU.

The impetus for the single market greatly helped the initial opening of telecommunications market for equipment.

There was a series of papers on the cost of non-Europe, including one on telecommunications equipment and services.<sup>9</sup>

Twenty years later there are few sign of progress in the single market for telecommunications services.

There are twenty-seven national markets with twenty-seven matching ministries and twenty-seven national regulators.

Some countries, like the United Kingdom, have managed to create a whole set of additional regulatory bodies, most of which exist far from the light of day or democratic scrutiny. Their names and functions would make an excellent specialist topic for BBC Mastermind.

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<sup>7</sup> The Rt Hon Earl of Stockton, OM.

<sup>8</sup> Single European Act (1986) *Official Journal* L 169 of 29 June 1987.

<sup>9</sup> Jürgen Müller (1988) The benefits of competing the internal market for telecommunications equipment and services in the Community (Brussels, European Commission).

Each country wraps its national market in arcane rules and regulations in order to ensure that it is distinct. Of course, this also justifies the future existence of the national regulator.

Given half a chance the Rt Hon Member for Banff and Buchan (Mr Salmond) would create a separate and distinct Scottish telecommunications market with its own set of regulators. While he might not be found cutting telephone wires along the border the imposition of roaming charges on visitors with English mobile phones would be very tempting.

As indeed would and perhaps will his counterparts in the soon to be former Belgian Republics of Flanders and Walloonina.

Telecommunications seems to bring out a strangely nationalistic spirit.

### **ERG, EECMA or something better?**

The idea of a single regulator dates back to the time of Lord Cockfield. It has periodically surfaced only to be killed by those preferring national solutions.

To misquote the Rt Hon Member for Kirkcaldy and Cowdenbeath (Gordon Brown) there should be British regulators for British markets.<sup>10</sup>

HMG has advocated the extension of the influence of the European Regulators Group (ERG), in preference to a single regulator.

For those who have not followed the story of the ERG, it has been long and troubled. Version 1.0 was cobbled together in 2000, while the directives were being debated in the Council and Parliament. Version 2.0 was what was made of it subsequently by the lawyers, applying the jurisprudence of the EU courts and the comitology rules.<sup>11</sup>

The current ERG 3.0 is the bawdlerised version, the lowest common denominator of regulatory powers.<sup>12</sup> It is merely the least of the powers assigned by member states to their regulators.

It is worth recalling that when OFCOM proposes a draft decision it does not merely send it to the EC, it also sends it to all twenty-six other NRAs for their opinions.<sup>13</sup> For four and a half years those other regulators have remained silent.

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<sup>10</sup> The Prime Minister actually said: "British jobs for British workers".

<sup>11</sup> Decision 2002/627/EC

<sup>12</sup> Decision 2006/24/EC

<sup>13</sup> Article 7 of the Framework Directive.

Equally, OFCOM has declines to comment on the draft decisions of all the other regulators, those they say are less independent.

The regulators have adopted the Sicilian practice of *omerta*, a code of silence.

The European Regulators Group (ERG) fails on all five of the principles of better regulation set out by HMG:

- Proportionality: it is too weak for the job
- Accountability: it is entirely unaccountable
- Consistency: there is very little agreement amongst its members
- Transparency: it is almost entirely opaque
- Targeting: it is all over the place

How HMG can then advocate it as a policy is an act of cognitive dissonance I do not understand.

Mr Richards concedes that the ERG might be called shadowy.

These are not the shadows of Mordor, there is no evil central power. It is technocrats talking in the foul language of legal economics in meetings closed to the world.

I am not sure if it is to be pronounced eek-ma.

Commissioner Reding has proposed the European Electronic Communications Market Authority (EECMA) in order to take us closer to a single market.

Creating EECMA creates some extraordinarily complex legal issues to be discussed later this morning.

There was once a theory, when OFTEL was created, that one day there would be competition and then the regulator would, like an old soldier, fade away. The residual duties would fall to the Office of Fair Trading (OFT).

Yet, by my count OFCOM published over 5,000 pages of consultation documents in 2006 (excluding broadcasting). Most of those documents are responded to by less than a dozen of the large commercial players, what we might term the "usual suspects". There are another thousand pages of reports and market analyses.

OFCOM seems neither to be fading away, nor diminishing the load, though we seem to have moved from regulatory burden to consultative burden.

There are days when the only stakeholder we require is Professor van Helsing, a dab hand with the wolfbane and the wooden stake.

### **Functional separation**

OFCOM is sometimes touted by HMG as a great *deregulatory* institution, leading the global charge in cutting real and virtual red tape. Sadly, there are no Key Performance Indicators (KPIs) for this and no comparative data to show whether this claim is true.

That BT Openreach reports weekly to OTA2 some forty indicators and that OFCOM then monitors this quarterly and annually, suggests something else.<sup>14</sup>

Openreach is like the Schleswig-Holstein Question of which Lord Palmerston observed that it was so complicated that only three men in Europe had ever understood it. One was Prince Albert, who was dead. The second was a German professor who had become mad. Palmerston himself had forgotten all about it.

The provision for functional separation proposed by the European Commissioner in the draft legislation will not take effect, at the earliest, until 2010 or more likely 2011. The first separation might be announced in 2011 or 2012. With appeals, this could take another five years. It could be a decade before we see a forced final separation of this sort.

By then, functional separation will have gone out of fashion. We may even have forgotten why it was once advocated. Some of us may well have been driven mad.

A regulator will never be able to implement functional separation against the will of an incumbent operator. If an operator offers divestiture of the assets it trumps functional separation. If it offers unbundling and bitstream access or wholesale line rental this is equally powerful. The regulator would have to show that functional separation was necessary and proportionate rather than any alternative. It is almost inconceivable that a court would accept this argument which would, at best, be based on conflicting expert opinions.

In the UK, there was a very big stick, the prospect of a process before the Competition Commission that could have lasted half a decade, cost millions and wasted the time of everyone.

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<sup>14</sup> <http://www.openreach.co.uk/orpg/products/llu/kpi/kpi.do>



The real lesson for Europe from the UK is not to adopt functional separation in the middle of the next decade, but to arm regulators with a big stick. It could be as simple as a national sector inquiry or a reference to the national competition authority. In NATO terminology, it is called “going nuclear”. It is a weapon you keep in reserve for when normal methods will not work.