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CHAPTER SIX

Institutional Innovation: Co-regulatory Solutions

If you try speed humps or disconnections for peer-to-peer, people will simply either disguise their traffic or share the content another way. It is a game of Tom and Jerry and you will never catch the mouse. The mouse always wins in this battle and we need to be careful that politicians do not get talked into putting legislation in place that, in the end, ends up looking stupid.¹

Charlie Dunstone, CEO, TalkTalk, UK consumer ISP

National Regulators' Response to Net Neutrality

European regulators lack forensic skills to analyse the potential consumer harms that can be created by unjustified discrimination, rather more than legislative authority to act on net neutrality – especially if the 2009 amendments become law. Because net neutrality 'lite' raises a set of new issues for regulators, the necessary skill set needs to be acquired and developed in consultation with other national and international regulators and the European Commission. In this chapter, I consider the approach taken in several European countries, notably the United Kingdom, which has the 'converged' regulator between content and carriage that makes it better able to regulate for net neutrality than more traditional telecoms regulators. Note one critical proviso. Regulation to ensure any form of net neutrality in Europe should have as light a touch as possible, while maintaining effectiveness based on three recourses:

1. Information regulation to require service providers to inform consumers about the choices they are making when they sign up for a service and any relevant changes to the service, for example, blocking of certain services. The relevance of the changes is consumer driven, and therefore full and prompt disclosure by companies via their websites is necessary. Even if not all customers choose to exercise the option to monitor the situation, providing the information promotes transparency. It also may head off calls to help desks, given that the technical fault may actually be a change of network policy.

2. Continually upgraded monitoring and surveillance.
3. Where necessary, investigation and timely but evidence-based intervention to correct harmful and unjustified discrimination.

These regulatory interventions do, however, require regulators to impose a reporting requirement on service providers to provide transparency in their traffic-management practices. This reporting requirement could be provided in a co-regulatory forum, as in codes of practice adoption by, for instance, ISPA in the United Kingdom and its counterparts in EuroISPA. However, there will be a need for content provider participation in, and consultation over, such a scheme to ensure it receives full industry backing. Consumers should also be consulted, and as Dunstone states in the opening quotation, the means adopted have to be flexible and proportionate. This co-regulatory approach, taking the United Kingdom as a case study, is the focus of the chapter.

‘Light Touch’ Regulation?

Communications lawyers such as Varney/Feintuck, Gibbons and Woods, human rights lawyers such as Phillipson and communications scholars such as Collins² have established the primacy in both UK and EU communications law of the welfare of the consumer and citizen,³ to whose benefit competition is one but by no means the only means employed by the regulator.⁴ Section 3(1) of the UK Communications Act 2003 states:

- 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) In performing their duties under subsection (1), Ofcom must have regard, in all cases, to—
- (a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and
 - (b) any other principles appearing to Ofcom to represent the best regulatory practice.

There is therefore a bold statement of the dual nature of the individual member of society: first as a citizen whose needs for information and communications

services are paramount, then equally as a consumer whose greatest benefits may be secured 'where appropriate by promoting competition'. This is far from a neo-classical view of regulation and competition. Ofcom in practice has tended towards the competition perspective with no intervention until harm is proved, wherever possible, and a 'light touch' in regulatory matters, based on the initial principles established by Lord Currie, its first chair, and its current Chief Executive Ed Richards. Currie in 2002 stated that:⁵

we will search for solutions which involve co-regulation; and that we will use the power of market competition to release and use innovation for everyone's benefit. We want to create the market conditions in which dynamic, vibrant industries can develop. I personally favour a light-handed style of regulation, letting go wherever possible. Market forces – the invisible hand – often provide the best regulation, provided there is effective competition and monopolies are held in check. But we will intervene decisively and firmly where necessary. Where there is a major problem, Ofcom will act decisively.

Richards by 2009 disowned the expression 'light touch' in the wake of the economic recession and evidence of disastrous light touch regulation in financial services, stating to BBC Internet site users that 'I don't like the expression "light touch" regulator. We try to be as unintrusive as we can be, not to intervene unless we have to, but if we have to and there's a public interest in intervening, we are willing to do so swiftly and effectively.'⁶ He also reflected that:⁷

The first five years of Ofcom's life were characterized by focussing on the fundamental problem of the previous twenty years – regulation of the enduring bottlenecks, ensuring downstream equivalence and, through it, effective competition. More recently we have also significantly raised our game in ensuring effective consumer empowerment and consumer protection.

On 3 March he went further on the specific issue of net neutrality and broadband service, stating that:⁸

We are very concerned about consumer transparency. It's something that a significant number of consumers have raised with us. With this in

mind we have recently published a code of practice which ensures that ISPs offer greater clarity over broadband speeds and caps.

These are very real pro-consumer policy shifts within Ofcom as expressed by its chief executive in public. They reflect a significant realignment with the statutory duties, and a reflection on the previous 'light touch' reliance on market forces to provide for consumer/citizens. Ofcom is, unusually for a sectoral regulator, required to write a justification for any decision occasioning a conflict between their treatment of the citizen and the consumer.⁹ The objective of Ofcom under Section 3(2) of the Act is to make clear that a regulator's role is far wider than simply to act as a competition tribunal between telecoms providers. Section 4 makes clear the elements that Ofcom must balance, and a huge and disparate group they are. They include the 'desirability of promoting':

- purposes of public service television broadcasting;
- competition in relevant markets;
- facilitating the development and use of effective forms of self-regulation;
- investment and innovation in relevant markets;
- availability and use of high-speed data transfer services throughout the United Kingdom;
- the special needs of children, elderly and disabled citizens, ethnic minorities, nations and regions, and crime prevention, and finally of consumers and other users.

They also include, presumably intended to cover rights to reply and balanced and pluralistic voices in the media 'the need to secure that the application in the case of television and radio services of standards ... is in the manner that best guarantees an appropriate level of freedom of expression'. Ofcom is increasingly resorting to forms of co-regulation to balance these aims.

New Regulators, New Co-regulatory Bodies

Ofcom is certainly not the first converged broadcast-telecoms-spectrum regulator of the modern era, following Malaysia 1999, Italian AgCom 2000 and Swiss Ofcom 2001. However, given the strategic importance of the United Kingdom for competitive liberalization in European telecoms, it may be the most ground-breaking new regulator in Europe. Several European regulators are constrained by constitutional and institutional barriers

from merging access and services regulation (for instance Germany) but are finding that the economics and social elements of access regulation throughout utilities can be regulated using one corpus of experts – and therefore merging energy regulation with communications regulation, as in Netherlands and Germany.

The response to continued access problems by regulator and industry may be to institute co-regulatory bodies to determine access. By giving industry actors the incentive to negotiate agreement on the increasingly complex service-level agreements and access conditions necessary for co-location of their switching equipment, the hope is that flexibility and speed of response can provide more investor certainty than the glacial progress of competition law investigations. Before examining in detail the UK response, we first define co-regulation in practice, a subject returned to in greater theoretical depth in Chapter 8.

Co-regulation expresses a form of regulation which is neither state command-and-control regulation in its bureaucratic central or NRA specialized functions,¹⁰ nor ‘pure’ self-regulation as observed in industry-led standard setting. The state and stakeholder groups including consumers are stated to explicitly form part of the institutional setting for regulation. Co-regulation constitutes multiple stakeholders, and this inclusiveness results in greater legitimacy claims. However, direct government involvement including sanctioning powers may result in the gains – speed of response, dynamism, international cooperation – being lost. It is clearly a finely balanced concept, a middle way between state regulation and ‘pure’ industry self-regulation. Co-regulation reflects a more complex dynamic interaction of state and market, a break with more stable previous arrangements. Price and Verhulst assert the limits of both government and private action in co-regulation and the interdependence of both – there is little purity in self-regulation without at least a lurking government threat to intervene where market actors prove unable to agree.¹¹

The term ‘co-regulation’ encompasses a range of different regulatory phenomena, which have in common the fact that the regulatory regime is made up of a complex interaction of a general framework of legislation and a self-regulatory body. The varying interests of actors result in different incentives to cooperate or attempt unilateral actions at the various points of the value chain. Without regulation responsive to both the single European market and the need for constitutional protection of national levels, co- and self-regulatory measures cannot be sufficiently responsive to economic and

cultural environments to be self-sustaining. Can co-regulation provide a solution to net neutrality?

The term ‘co-regulation’ gives a sense of the joint responsibilities of market actors and state, in the activity under investigation. It has been used by Ofcom to suggest a state role in setting objectives which market actors must then organize to achieve – with the threat of statutory powers invoked in the absence of market self-regulation.¹² However, co-regulation is used in such a wide variety of circumstances that its specific meaning must be seen in the national, sectoral and temporal context in which it is used. For instance, in the case of the premium telephone regulator in the United Kingdom, ICSTIS (now renamed PhonePayPlus), Ofcom’s stated aims in co-regulation were:

approving the ICSTIS Code and the ICSTIS budget, where it is satisfied that these enable Ofcom to meet its obligations under the Act; using its powers to ensure compliance with ICSTIS Directions; and carrying out sufficient oversight, and using its backstop powers where necessary, to make sure that regulation is effective.¹³

The basis on which Ofcom delegated its powers under the Communications Act to ICSTIS was:

in keeping with the principles of co-regulation and with the arrangements in existence before the enactment of the Act and the creation of Ofcom ... Ofcom will only approve a code if it is satisfied, amongst other things, that there is a person who has the function of administering and enforcing the code. It follows, therefore, that approval of a code effectively signals the approval of an ‘enforcement authority’ to regulate premium rate services.¹⁴

Co-regulation in the European context must also be proportional to the aims of the legal instrument, as well as conforming to the competition law of the European Union. Enforcement is the ultimate responsibility (‘the safety net’) of the state.

Ofcom Co-regulation in Telecommunications: The Strategic Review

In 2004, Ofcom conducted strategic reviews of spectrum, public service broadcasting and telecom regulation. In 2004–5, it conducted the first telecoms ‘strategic review’ (TSR) since the Duopoly Review of 1991, the 1982

Review that led to BT privatization and the Telecommunications Act 1984. It is the entire work programme that forms the basis for assessing the success or failure of the Ofcom converged model. The TSR took place after Oftel's 2003 completion of the market reviews for the Telecoms Directive package, which was the culmination of a seven-year convergence-based review stemming from 1996. It was clear in the case of the TSR that there was no point conducting a review whose aim was to tweak the last policy cycle and make LLU work as successfully as in the Netherlands or Denmark. The 2004 TSR came at the end of a precarious time for competition in the telecoms industry in the United Kingdom.

The 1991 Review that decided to introduce facilities-based competition to BT and Cable & Wireless (in its Mercury domestic operation) via US cable investment produced a consolidated but insolvent cable industry by 2003, and an insolvent but unconsolidated competitive telecoms industry. The combined meltdowns of investment in cable and competitive telecoms are therefore the backdrop to the competitive landscape. It should also be admitted that the incumbents are actually in rude health post-meltdown.

The outcome of the three-part TSR was a negotiated settlement that resulted in BT separating much of its regulated national wholesale telecom network into a separate subsidiary called 'OpenReach', which began activities in January 2006.¹⁵ This radical reorganization of the former incumbent's access lines business was undertaken 'voluntarily' by BT, with the threat of a referral by Ofcom behind the decision. To enforce this action via a referral under the Enterprise Act 2002 may have required a political intervention by the incoming secretary of state for trade and industry after the May 2005 general election, a referral to the Competition Commission for a full sectoral enquiry, and potentially judicial review of the outcome.¹⁶ I contend that it would be politically naïve in the extreme to suggest that such a decision would be made by Ofcom without the support of the secretary of state. This could have prevented any remedy until at least 2009, and may have severely depleted the regulator's resources.

The Office of the Telecoms Adjudicator¹⁷ has been established to oversee the various service-level agreement issues that arise when competitors claim that BT is behaviourally discriminating in its dealings with them. An industry co-regulatory body was set up called 'NGN UK',¹⁸ chaired by the Telecoms Adjudicator Peter Black. It will deal with three specific initial issues: IP interconnect architecture, the IP interconnect commercial model and network intelligence interoperability.¹⁹ Ofcom formally considered the future of LLU

products in its market reviews in 2006–7 (especially flat rate Internet FRIACO, voice access origination and broadband), but conducts much of its strategic NGN work through the steering of this formally independent body. It is clear that the future of UK access regulation will be determined in these negotiations,²⁰ and the stakeholder Next Generation Access (NGA) initiative of the Regulatory Affairs Group of the Broadband Stakeholder Group, a forum funded in part by government and steered in consultation with government and Ofcom.

It is remarkable that a solution to interconnection is being sought in the United Kingdom, with the ‘voluntary’ agreement of the incumbent to form OpenReach and its active participation in NGN UK, though it is premature for the operational significance of either to be judged fully. In the Microsoft litigation, it was suggested that the diversion from innovation produced when an incumbent chooses to deliberately raise entry barriers rather than attempt a Schumpeterian innovation-led competitive strategy was preventing the most efficient outcome for the company, the market and the consumer.²¹ In this case, the telecoms incumbent appears to have (grudgingly) accepted the case for innovation and separation of the regulated access business from its value-added retail businesses. This may set a precedent for other markets where regulators have sufficient intellectual and political capital, and incumbents sufficient stimulus to move away from the regulated business. It does only provide an extremely partial structural solution to the various institutional barriers in both access and content businesses. Architecture of NGA will be vital to continued competition, and van der Berg states: ‘From a regulatory perspective a point-to-point network offers more possibilities for regulatory measures such as LLU and Wholesale Broadband Access.’²²

The success of the co-regulatory model for NGN will be a true test of the new regulatory settlement.

Critique of OpenReach

Initially the outcome of the TSR and its co-regulatory bodies was a far more rapid deployment of LLU. Ofcom hailed OpenReach as a successful policy innovation that reduced its workload and prevented disputes from arising. However, criticism has been aimed at the solution adopted as toothless. Burstein takes a critical view:

Structural separation currently is looking to fail badly in Britain, after an important initial success in opening the retail market and bringing down

prices from exorbitant to not so bad and spurring enormous growth. The weaknesses are now becoming visible. BT Wholesale has a reinforced monopoly of the local loop, so requires stronger than ever regulation. The loop charge alone is more than the total charge in some other regions.²³

He notes that cableco Virgin is charging a premium for its high-speed DOCSIS 3.0 service, and then discusses Ofcom's views:

Ofcom talk of 'super-fast broadband' is an attempt to fool the British people. BT's [plan] is 50–90% slower than what's building in New York, Boston, Paris, Geneva, and Amsterdam. That looks to be the only choice for half the country unless Ed demands more from BT.

He notes BT's refusal to upgrade its network, claiming a lack of consumer demand, as discussed in Chapter 3:

[BT CEO] Ian Livingston isn't afraid they will lose the customers even if they do only a modest upgrade of their copper lines. So they are fighting with everything they have to keep the copper valuable for many years. As long as the companies can make money on copper, they have enormous incentive to not upgrade. Verizon, FT, KPN and others facing competition can't think like that. If they didn't replace copper with fiber, they would be clobbered.

This is fairly brutal criticism, which if true, means that structural separation has failed to incentivize the incumbent to upgrade its network, but rather led it to sweat its existing assets. There is no need in this book to take a particular view, but it remains remarkable the degree to which UK regulation has tried to rely on consensus and co-regulation despite what may be characterized as diametrically opposed views amongst many stakeholders.

Co-regulation and Broadband QoS Reporting Requirements

Notwithstanding the backstop of regulatory intervention, based on the incomplete evidence thus far, net neutrality will be primarily enforced via reporting requirements. This is a form which can be classed as self-regulation where there is an incentive on market players to cooperate, and co-regulation

or formal regulation if there is not, in which market actors and self-regulatory bodies maintain a constant dialogue with regulators and consumers. This is a preferable lighter-touch regime compared to those of government-funded regulation and non-regulation of European Net Neutrality, and a flexible and responsive framework. The pace of change in the relation between architecture and content on the Internet requires continuous improvement in the regulator's research and technological training. This is in part a reflection of the complexity of the issue set, including security and Internet-peering issues, as well as more traditional telecoms and content issues.

Regulators will need to ensure that the network operators report more fully and publicly the levels of QoS that they provide between themselves and to end-users. Internet architecture experts have explained that discrimination is most likely to occur at this level, as it is close to undetectable by those not in the two networks concerned in the handover of content, as discussed in the 2006 US mergers. It is very difficult (if not impossible) to monitor the former for any one other than the two network operators themselves, and therefore shedding light on QoS in this area will require reporting. As this information is routinely collected by the network operators for internal purposes, this should not impose a substantial burden. In fact, in the United Kingdom, Ofcom has worked with the consumer/industry research website Samknows to conduct panel research on broadband quality.²⁴

These regulatory interventions do, however, require a reporting requirement on service providers to provide transparency in their traffic-management practices. I noted in Chapter 5 that the danger of fragmentation and regulatory arbitrage is apparent here for two reasons: a 'regulatory holiday' for ISPs in one country but not another is quite likely, and highly divergent enforcement of net neutrality. Therefore the EC as well as Member States will need to monitor developments in this area closely, especially in view of policies for Content Online and the wider 'i2010' goals, under which the importance of content provision (as well as network deployment) for jobs and growth are emphasized.²⁵ In particular, the role of start-up and small companies in content and service provision is likely to be a substantial engine for such growth.

Ofcom has so far responded with a combination of denial that there is a problem, an acceptance and willingness to deal with those problems that were shown to have emerged, regulation of customer switching problems

between ISPs, regulation of video on broadband offered by the public service broadcaster BBC and a light touch attempt to persuade ISPs to offer greater transparency to users. I examine these in turn.

The initial Ofcom position was that there was no evidence of discrimination, no complaint from other ISPs, and therefore no need to examine the problem. In its 2006 response to the 'ContentOnline' consultation,²⁶ Ofcom defined net neutrality as permitting no QoS on the network, itself terming this an 'extreme' position: 'Net neutrality implies there is absolutely minimal differentiation. It is therefore at the extreme end of this continuum of different approaches.' This meant that institutionally Ofcom had decided there was little evidence of a problem, by taking that extreme definition. It explains that it has tools to deal with SMP operators, and that competition will settle the issue for non-SMP ISPs:²⁷ 'if a single operator without SMP were to introduce charging for the delivery of third party content services, or to block specific services, consumers would be able to move supplier.' This is despite the mounting evidence that ISPs were non-transparent in their blocking and throttling and that ISPs were preventing consumers from switching by refusing to release their MAC (Migration Authorization Code) numbers (see below). In case of such evidence, Ofcom admitted:

If this [easy switching] is not the case, then there may be a role for regulatory intervention to protect consumer interests. However, any intervention would be best focussed on addressing the lack of consumer information, consumer empowerment or migrations processes.

That became exactly its policy throughout 2007–8.

When the problem was exposed at the Ofcom Annual Conference 2006, by several non-dominant ISPs' own admission that they were throttling BitTorrent, Ofcom's position of denial could no longer be maintained.²⁸ Ingram stated: 'there is no requirement for new legislation to ensure that the net remains neutral – there are existing solutions'.²⁹ Ingram importantly stated a willingness to engage with the research community and others to discuss issues of consumer concern, stating 'Under the Communications Act, suppliers have to comply with various General Conditions in order to take part in the market. If there was evidence that the market wasn't doing so adequately, these could address, for example, the information that providers supply consumers about their products'. Evidence was building

that BitTorrent throttling was preventing download of updates to hugely popular multi-player online game World of Warcraft and that subscribers were unable to switch between providers in response. Within two months of Ingram's remarks, Kiedrowski stated:

we could apply Article 5.1 of the Access and Interconnection Directive, which allows NRAs to impose ex ante obligations on operators to ensure end-to-end connectivity, without the need to find SMP. We could use our powers derived from the European Framework which enable us to require suppliers (even non-SMP suppliers) to comply with various general conditions in order to take part in the market to address particular issues, for example, in relation to information transparency.³⁰

This was to follow in an Ofcom intervention to ensure migration between ISPs.

Ofcom was forced to take regulatory action to ensure customers could migrate ('switch' or 'churn' in telecoms terminology) between ISPs, by ensuring portability of MACs.³¹ In 2005, it became clear that many ISPs were not cooperating in letting unhappy customers switch away to better providers, whether for throttling or (more likely) other issues. This came into sharp focus in the period before the collapse of abusive ISP E7even UK Ltd on 3 July 2006,³² but it had been an issue during the crisis at ISP Bulldog in summer 2005.³³ In December 2006, after public consultation, Ofcom imposed a new General Condition, GC22, governing the obligations of broadband providers to switching customers. GC22 entered into force on 14 February 2007. Ofcom stated: 'Under GC22, all broadband providers must use the MAC Broadband Migrations Process ('the MAC process') if they receive a migration request from an end-user, customer or another provider.'³⁴ An eighteen-month enforcement action ensued, which Ofcom stated would force ISPs to comply with customer requests:

The focus of the extended programme has been direct engagement over the course of six months with the broadband providers who were the subject of the most MAC-related complaints from consumers. As a result of this action, these companies have reviewed their processes and procedures for providing consumers with MACs and made a range of improvements to these processes.³⁵

Ofcom had to get tough with non-compliant ISPs, though the length of the action shows how difficult it proved to achieve the basic requirement that customers be able to switch provider – if they had managed to work out why their service was so poor. I consider the transparency issue below.

Kiedrowski further stated: ‘It is a supplier’s responsibility to ensure that information about these kinds of [throttling] considerations is communicated to consumers in a way that is understandable and we’re encouraged that ISPA has published a best common practice document for their members, encouraging them to provide clear information about internet filtering practices.’ He stated that Ofcom could use its powers under the general conditions to require all – even non-dominant – suppliers to provide better consumer information about their products, if self-regulation continued to be inadequate.

The best practice document released by ISPA in fact did not succeed in encouraging ISPs to demonstrate real transparency and Ofcom was forced to engage in some strenuous arm-twisting to arrive at a mediated self-regulatory position whereby ISPs did agree to provide the information on broadband speeds (if not necessarily service) in their Code released on 5 June 2008. They clearly warned ISPs that a failure to continue to improve transparency could result in a regulatory action under those General Conditions of their authority to offer services. Point 39 of the Code states: ‘Where ISPs apply traffic-management and shaping policies, they should publish on their website, in a clear and easily accessible form, information on the restrictions applied. This should include the types of applications, services and protocols that are affected and specific information on peak traffic periods.’³⁶ Ofcom warns ISPs that ‘Ofcom also intends to monitor compliance with the Code through a number of methods including, but not limited to, carrying out regular mystery shopping exercises by Ofcom itself or its agents.’ The Code states that ISPs are required to:

- provide consumers at the point of sale with an accurate estimate of the maximum speed that their line can support;
- explain clearly and simply how technical factors may slow down speeds and give help and advice to consumers to improve the situation at home;
- offer an alternative package (if there is one) without any penalties, if the actual speed is a lot lower than the original estimate; and
- explain fair usage policies clearly and alert consumers when they have been breached.

Ofcom has therefore tackled several issues relating to net neutrality, if somewhat reluctantly in keeping with its 'deregulatory' agenda. It recently asked if mobile applications and services might gain from a net neutrality approach, 'Should Ofcom explore open access requirements to ensure opportunities for innovation? What role might 'net neutrality' play in the mobile sector?'³⁷ This reflects the now well-established place for such debates within Ofcom consultations. However, Richards warns that 'The shibboleth of net neutrality should not be allowed to become an obstacle or a distraction to investment in NGNs in the UK.'³⁸

Ofcom's approach remains agnostic and wary towards intervention on behalf of the current generation of Internet consumers, for fear it might slow investment for the next. It also remains committed to light touch self-regulation where possible, despite Richards' more recent remarks: 'Within the UK, the need for specific regulation is likely to be lower, with ISPs and VoIP providers working together through industry bodies to agree a self-regulatory approach to providing consumers with transparency on whether service prioritization or quality of service charging is being applied.'³⁹ The fact that Ofcom is often having to bang the table to get ISPs to commit to even these non-enforced codes is evidence that co-regulation will be more effective than the much-vaunted self-regulation.

To see co-regulation in more effective practice, it is necessary to look east across the North Sea, to European Economic Area (not full European Union) member, Norway.

'Nettnøytralitet' in Norway

The regulator in Norway has made the ISPs and cablecos sign up to a co-regulatory pact on transparency and consumer rights in February 2009, following over two years' research and multi-stakeholder discussions.⁴⁰ This stands in contrast to the slower progress towards detailed reporting standards in the United Kingdom. The subject arose due to a dispute between an ISP, NextGenTel, and the Norwegian state broadcaster NRK in mid-2006. NextGenTel limited the bandwidth available to the website of NRK, which the operator said was generating excessive traffic caused by its subscribers streaming free Internet TV provided by the broadcaster. NRK published a statement on its website stating that NextGenTel had considerably decreased the transfer capacity from its website to NextGenTel broadband customers. According to the broadcaster, the operator had asked for an additional payment for an increase in capacity. In its statement, NRK said that the matter was

out of its control and that NextGenTel customers should contact the operator directly – which the customer did in their droves, according to local reports. NextGenTel threatened to place a 1 Gbps limit on traffic from NRK.

The Norwegian Code states:⁴¹

- Internet users must be given complete and accurate information about the service they are buying, including capacity and quality.
- Users are allowed to send and receive content of their choice, use services and applications of their choice and connect any hardware and software that doesn't harm the network.
- The connection cannot be discriminated against based on application, service, content, sender, or receiver.

There are various explanations that any network management must be non-discriminatory. Head of the regulator Willy Jensen states:

Everyone who endorses these guidelines has made it clear that they support an open Internet on which different providers can compete freely to offer content and services. Internet users need to be assured that the ISP they have chosen will not act as a gatekeeper for their Internet use.⁴²

Government Policy: Universal Service Obligation and Neutrality

One right does unreservedly apply to European citizens: the right to a 33 kbps telephone line. A type of Universal Service Obligation (USO) that is upgraded as broadband network speeds increase can ensure a minimal open Internet layer is maintained. I do not in this book take any position on whether the USO will be extended for NGNs, nor is it possible to do so in an environment where the future bandwidth supply/demand capabilities are so uncertain. A group of academics and engineers have proposed rules on what can be called 'Internet' service. Those rules might be considered a form of transparency regulation. Essentially they claim that any service that differentiates between packets is breaching the end-to-end principles of the Internet protocol and therefore should not be labelled as an 'Internet' service. They suggest legislative wording as follows:

Network providers that offer special features based on analyzing and identifying particular applications being conveyed by packet transmissions must not describe these services as 'Internet' services. Any

representation as to the speed or 'bandwidth' of the Internet access shall be limited to the speed or bandwidth allocated to Internet access.⁴³

This proposal that 'broadband' should not be marketed as Internet service unless it offers unfettered Internet access is not yet accepted in the United Kingdom, but note the website-based campaign 'It's the Internet, stupid'⁴⁴ is continuing this proposal for the Obama administration stimulus plan.

I suggest that regulators will need to form a view of what access to the public Internet is required in order to make effective conclusions on the future for USO during the course of 2010. I emphasize that this debate is likely to grow in complexity during that period and urge regulators to conduct research in this area. Unfettered Internet access of some type is a currently enjoyed 'public good' for consumers, particularly in the use of Web2.0-type applications and services, and this public sphere is a regulatory policy of continued consideration. In the United Kingdom, policy towards universal service in broadband has been driven by first the work of the government-funded quasi-independent industry group the Broadband Stakeholder Group⁴⁵ (chaired by Phorm director, former Ofcom partner and advisor to Lord Carter in 2008–9, Kip Meek) and second a series of policy discussions held in 2008, called the 'Convergence Thinktank'.⁴⁶ The multi-stakeholder industry-led Broadband Stakeholder Group made the following relevant recommendations to government:⁴⁷

Recommendation 4 – Explore alternative commercial models to support network investment

Further work should be undertaken by stakeholders to debate and explore alternative commercial models to support network investment. Good solutions need to be found that align the interests of operators with upstream content and service providers and end consumers whilst mitigating concerns about blocking or degrading third party applications and services.

Recommendation 9 – Review universal service/universal access The current universal service directive refers only to functional Internet access. However, as the adoption of broadband continues to accelerate, this definition is starting to look outdated. Ofcom's consultation on universal services should address both the definition of universal service and future approaches to funding universal service/universal access.

A background paper for the government's 2008 'Convergence Thinktank', yet again an industry-led multi-stakeholder consultation, stated:⁴⁸

Digital and broadband open up the prospect of many new entrants into the media market, and remove the need for intermediation between producers and consumers ... [but] Some powerful bottlenecks will remain.

The Thinktank was to inform the new much-heralded 'Digital Britain' report,⁴⁹ drawn up by former Chief Executive of Ofcom (2003–6), (Lord) Stephen Carter, appointed Communications Minister on being removed from the Prime Minister's Private Office in 2008. It was written as a draft report to which criticism could be aimed, in January 2009,⁵⁰ before the final report was presented to the Cabinet of the British government on 16 June 2009. Concurrently, the Ciao Review to the UK Treasury of September 2008 was designed to examine how far deregulation and market forces could produce NGA solutions.⁵¹

Carter Report: Digital Britain

The UK government put a noose around its neck in the early part of this decade by declaring its aims for leading the G7 in broadband – an overambitious target.⁵² Known arch-realist Stephen Carter appointed a list of business advisors on the Digital Britain report, eliminating such hostages to fortune. Carter overall makes some interesting points on both network deployment and universal service, but I highlight the area where he deliberately chose to come down on the side of industry, not consumers. ISPs are given carte blanche to breach net neutrality under Action 2 in Carter's interim report:

ISPs can take action to manage the flow of data – the traffic – on their networks to retain levels of service to users or for other reasons. The concept of so-called 'net neutrality' requires those managing a network to refrain from taking action to manage traffic on that network. It also prevents giving to the delivery of any one service preference over the delivery of others. Net neutrality is sometimes cited by various parties in defence of internet freedom, innovation and consumer choice. The debate over possible legislation in pursuit of this goal has been stronger in the US than in the UK. Ofcom has in the past acknowledged the claims in the debate but have also acknowledged that ISPs might in future wish to offer guaranteed service levels to content providers in exchange for

increased fees. In turn this could lead to differentiation of offers and promote investment in higher-speed access networks. Net neutrality regulation might prevent this sort of innovation.

Ofcom has stated that provided consumers are properly informed, such new business models could be an important part of the investment case for NGA, provided consumers are properly informed.

On the same basis, the Government has yet to see a case for legislation in favour of net neutrality. In consequence, unless Ofcom find network operators or ISPs to have Significant Market Power and justify intervention on competition grounds, traffic management will not be prevented.

In particular, note the continuing analysis that only BT might be regulated as the dominant SMP operator – when throttling goes on over all consumer ISPs. The report chooses the expression ‘so-called net neutrality’, reflecting 2006 Ofcom thinking. Some trade press journalists picked up on the decision to substitute net discrimination for any actual government support for roll-out. On net neutrality, not only is there no mention of mobiles in connection with ‘so-called’ net neutrality, a vital consideration for a growing number of people using sub-dial-up-speed 3G broadband (see the discussion in Chapter 7), but the proposals do not discuss preventing ISPs from throttling customers to below current levels, or measures to prevent them targeting specific applications, in contrast with the FCC or CRTC. Carter told Parliament he was in favour of permitting discrimination and behavioural advertising. The Register put it well:

In the UK, net neutrality was stillborn as an issue, but Carter was happy today to give its corpse a kick. As well as advocating tiered content delivery, he backed ‘traffic management’; the somewhat euphemistic industry term for BitTorrent throttling.⁵³

Carter considered the argument for universal broadband in the draft report,⁵⁴ confirmed in the final version:

ACTION 17: We will develop plans for a digital Universal Service Commitment to be effective by 2012, delivered by a mixture of fixed and mobile, wired and wireless means. Subject to further study of the costs and benefits, we will set out our plans for the level of service which we believe should be universal. We anticipate this consideration will include options up to 2 Mbps.

A key Tony Blair advisor, Lord Puttnam who chaired the Joint Lords-Commons Scrutiny Committee on the draft Communications Bill of 2002, bewailed the lack of ambition in Digital Britain, and sees a 2 Mbps ambition (not a declared goal but an aspiration according to Lord Carter) for USO as ‘Twentieth Century thinking’:

The report has its priorities straight but I worry greatly about its scale and ambition regarding the level of bandwidth we need. I’ve been talking to people in Singapore about needing gigabytes by 2015. Either the authorities here are barmy and don’t realize what the British creative industries here need, or we are. There’s a massive gap of where the balance of credibility lies. Are we a Twenty-first-Century nation or are we equipping ourselves for the 20th Century?⁵⁵

Carter on Net Neutrality: Disconnecting Illegal File-Sharers

The action on net neutrality in the final report comes in the shape of instructions to Ofcom to tell ISPs to throttle connections of users suspected of illegal file-sharing – a UK HADOPI but without any apparent appeal to judicial authority. It is a proposal that caused great controversy, and may prove Dunstone to be prophetic in warning government not to place itself as the cat chasing a mouse that is all but impossible to catch. The Report stated:

Ofcom will be placed under a duty to take steps aimed at reducing online copyright infringement. Specifically they will be required to place obligations on ISPs to require them:

- to notify alleged infringers of rights (subject to reasonable levels of proof from rights-holders) that their conduct is unlawful; and
- to collect anonymized information on serious repeat infringers (derived from their notification activities), to be made available to rights-holders together with personal details on receipt of a court order.⁵⁶

Ofcom will also be given the power to specify, by Statutory Instrument, other conditions to be imposed on ISPs aimed at preventing, deterring or reducing online copyright infringement, such as:

- Blocking (Site, IP, URL)
- Protocol blocking

- Port blocking
- Bandwidth capping (capping the speed of a subscriber's Internet connection and/or capping the volume of data traffic which a subscriber can access)
- Bandwidth shaping (limiting the speed of a subscriber's access to selected protocols/services and/or capping the volume of data to selected protocols/services)
- Content identification and filtering

This power would be triggered if the notification process has not been successful after a year in reducing infringement by 70 percent of the number of people notified.⁵⁷

This blocking of end-user Internet access is almost exactly the HADOPI authority which was ruled unconstitutional in France a week earlier – graduated response without a court ruling, to restrict users' access, as we saw in Chapter 5. Consultation responses were due by 15 September 2009, but delayed until October under a hardened proposal to shorten the timescale radically. The document at Paragraph 4.39 set out an indicative timeline, with government response by 15 December 2009, and no technical measures taken against subscribers until 'Zero+28 months', zero being date of royal assent to any order instructing Ofcom to set up the mechanism.⁵⁸ That suggested at earliest May 2012, and given the general election due by May 2010, indicated late 2012 as the more likely date for implementation. This is likely to be a highly controversial three years from the time that I write this, and whether Ofcom will actually reach the 'throttling point' under the next government must be open to severe doubt.

Reaction to the Digital Britain Report

The report is notable for its free market attitude, with very little government intervention, except to discriminate against file-sharers as we saw above. The Ofcom instruction to throttle users' connections is a work of quite breath-taking complexity as well as obviously riding roughshod over due process of law. On net neutrality, the final report is silent, but the interim report and the UK attitude to Phorm, as seen in Chapter 2, reveals the current government's market-led approach. Even here, it has prominent critics, as Christopher Bland commented:⁵⁹

Digital Britain, described by its author in this newspaper yesterday as ‘industrial activism’, represents a well-intentioned mixture of inadequate analysis and old-fashioned tinkering with matters best left to markets.⁶⁰

Charles Leadbetter summarizes Carter:

There is nothing in the Carter report about how Britain will create the next Google or Youtube, where the money, entrepreneurship and markets will come from ... If we are not careful the Digital Revolution will become a manifesto to protect incumbents rather than promote competition and innovation. Reading Digital Britain one cannot help but feel the government finds the opportunities for people to self-organize through the web all too unsettling for its more technocratic, controlling tendencies.⁶¹

Whether Leadbetter, Bland and Puttnam are correct or not, the UK aspiration for broadband and network discrimination does seem very conservative. A backward-looking industrial policy based on broadcast one-way communication has captured the debate on both sides of British politics – in contrast to the United States or Sweden, for instance. All the action remains in Brussels – on network subsidy, on Universal Service, on net neutrality.

However, lest I be accused of believing that UK fixed ISPs provide an imperfect example of net neutrality commitments, it is instructive to consider the much more closed world of mobile ISPs, the subject of the next chapter.

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