



Regulation and Anti-Trust in European Communications and Media: Bracing for the Future

In merely a decade, digital innovation has taken the communications industry by storm. Individuals and business users alike have seen their communications repertoire evolve with high-speed broadband, Cloud-support and smart technologies. They are also benefiting from novel ways in which to engage with media content, for example, live-streaming TV shows and events.

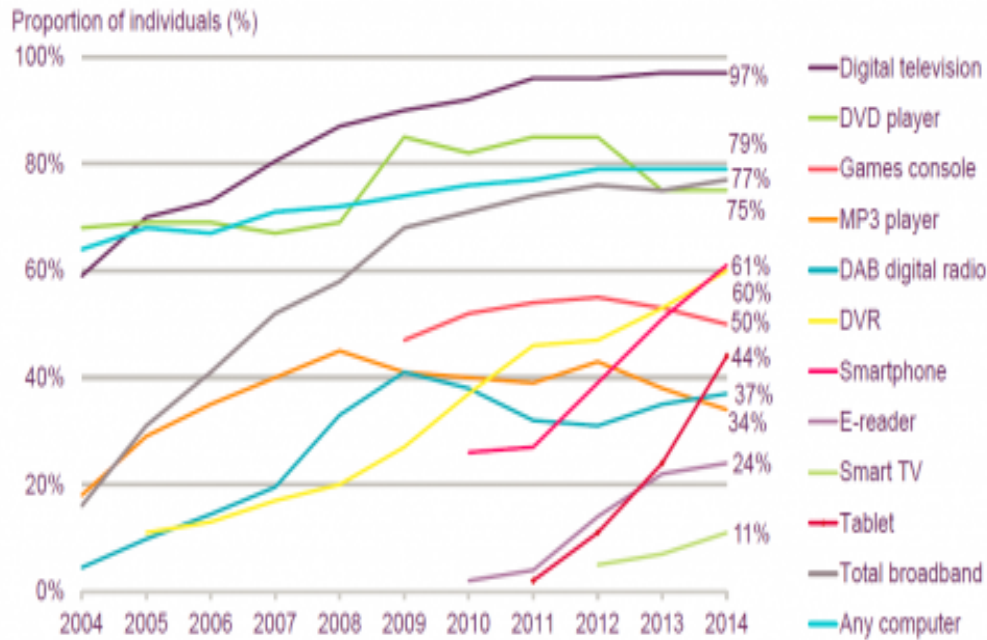
Striking the right balance between fair competition and effective regulation in such rapidly-evolving markets is a veritable challenge for industry regulators and competition authorities alike. Likewise, entities conducting business around the world must stay abreast of changing policies and the shifting terrain to gain a clear understanding of their service provider options.

In this issue of Action Matters, A&M Managing Director Tasneem Azad, examines a number of the issues by reference to the UK landscape, a recently announced strategic review by Ofcom (the country's media and communications regulator), expected investment plans of the firms involved and notable consolidation activity in the sector.

On 12 March 2015, the UK media and communications regulator, Ofcom, announced an overarching strategic review of the digital communications market in the UK, both to inform policy in the UK and to help inform future debates at a European level on the wider Framework.^[1] The last such review was conducted over a decade ago: before smartphones; before Spotify, BBC iPlayer (the BBC's on-demand service) and live-streaming; before the Cloud; before tablets and e-readers; before wireless homes, 3D TVs and intelligent appliances; and, for that matter, effectively before Facebook and Skype (both had just been launched about a year earlier). In short, the digital backdrop of Ofcom's strategic review could not be more markedly different today, with the fruits of the £60 billion industry now firmly embedded within our daily lives.

The average UK adult now spends over half of his or her waking hours engaged in some form of media or communications activity, squeezing some 11 hours' worth into less than nine hours.^[2] Six in 10 UK adults now own a smartphone (take-up on par with laptop ownership), and four in 10 UK households have a tablet. Some 78 percent of households have broadband, with over a quarter on superfast connections, i.e., connections offering speeds in excess of 24 Megabits per second (Mbps).^[3] Particularly transformative for voice services is that over a third of adults are now Voice over IP (VoIP) users, relying on apps such as Skype and WhatsApp on their smartphones or tablets to communicate with their friends and family. Similar trends are being observed across Europe.^[4] Whilst it may be near impossible to predict future trends, Figure 1, on household take-up of devices, seems to suggest that consumer demand for digital technology is unlikely to abate any time soon.

Figure 1: Household take-up of communications and media devices



Source: Ofcom Technology Tracker. Data from Q1 of each year

Note: The question wording for DVD player and DVR was changed in Q1 2009 so data are not directly comparable with previous years. Base: All adults aged 16+ (2014 n=3740).

In this constantly evolving sector, finding the right balance between competition and effective regulation is by no means straightforward, and the current Ofcom review is timely. A decade ago, Ofcom's primary focus had been on the core fixed-line provider, British Telecommunications (BT), with its then strategic review leading to the creation and functional separation of Openreach, BT's wholesale arm. At the time, Ofcom's view was that non-discriminatory and transparent access to BT's copper network would allow for retail competition to thrive, at least downstream of BT's core physical infrastructure. Similar approaches have been adopted throughout Europe, putting in place regimes to access the networks of incumbent telecommunications providers.

Whilst the move undoubtedly facilitated a measure of competition in specific segments over the years (unbundled local-loop connections, for example, now account for 44 percent of all UK broadband connections),^[5] competitors are beginning to argue that Ofcom ought to be looking to more significant — and, crucially, structural — changes in order to allow for deeper and more resilient competition in digital services. Sky's group chief executive, Jeremy Darroch, responded to the Ofcom announcement by welcoming the strategic review and stressing that full and structural separation of Openreach from BT was at "the heart of creating a sustainable industry; one that provides the capacity and incentive to invest whilst also harnessing the power of multiple competing retailers to drive higher take up and lower prices for customers."^[6]

In this respect Ofcom is right to have highlighted, as one of its aims, the consideration of the efficacy and sustainability of competition going forward in digital communications. Specifically, Ofcom has noted that it expects to investigate where future "enduring bottlenecks" might reside, and thus identify where the focus of its future competition and regulatory policy ought to lie.^[7] The question is certainly a complex, and multi-layered, one.

Wireless technologies and next-generation networks are taking us into new virtual worlds, with associated novel complications. In response to a third-party complaint, Ofcom recently found itself having to make a judgment regarding margins associated with Openreach's Virtual Unbundled Local Access offering (i.e., access to its next-generation superfast broadband network).^[8] Ofcom's decision was necessary, in its view, in order to ensure that BT remained constrained in its ability to hinder competition in the provision of superfast broadband services. BT in turn has highlighted the lopsided nature of the regulations, and some commentators are suggesting that the firm may appeal the decision, particularly in respect of some provisions related to BT Sports, one of its commercial TV offerings and a market segment in which BT is not regarded as benefiting from significant market power.^[9] Coupled with the idea of technological convergence — the same network being relied upon for multiple uses such as TV, voice and broadband — and with retailers now bundling and packaging a variety of services for their customers, including offers of triple-play (TV, voice and broadband) and quad-play (triple-play with mobile), it is no longer obvious that the competitive bottlenecks of the future will necessarily be the same as the BT copper infrastructure bottleneck of yesteryears.

Closely related is the question of investment in new technologies and infrastructure, specifically, in mobile and fibre technologies. Ofcom notes that its review is expected to consider how incentives for effective investment can be maintained or, for that matter, strengthened. Mobile network investment continues apace, with operators spending heavily on their

current high-speed 4G networks and talk now turning to what future 5G networks might look like (for example, able to support uses “ranging from financial trading and entertainment to gaming and holographic projections”^[10]) and its likely commercialisation from 2020. In respect of fibre, considerable investment is being made in the sector in order to future-proof existing networks. BT itself has committed £2.5 billion to its fibre roll-out programme^[11] and Virgin Media announced last month a similar fibre investment programme of £3 billion, called Project Lightning.^[12]

Notably, the UK government is also injecting considerable funds into the industry. Through a vehicle called Broadband Delivery UK (BDUK), the government has committed £1 billion to improving broadband and mobile infrastructure in the country. Amongst other goals, the investment is expected to “provide superfast broadband coverage to 90% of the UK by 2016 ... , provide superfast broadband to 95% of the UK by 2017 ... [and] improve mobile coverage in remote areas by 2016.”^[13] However, questions have been raised in relation to BDUK’s arrangement with BT and to the commercial advantage that access to funding of this scale might afford the firm.^[14] Such questions are likely to persist for the foreseeable future, not least given the UK government’s interest in digital progress continuing unabated. Indeed, in his most recent March 2015 budget speech the UK Chancellor, George Osborne, announced a brand new commitment to ultrafast broadband (i.e., with speeds in excess of 100Mbps) for “nearly all homes in the country, so Britain is out in front.”^[15]

Finally, the Ofcom review takes place during a period of significant market consolidation, both in the UK and across Europe. A merger between BT and EE (a UK mobile operator itself formed by a 2010 merger between Orange and T-Mobile) is currently under review by the competition watchdog, the Competition and Markets Authority.^[16] A few weeks ago, the Spanish firm Telefónica confirmed the sale of its UK mobile operator, O2, to Hutchinson Whampoa, the current owner of Three. The deal will lead to the formation of the UK’s largest mobile provider and thus will also be subject to clearance by relevant authorities.^[17] Such deals will no doubt shape significantly the relevant markets going forward, and any strategic review will need to take their likely effects into account.

What the digital landscape will look like in another decade is anyone’s guess. What is incontrovertible, however, is that it will be transformed beyond all recognition, across Europe and the globe. In turn, this will continue to present challenges to sectoral regulators and competition authorities alike. Solutions they found effective thus far may simply fail going forward, leading to less predictable regulatory backdrops. Businesses should brace for such changes as the media and communications landscape undoubtedly continues to shift.

A&M and Devereux Chambers, one of the UK’s leading civil and commercial sets of barristers, are hosting a joint evening event on 17 June 2015 at the Royal College of Physicians in London to discuss some of the issues highlighted in this newsletter.

We will be joined by several industry and regulatory expert speakers including **Kim Hilton Cowie**, Head of Regulatory and Competition at mobile network operator company EE, and **Dr. Andrea Coscelli**, Executive Director Markets and Mergers, Competition and Markets Authority, as we look to address if it is possible to achieve “**Regulatory Certainty in Fast-Moving Competitive Markets.**”

To register your interest in joining the debate and to secure your place at the event, please email A&M marketing director, Zoë Grayston: zgrayston@alvarezandmarsal.com

[1] Ofcom, *Strategic Review of Digital Communications: Terms of Reference, Competition and investment in converged communications infrastructure*, 12 March 2015, accessed April 19, 2015, <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/digital-comms-....>.

[2] In other words, undertaking some activities simultaneously. See Ofcom, *Communications Market Report*, 7 August 2014, p. 9, accessed April 19, 2015, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/2014_UK_CM...

[3] *Ibid*, pp. 27–28.

[4] See Ofcom, *International Communications Market Report*, 11 December 2014, p. 15, accessed April 19, 2015, http://stakeholders.ofcom.org.uk/binaries/research/cmr/cmr14/icmr/ICMR_0...

[5] Ofcom, *Strategic Review of Digital Communications: Terms of Reference, Competition and investment in converged communications infrastructure*, 12 March 2015, p. 5, accessed April 19, 2015, <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/digital-comms-....>

[6] Sky Plc, "Response to Ofcom Announcement of Strategic Review of Digital Communications," press release, 12 March 2015, accessed April 19, 2015, <http://corporate.sky.com/media-centre/news-page/2015/response-to-ofcom-...>

[7] Ofcom, *Strategic Review of Digital Communications: Terms of Reference, Competition and investment in converged communications infrastructure*, 12 March 2015, p. 7, accessed April 19, 2015, <http://stakeholders.ofcom.org.uk/binaries/telecoms/policy/digital-comms-...>

[8] See Ofcom, *Fixed Access Market Reviews: Approach to the VULA margin* (redacted for publication), 19 March 2015, p. 13, accessed April 19, 2015, <http://stakeholders.ofcom.org.uk/binaries/consultations/VULA-margin/stat...>

[9] Dan Worth, "Ofcom sticks to its guns in BT broadband fibre price tests despite EU concerns," V3.co.uk, 19 March 2015, accessed April 19, 2015, <http://www.v3.co.uk/v3-uk/news/2400461/ofcom-sticks-to-its-guns-in-bt-br-...>

[10] Ofcom, "Laying the foundations for '5G' mobile" (undated announcement), accessed April 19, 2015, <http://consumers.ofcom.org.uk/news/laying-the-foundations-for-5G/>.

[11] British Telecommunications Plc, "About [BT] ... What is fibre broadband?" (undated), accessed April 19, 2015, <http://www.bt-ngb.com/about>.

[12] See Virgin Media Inc., "Virgin Media and Liberty Global announce largest investment in UK's internet infrastructure for more than a decade," news release, 13 February 2015, accessed April 20, 2015, <http://about.virginmedia.com/press-release/9467/virgin-media-and-liberty-...>

[13] Government of the United Kingdom, Department for Culture, Media and Sport, "Broadband Delivery UK: Details of the plan to achieve a transformation in broadband in the UK by 2017," published 27 February 2013, last updated 13 November 2014, accessed April 20, 2015, <http://www.gov.uk/broadband-delivery-uk>.

[14] Gaining European Commission competition clearance for the state-aid took some time and Fujitsu, a firm previously involved in the framework bidding process, withdrew its bid, leaving BT essentially alone with the BDUK contract. See Caroline Easter and Shari Taylor, "BDUK superfast broadband now on track following delayed EU State aid clearance?" Ashurst LLP Communications newsletter, January 2013, accessed April 20, 2015, http://www.ashurst.com/publication-item.aspx?id_Content=8667; see Steve McCaskill, "Fujitsu Abandons BDUK, Leaves BT to Scoop Up Contracts," TechWeekEurope, 15 March 2013, accessed April 20, 2015, <http://www.techweekeurope.co.uk/workspace/fujitsu-bduk-withdrawal-bt-fib-...>

[15] The Financial Times Ltd., "UK Budget, the Chancellor's Speech," transcript, 18 March 2015, accessed April 20, 2015, <http://www.ft.com/cms/s/0/f766c4e2-cd64-11e4-a15a-00144feab7de.html#axzz...>

[16] Competition and Markets Authority, Government of the United Kingdom, "BT Group / EE merger inquiry," case opened 4 March 2015, updated 18 March 2015, accessed April 20, 2015, <http://www.gov.uk/cma-cases/bt-ee-merger-inquiry>.

[17] Tim Skinner, "Hutchison and Telefónica confirm O2 acquisition," Telecoms.com article, 25 March 2015, accessed April 20, 2015, <http://telecoms.com/411912/three-and-o2-merge-to-create-uks-largest-mobi-...>

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