

THE POLITICS OF UK TELEVISION POLICY: THE INTRODUCTION OF DIGITAL TELEVISION

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Introduction

Unlike in some other European countries, such as Germany and Spain, digital television began in the UK with a comprehensive regulatory framework already in place.¹ When, in October 1998, BSkyB, the UK's leading (and only) satellite broadcaster, launched a digital service of around 200 channels, the European Directive on Advanced Television Standards had been translated into detailed regulations and specific regulatory responsibilities had been assigned to the existing television and telecommunications regulators. BSkyB's digital launch was followed almost immediately by the introduction of the world's first digital terrestrial television service, providing around 30 channels, including additional channels from the established analogue terrestrial broadcasters and pay-TV channels from the newly formed ONDigital, a joint venture between the existing ITV broadcasters Granada and Carlton. This 'world first' was facilitated by the 1996 Broadcasting Act, which detailed the specific licencing and regulatory arrangements for UK digital terrestrial television. Finally, when Cable and Wireless Communications (CWC), the UK's largest cable company, launches a digital service later this year it will do so against the background of the established regulatory framework.

Despite this, however, there remains considerable uncertainty surrounding policy outcomes in UK digital TV. Will all three delivery platforms (satellite, terrestrial and cable) survive? To what extent will pay-TV services and specifically pay-per-view (ppv) services dominate digital TV? What degree of vertical integration will be tolerated by UK

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¹For more details on the confusing regulatory situations surrounding the launch of digital television in Germany and Spain see M. Cave, 'Regulating Digital Television in a Convergent World', *Telecommunications Policy*, Vol. 21, No. 7, pp.575-596.

regulators? What will the structure of UK television be like in 5 years time? To answer these questions with any degree of certainty is practically impossible.

In this paper it is argued that such a high degree of uncertainty is, at least in part, a product of the changing politics of UK television policy. Specifically, it is argued here that the introduction of digital television in the UK has been shaped by two interrelated trends, which together have undermined the power of UK central government to determine policy outcomes. First, the prospect of an end to spectrum scarcity combined with the UK government's general adherence to 'free market' values has meant that the power to control market entry has shifted away from UK government and towards a small number of commercial firms. Second, partly as a response, a complex structure of policy making and implementation has developed, encompassing a wide range of public and private policy actors. Most notably, this has led to the *'hollowing out'* of UK government, whereby key policy making and implementation functions have been carried out by European government institutions or assigned to 'independent' regulatory agencies.²

The remainder of this paper focuses on tracing the emergence of these trends and illustrating how they have shaped the introduction of digital television in the UK. Specifically, to begin with this paper focuses on the formation of the general digital television policy agenda. Essentially, it is argued that whilst the rhetoric of 'information society' gained renewed popularity in the mid 1990s, the introduction of digital television in the UK was most significantly shaped by a number of key developments in the politics of UK television policy and UK public policy making more generally which first became apparent during the 1980s. In the second part of the paper it is argued that the regulation of digital conditional access systems and the licencing of digital terrestrial television (DTT) illustrate particular well how the power of UK central government to determine policy outcomes has been undermined.

The 'information society'

²For a more detailed discussion of the trend towards the 'hollowing out' of UK government see R. A. W. Rhodes, 'The Hollowing Out of the State', *Political Quarterly*, Vol. 65, No.2, 1994, pp.138-51.

By around the mid-1990s, the discussion of UK television policy had become dominated by the notion of an 'information society' fostered by the 'digital revolution'. In many ways this was a shift back to a policy agenda occupied during the early 1980s, which emphasised the possible industrial benefits to be gained by fostering the development of new technologies. As long ago as July 1981, the then Prime Minister, Margaret Thatcher, claimed that,

'The government fully recognises the importance of information technology for the future industrial and commercial success of the UK and the central role that government must play in promoting its development and application'³

Moreover, long before the idea that digital technology could lead to the convergence of telecommunications, television and computing technologies, cable television policy was described in the government's 1983 White Paper on cable television as, 'the crossroads at which broadcasting and telecommunications issues meet.'⁴ However, the Conservative government's commitment to 'free markets' (discussed more below) meant that it had no intention of assisting with the huge investment costs required to turn rhetoric into reality. Partly as a result, the hoped for industrial and commercial benefits never materialised and the idea of an 'information society' all but disappeared from the 1980s television policy agenda.

The vision of an 'information society' was given new credibility during the early 1990s by the prospect of the widespread adoption of digital technology. In the USA, the Vice President, Al Gore coined the term 'information superhighway', to describe

'a network of networks, transmitting messages and images at the speed of light across every continent [which would] bring economic progress, strong democracies, bet-

³ Quoted in R. Negrine, 'New Media in Britain: Is There a Policy?' in K. Dyson and P. Humphreys (eds.), *Broadcasting and New Media Policies in Western Europe*, Routledge, 1988, p.226.

⁴ Home Office and Department of Trade and Industry, *The Development of Cable Systems and Services*, HMSO, 1983, p.5.

ter environmental management, improved health care and a greater sense of shared stewardship of our small planet’⁵

Similarly, in Europe, the 1993 White Paper on Growth, Competitiveness and Employment linked the development of the information society to the creation of new markets, jobs and European economic growth.⁶ The following year the Bangemann Report, on the information society, identified the,

‘interconnection of networks and interoperability of services and applications’ as ‘primary Union objectives’ and concluded that ‘open system standards will play an essential role in building a European information infrastructure.’⁷

The rhetoric of ‘information society’ has certainly been a detectable feature of UK government policy initiatives on digital television. The UK government’s White Paper on digital terrestrial television (DTT) claimed that DTT would ‘provide significant opportunities for the British manufacturing and programme production industries’ and that for many people DTT would ‘provide their first experience of the full potential of the information superhighways’.⁸ However, for the most part, in reality, the introduction of digital television in the UK has been shaped more by political developments which first became apparent during the mid 1980s than any commitment to the ideal of an ‘information society’. Essentially, during the early 1980s the UK had four terrestrial television channels (BBC-1, BBC-2, ITV and Channel 4), which were all delivered terrestrially and subject to detailed, albeit informal, regulation in order to ensure the fulfillment of certain ‘public service’ objectives. By the mid 1990s, much of this had fundamentally changed.

Free Markets and Consumer Choice

⁵A. Gore, ‘Plugged Into the World’s Knowledge’, *The Financial Times*, 19 September 1994, p.22.

⁶Commission of the European Communities, White Paper on Growth, Competitiveness and Employment, COM (93)700, 1993.

⁷Europe and the Global Information Society: Recommendations to the European Council. Report of the High Level Group on the Information Society (the Bangemann Report), 1994.

⁸Department of National Heritage, *Digital Terrestrial Broadcasting: The Government’s Proposals*, HMSO, 1995.

The introduction of digital television took place against the background of nearly 20 years of neo-liberal Conservative rule. As in other areas of public policy, the Conservatives television policy was heavily informed by an ideological commitment to 'market forces' and the expansion of consumer choice.⁹ The clearest expression of this 'free market' agenda in relation to UK television policy came with the publication of the Peacock Report in 1986. Alan Peacock, a well known free marketeer, was appointed to chair a committee to examine alternatives to the BBC's licence fee. Despite Thatcher's own preferences, the committee rejected the replacement of the licence fee with advertising, but in doing so still adhered to 'free market' thinking. The report argued that,

'The fundamental aim of broadcasting policy should in our view be to enlarge both the freedom of choice of the consumer and the opportunities available to programme makers to offer alternative wares to the public'¹⁰

And went on to conclude that,

'British broadcasting should move towards a more sophisticated market system based on consumer sovereignty...'¹¹

Despite its support for the licence fee, the Peacock Report was fundamental in establishing 'free markets and consumer choice' as the guiding principle of Conservative broadcasting policy.

The report provided the 'free market' basis for the governments 1988 White Paper, Broadcasting in the '90s: Competition, Choice and Quality and the 1990 Broadcasting

p.1.

⁹For more details see A. Gamble, *The Free Market and the Strong State: The Politics of Thatcherism*, Macmillan, 1988.

¹⁰ Home Office, *Report of the Committee on Financing the BBC (The Peacock Report)*, HMSO, 1986, p.125.

¹¹ *Ibid.* p.133.

Act.¹² Not by any means all of the specific policy recommendations made in the Peacock Report were actually implemented. However, a number of significant reforms were introduced, such as the auctioning of ITV franchises and allowing Channel Four to sell its own advertising time in competition with ITV, which aimed to introduce more competitive pressures into UK television. In fact, perhaps the best illustration of the influence of 'free market' ideas on the Conservatives television policy was not so much what was included in the 1990 Broadcasting Act, but rather what was not. The new satellite and cable broadcasters were simply left to the market place.¹³

The development of new delivery technologies

Influenced by their belief in the superiority of free markets, during the early 1980s the Conservative government saw cable as the means by which new entrants could enter the television market. Cable systems were to be developed by private sector investors and cable broadcasters were to be free from the public service commitments of terrestrial broadcasters. However, as mentioned above, cable television's role as the driving force behind the development of the 'information society' stalled largely because of a lack of willing investors. By 1988, cable was available to just 300,000 homes across the UK and of them only 45,000 were connected.¹⁴ In fact, it was not until direct-to-home satellite television (DTH) had become established in the UK that cable television experienced any significant growth.

The 1977 World Radio Administrative Conference (WARC) allocated five DTH television channels to the UK. To begin with, the Conservatives reaction to the possibility of satellite broadcasting owed more to the traditional public service approach than Thatcherite 'free markets'. Backed by the government, the BBC was initially enthusiastic to take advantage of the opportunity to launch new channels. However, as the extent of

¹²Home Office, *Broadcasting in the '90s: Competition, Choice and Quality*, HMSO, 1987; *Broadcasting Act 1990*.

¹³For a more detailed account of the limited implementation of the Peacock Report see M. Wheeler, *Politics and the Mass Media*, Blackwell, 1997, pp.126-138.

¹⁴Quoted in P. Goodwin, *Television Under the Tories: Broadcasting Policy 1979-1997*, British Film Institute, 1998, p.64.

the investment costs required (and the government's unwillingness to contribute towards them) became increasingly apparent the BBC was forced to withdraw from the venture.

Consequently, in 1986, the government requested the Independent Broadcasting Authority (IBA), the regulator of ITV, to advertise for a commercial contractor to provide a DTH service of three (later five) channels, which would fulfill certain public service criteria and be expected to go on air before 1990. The franchise was eventually awarded to British Satellite Broadcasting (BSB), a consortium of companies including Virgin (which later dropped out), Pearson, Reed International and existing ITV franchise holders, Granada and Anglia TV. However, the new transmission technology that BSB was required to use was subject to continue difficulties and the start of the new service was repeatedly delayed.

In fact, the development of satellite television was determined by two factors, which have also shaped the introduction of digital television in the UK. First, for the first time, UK television policy was significantly influenced by a European government policy initiative. In response to Japanese proposals for the adoption of the MUSE transmission system as a world standard for high definition television, European policy makers set about the development of a rival high definition standard to be adopted by Europe wide satellite broadcasters (MAC).¹⁵ This culminated in the adoption of the so-called European Mac Directive.¹⁶ However, the MAC standard itself became fragmented (DMAC, D2MAC and HDMAC) as different standards were adopted by different national governments. As a result, many of the proposed economic benefits of a single standard were lost. Hence, the MAC's development problems and BSB's delayed launch.

In addition, the MAC debacle was an expensive embarrassment for the European Commission, costing some 900m ECU's in development and marketing.¹⁷ This lesson

¹⁵For a more detailed account of the development of the MAC standard and the making of European Commission policy on high definition television see A. Cawson, 'High Definition Television in Europe', *Political Quarterly*, Vol. 66, No. 2, 1995, pp.157-73.

¹⁶Council Directive (86/529/EEC) (The Mac Directive).

¹⁷ Figure cited in C. Cowie, 'Vierteljahrshefte Zur Wirtschaftsforschung, heft 4, 65. jahrgang, 1996, p.473.

informed the thinking of the Commission when it came to the technical standard setting for digital television services and this was to have a significant impact on the introduction of digital television in the UK.

Second, the development of satellite television also illustrated how with the ending of spectrum scarcity the power to control market entry had shifted away from UK government and towards commercial firms. The launch of Murdoch's Sky satellite television service in 1989 demonstrated the inability of UK government to effectively control market entry, the basis of the public service based terrestrial system. The MAC standard was ignored by Sky television, which by using the Luxembourg Astra satellite and the less expensive PAL transmission system was able to capitalise on the fact that BSB, the authorised British satellite broadcaster, was forced to wait and use the more expensive MAC standard. This enabled Sky to build up a sizable market base and eventually Sky and BSB merged in what was in all but name a takeover of the latter by the former. Hence the newly formed company was named British Sky Broadcasting (BSkyB), continued to use the PAL transmission standard and the Astra satellite and ignored the public service requirements initially imposed on BSB.¹⁸

Strictly speaking, the UK government was not entirely powerless to act against the merger. In subsequent years UK governments have acted successfully to drive UK directed pornographic channels out of business.¹⁹ However, the Conservatives adherence to 'free markets' and Thatcher's personal admiration for Murdoch's commercial dynamism ensured there was no government intervention. This was despite BSB's attempts to persuade the government to take action against Sky and provide 'a level playing field'. In fact, when, on one of their rare visits to 10 Downing Street, BSB representatives complained about Sky Thatcher simply told them to 'stop whining'.²⁰

¹⁸For more details (from a BSB perspective) see P. Chippindale and S. Franks, *Dished! The Rise and Fall of British Satellite Broadcasting*, Simon & Schuster, 1991. (From a Sky perspective) see M. Horsman, *Sky High: The Inside Story of BSkyB*, Orion Business Books, 1997, pp. 67-85.

¹⁹ For more details see F. Coleman and S. Mcmurtrie, 'Red Hot Television: Domestic and International Legal Aspects of Satellite Television', *European Public Law*, Vol. 1, No. 2, 1995, pp.201-214.

²⁰ Chippindale *Op. Cit.* p.211.

Facilitated by the Conservatives 'laissez- faire' approach, BSkyB achieved impressive growth during the 1990s. By gaining exclusive rights to a whole host of sports events and Hollywood movies, BSkyB soon developed into a highly profitable enterprise. By mid 1997, BSkyB dominated UK pay-TV with over 6 million subscribers and annual profits of over £300 million.²¹ Moreover, the cable industry had also benefitted from BSkyB's success. By May 1997, principally by relaying BSkyB channels, the number of homes passed had increased to around 9 million and the number of TV subscribers to around 2 million.²² In fact, by the mid-1990s the public policy problem had become how to avoid the translation of BSkyB's dominance of analogue pay-TV into the digital age. To a large extent, the UK government's solution has been to put its faith in economic regulation.

The emergence of the 'regulatory state'

For much of the post war period UK governments placed great emphasis on redistributive policies and 'demand management'. Hence labels such as the 'welfare state' or 'Keynesian state'. However, political consensus about the beneficent role of the state - as planner, direct producer of goods and services and employer - began to crumble during the 1970s. The combination of rising unemployment and rising rates of inflation could not be explained within the Keynesian models of the day, while discretionary public expenditure and generous welfare policies were increasingly seen as part of the problem of poor economic performance.²³

Informed by economic theory, during the 1980s, the Conservatives contributed towards a discernible shift in the mode of governance in the UK, away from the previously dominant 'positive state' and towards the development of a 'regulatory state'.²⁴ Ac-

²¹Horsmann Op. Cit. p.xiii.

²² S. Peake and P. Fisher (Eds.) *The Media Guide 1998*. Fourth Estate, 1998, p.192

²³For more detail see D. Kavanagh, *Thatcherism and British Politics: The End of Consensus?* Oxford University Press, 1990.

²⁴ See M. Loughlin and C. Scott, 'The Regulatory State' in P. Dunleavy, A. Gamble, I. Holliday and G. Peele (Eds.), *Developments in British Politics 5*, Macmillan, 1997, pp.205-219; G. Majone, 'The Rise of the Regulatory

According to economic theory, resources are distributed more efficiently through competitive markets than directly by the state. However, market failures occur when one or more market conditions are imperfect. For example, common market failures are monopoly power, negative externalities or the insufficient provision of public goods. Hence the theory that economic regulation, if it succeeds in removing such 'failures' at a reasonable cost, can improve market efficiency.

The most obvious product of the Conservatives adherence to this new 'regulatory' approach was the privatisation of public utilities in the 1980s and early 1990s.²⁵ Each privatisation was accompanied by the establishment of an 'independent' regulatory agency. For example, the privatisations of British Telecom, British Gas and the electricity industry were accompanied by the formation of the Office of Telecommunications (OfTel), the Office of Gas Supply (OfGas) and the Office of Electricity Regulation (OfReg). These agencies were all modeled on the Office of Fair Trading (OFT), established in 1973, and were designed to promote 'economic efficiency' in the newly privatised industries by regulating competition and tackling 'market failures'.

In fact, since the 1980s the logic of 'economic regulation' has dominated the making of UK public policy even in areas where the appropriateness of free markets has not been automatically apparent. For example, both the introduction of an 'internal market' into the NHS and the 'contracting out' of local government services were designed to improve efficiency by imposing regulations inspired by the logic of economic regulation. Such has been the widespread acceptance of the logic of economic regulation that in their survey of the role of 'experts' in UK policy making, Markoff and Monocinos found that,

State in Europe', *West European Politics*, Vol. 17, No.3, 1994, pp.77-101.

²⁵The policy also delivered certain political benefits to the Conservative governments, such as reducing public expenditure, widening share ownership and reducing the power of public sector trade unions.

'economists have been the fastest growing group of professionals throughout executive bureaucracies in recent decades and have partially displaced older groups as the principle advisers to ministers.'²⁶

And they concluded that,

'In Great Britain, the language of economists has now become part of the parlance of government.... Under Margaret Thatcher, the Whitehall elite came to use the language of the market rather than their traditional Mandarin English.'²⁷

The impact of the shift towards a 'regulatory state' had only a minimal impact on UK television policy during the 1980s. Although it is worth drawing attention to the fact that the Broadcasting Act 1990 replaced the (IBA), which was legally responsible for ITV broadcasts and designed to facilitate the 'self regulation' of commercial broadcasting, with the supposedly 'light touch' regulator, the Independent Television Commission (ITC), to act simply as the licencing body and independent regulator. The 1990 Broadcasting Act also gave the ITC the duty to 'ensure fair and effective competition' amongst licenced services. For the most part, however, the replacement of the old 'broadcasting' IBA with the new 'regulating' (ITC) has made little difference to UK television policy.

However, due in no small part to BSkyB's dominance of the analogue pay-TV market, the introduction of digital television has illustrated the increasing salience of economic regulation in relation to UK television policy. Most notably, digital television and especially pay-TV has a high potential for what economists term 'foreclosure'. Foreclosure is the use of dominance in some part of a market to leverage power in a related market. Horizontal foreclosure may result from anti-competitive joint action in the same market or through some exclusionary practice such as predatory pricing. Alternatively, vertical foreclosure is where the controller of a bottleneck facility uses this technology to

²⁶ J. Markoff and V. Montecinos, 'The Ubiquitous Rise of Economists' *Journal of Public Policy*, Vol. 13, No. 1, 1993, p.39.

²⁷ *Ibid.* p.47.

enhance its position in either an upstream or a downstream market.²⁸ By the mid-1990s, the need to regulate economic competition had become an established feature of UK television policy.

Overall, since the 1980s, there has been a shift from a mode of governance based on direct state intervention, supported by the power to tax and spend, to one characterised by rule making and extensive delegation of powers to institutions operating at arm's length from government. The 'regulatory state' involves the establishment of new forms of control and accountability. If policy makers wish to control or influence regulatory agencies operating at 'arm's length', they must do so by contractual arrangements. In effect, government by regulation, as the introduction of digital television in the UK illustrates, is government by proxy.

The regulation of digital conditional access systems

Conditional access describes the system by which service providers control viewer access to different programmes and channels, so that only those who have paid the appropriate charges can actually watch the service. Conditional access is achieved by the service provider scrambling the TV signal, whilst providing subscribers with an Integrated Receiver Decoder (IRD) - most commonly known as a 'set top box'. If the subscriber has paid to receive the services he or she will be issued with the appropriate smartcode, which when combined with the set top box allows the subscriber to unscramble the picture. However, establishing a conditional access system is extremely costly, both for the developer and consumers who have to purchase a 'set top box' decoder connecting the conditional access system to their television. As a result, there are tremendous 'first mover' advantages in the pay-TV market (consumers are unlikely to purchase two different set top boxes). This effectively means that control of conditional access is likely to put the service provider in a gatekeeper position over the entire pay-TV

²⁸For a more detailed account of the possibilities of 'foreclosure' in UK digital pay-TV see C. Cowie and P. Crowther, *Review of the Allocation of Digital Multiplex Licences and its Implications for Competition in UK Broadcasting*, Unpublished.

market. For example, BSkyB's dominance of the analogue pay-TV market was in no small part facilitated by its control of access to conditional access technology.²⁹

The introduction of digital television offers the potential for non-pay TV broadcasters to gain access to this lucrative market. In fact, the growing importance of conditional access is likely to be a defining feature of digital TV. For example, the Department of Trade Industry has noted how,

'Conditional access - the management of subscription or pay television - will be an important feature of all forms of digital broadcasting.'³⁰

However, the regulation of digital conditional access systems illustrates particularly well how UK central government's power to determine policy outcomes has been undermined. Specifically, the 'hollowing out' of UK central government has been particularly apparent. First, the impetus for the regulation of digital conditional access systems in the UK came from the European Commission's 1995 Advanced TV standards Directive.³¹ The measures that the UK government took during 1997 were essentially devoted to its implementation.

From a European perspective, the switch to digital technology offered the opportunity to engineer a single market in European television, with European level standardisation replacing the disparate collection of analogue national transmission standards. However, following the 'Mac debacle', the Commission's guiding principle was now to go with the grain of the market, rather than try to steer it. Increasingly, the Commission

²⁹ For more details see M. Cave and C. Cowie, 'Regulating Conditional Access in European Pay Broadcasting', *Communications & Strategies*, No. 23, 3rd quarter, 1996, pp.119-142.

³⁰ Department of Trade and Industry, *The Regulation of Conditional Access Services for Digital Television*, January 1996.

³¹ Council of the European Communities, *Directive on the use of standards for the transmission of television signals*. 95/47/EC.

conceived of its role as a facilitator and legitimiser of industry consensus, rather than that of a regulator imposing regulations on a reluctant industry.³²

This approach was illustrated most clearly by the importance attached to the role of the Digital Video Broadcasting Group (DVB). The DVB was established in September 1993, on the initiative of Peter Kahl, an official of the German Telecommunications Ministry. Strictly speaking, the DVB was simply a private industry grouping. In reality, however, it played a key role in the establishment of European and thereafter UK policy towards digital TV. The drafting of the 1995 directive saw particularly close links develop between the Commission and the various industry players involved in the DVB. Above all else, the desire of European government policy makers for the DVB to take responsibility for standardisation gave the group a privileged position. DVB specifications usually made rapid progress through the formal standard setting procedures and both the Council and the Commission delayed regulatory proposals in the hope that consensus agreements in the DVB would make them unnecessary.³³

In areas where there were no great vested interests at stake, the DVB served as an efficient forum to agree industry standards. Agreements on a digital satellite transmission specification and a common scrambling algorithm were both reached by the end of 1993. However, the limits of the DVB were clearly illustrated in the area of conditional access, where the interests of existing analogue pay broadcasters in extending their control of proprietary conditional access systems to the digital market placed them in opposition with third party broadcasters who would need access to these systems. Essentially, the dispute was between broadcasters such as Canal Plus and BSkyB, with an existing proprietary access system and a significant installed base of subscribers, and potential entrants into the industry with neither of these advantages. The former favoured the so-called 'Simulcrypt' option, which would involve creating proprietary encryption systems. The latter favoured 'Multicrypt' technology, which would provide a 'common interface' and enable the host's 'set top box' to interact with a wide variety of conditional ac-

³² D. Levy, 'The Regulation of Digital Conditional Access Systems: A Case Study in European Policy Making', *Telecommunications Policy*, Vol. 21, No.7, 1997, p.665.

³³ *Ibid.*

cess systems. After a great deal of heated discussion the DVB eventually approved the use of both systems and failed to give support to the mandatory inclusion of a common interface for all EU decoding equipment.

The European Commission Draft Directive on the use of standards broadly accepted this approach. It was only with the adoption of an amendment from the European Parliament that conditional access services were deemed to require more detailed regulatory scrutiny. Essentially, the revised provisions of the directive left digital TV operators free to use their own proprietary decoders, but obliged them to provide 'fair, reasonable and non-discriminatory access' to these conditional access systems for third party broadcasters. The newly amended Article 4(c) of the Advanced Television Standard Directive established the requirement that,

'Member states shall take all the necessary measures to ensure that the operators of conditional access services, irrespective of the means of transmission, who produce and market access services to digital television services... offer to all broadcasters, on fair reasonable and non-discriminatory basis, technical services enabling the broadcasters' digitally transmitted services to be received by viewers authorized by means of decoders administered by the service operators, and comply with Community competition law, in particular if a dominant position appears.'³⁴

In other words, the role of UK government in relation to the regulation of conditional access systems was restricted to implementing the Directive.

Secondly, the 'hollowing out' of UK government was also illustrated by the extent to which the government's was willing to delegate the achievement of the policy goals outlined in the Directive to an independent regulatory agency. Unsurprisingly, in the UK, public debate focused overwhelmingly on Rupert Murdoch's BSkyB, whose dominance of the existing analogue pay-TV market and exclusive rights over a major encryption

³⁴Council of the European Communities, Directive on the use of standards for the transmission of television signals (Advanced Television Standards Directive). 95/47EC, Article 4 (c)

technology, meant that it seemed likely to become dominant in digital TV and could, in the absence of adequate regulation, restrict competition.³⁵ BSkyB maintained that the regulation of conditional access should be left to existing national and European competition law in the same way as analogue conditional access. In contrast, both the BBC and ITV broadcasters were vociferous in urging tough regulation. Most notably, the BBC lobbied hard in an attempt to persuade the government to force the licencing of proprietary conditional access systems.³⁶ In response, BSkyB argued that such a move would undermine investment in digital services.

The result of this political debate was that the UK government's implementation of the EU directive on conditional access took on a high degree of political salience. For example, the Department of Trade and Industry consulted three times on the implementation measures.³⁷

Eventually, the UK government rejected BSkyB's preferred option of leaving conditional access to existing competition law and the Office of Fair Trading. However, rather than make the licencing of conditional access systems mandatory it proposed the regulation of access to digital conditional access services on 'fair, reasonable and non-discriminatory' grounds. Essentially, by rejecting the licencing of proprietary conditional access systems, the UK government ensured that the achievement of key policy goals was to be reliant upon 'day to day' economic regulation, which can only practically be carried out by an independent regulatory authority.

In fact, the trend towards the 'hollowing out' of UK government was further illustrated by the fact that much of the debate surrounding the regulation of digital conditional access focussed not on how it should be regulated, but rather by whom. Oftel argued that it already undertook the economic regulation of broadcast transmissions, as

³⁵ See for example H. Porter, 'The Keeper of the Global Gate', *The Guardian*, 29 October 1996, (G2) pp.2-4; P. Tonybee, 'Will Parliament Resist Rupert's Grip?' *The Independent*, 4 November 1996, p.9.

³⁶ R. Snood, 'BBC Seeks Tighter Digital Rules' *Financial Times*, 4 December 1996, p.9.

³⁷ Department of Trade and Industry, *The regulation of Conditional Access Services for Digital Television: Final Consultation Paper on Detailed Implementation Proposals*, HMSO, November 1996. Previous drafts were published in January and June of the same year.

well as switched telecommunications networks such as BT's and Mercury's. Hence, the regulation of conditional access and multiplex services under the Telecommunications Act would allow Oftel to utilise its existing expertise on issues such as ensuring interconnection to telecommunications networks on non-discriminatory terms.³⁸ In response, the ITC argued that the regulation of fair and effective competition should relate directly to the services which are available to viewers and should therefore be regarded as an element of broadcasting rather than telecommunications regulation.³⁹

In its final consultation paper, the DTI stated that the Government had decided to introduce Conditional Access regulations under the Telecommunications Act 1984, and gave regulatory powers to Oftel. As a result, the achievement of any public policy goals relating to digital conditional access systems in the UK is dependent upon the implementation of Article 4(c) of the European Directive' by Oftel.

The licencing UK digital terrestrial television

At first glance, the introduction of digital terrestrial television may appear to be a clear example of UK central government dictating policy outcomes. The centrepiece of the 1996 Broadcasting Act was the arrangements for the introduction of the world's first digital terrestrial television service. However, in reality, the UK government's inability to control market entry across the whole of digital TV (satellite as well as DTT) meant that the licencing of DTT was overshadowed by the imminent launch of BSkyB's digital satellite service.

The UK government had a definite economic interest in promoting the development of digital terrestrial services. Not least, in order to promote a more efficient use of the spectrum frequency. A single analogue television channel uses at least eight times as much of the scarce spectrum resource than a corresponding digital transmission. Moreover, in the long term, the success of DTT could facilitate the eventual switch off of ana-

³⁸Response by the Office of Telecommunications (Oftel) to Digital Terrestrial Broadcasting: The Government's Proposals, 1995.

³⁹Digital Terrestrial Broadcasting: ITC's Response to the Government's Proposals, 1995.

logue transmissions. The auction of the released spectrum to other users, such as mobile phone operators, could then earn considerable revenue for the UK Treasury. For example, in 1994, the Department of National Heritage estimated that if analogue television transmission was shut down, the available spectrum could be worth as much as £5bn per annum.⁴⁰

However, the UK government's decision to allocate spectrum for digital terrestrial television was not the only way to achieve these economic benefits. For instance, the UK government could well have decided to promote the distribution of digital television via cable or satellite. Both these policy options would have released spectrum for other services and hence provided the UK government with economic benefits. Moreover, technically DTT had been possible for a long time. Since the mid 1980s, contributors to debates on UK television had bemoaned the fact that the government had not seriously considered it.⁴¹ Why then did the UK government chose this particular time to attempt to stimulate the development of DTT?

The government's enthusiasm for DTT can only be explained as a response to BSkyB's plans to launch a digital satellite service. Originally, BSkyB planned to launch as early as mid-1996.⁴² The government's White Paper on DTT clearly revealed the impact of BSkyB's planned launch. It described how,

'the 1990 Broadcasting Act, already allows digital broadcasting via satellite or cable. But 'terrestrial broadcasters can not go ahead with the new technology until the Government introduces legislation, because there is no provision to licence new terrestrial services'⁴³

⁴⁰ Department of National Heritage, 'News Release', 14 July 1994.

⁴¹ Goodwin Op. Cit. p. 149.

⁴² R. Snood, 'BSkyB Plans 120 Channels for 1996', Financial Times, 22 March 1995, p.8.

⁴³ Department of National Heritage, Digital Terrestrial Broadcasting: the Government's Proposals, HMSO, 1995, p.4.

Essentially, DTT was viewed so positively by UK government due to a number of perceived 'non-economic' policy benefits. From the UK government's perspective DTT had the advantages of providing a national digital transmission system with guaranteed coverage for existing free-to-air public service terrestrial channels, offering a nationwide distribution system still under UK government control and creating a rival digital system to BSkyB's planned digital satellite services. This aim was rarely articulated by a government which was wary of being seen to openly challenge Murdoch's broadcasting interests. However, as mentioned above, there was considerable concern that BSkyB could establish the same hold over digital TV that it already possessed in the analogue pay-TV market. Consequently, the 1996 Broadcasting Act specifically charged the ITC with considering how a licence would 'promote the development of digital broadcasting in the UK otherwise than by satellite'.⁴⁴ Clearly, the UK government placed a high priority on ensuring that a variety of transmission paths and distribution technologies would be employed for UK digital television.

This was also reflected in the licencing structure originally devised for DTT. The UK's system of DTT was constructed to fit the technology, but was not determined by the technology. At the centre of the UK government's model for the licencing of DTT was the multiplex - the frequency band within which a number of different channels can be multiplexed together to provide a multi-channel service, otherwise known as MUX. The primary focus of the licencing scheme was the operation and control of the multiplex. The provision of programmes and services to be transmitted over the multiplex was deemed a secondary issue to be determined between the multiplex operator, who holds the licence, and the programming supplier (who may be a separate organisation, or a different part of the multiplex operator's own organisation).

Essentially, the government aimed to achieve its public policy objectives by controlling market entry via the licencing of multiplexes operators. However, to a large extent the licencing arrangements were shaped by the shadow of BSkyB's proposed digital satellite service. It was widely argued, not least by representatives of BSkyB, that when compared with digital satellite DTT had little to offer. It was pointed out that from the

⁴⁴ Broadcasting Act 1996, Section 8 (1)

broadcasters perspective DTT looked like an expensive way of achieving nationwide coverage for a mere 20-30 channels when compared with the 200+ channels that digital satellite could offer. Also, it was suggested that consumers might not buy DTT decoders if they were not compatible with those used for BSkyB's digital satellite services.⁴⁵

The response of the UK government was to offer multiplex licences on particularly favourable terms. Of the six multiplexes available, three were simply allocated 'free of charge' to the existing terrestrial broadcasters (BBC, ITV, Channels 4 and 5 and S4C in Wales) for simulcasting and additional services. The remaining three were to be awarded by the ITC. Licences were to be offered for a renewable 12 year licensing period and, unlike with conventional ITV licences, no cash bid or annual 'licence fee' was required. Originally, these multiplexes were seen as the means by which competition could develop within DTT, with one multiplex operator competing against another. However, with ever increasing doubt being cast over the commercial viability of DTT this plan was quickly dropped.⁴⁶

Despite their initial scepticism, by early-1997 all the terrestrial broadcasters had confirmed that they planned to take up their reserved DTT capacity. Also, by the deadline, two rival commercial bidders had emerged for the other three multiplexes that were made available. One bid came from British Digital Broadcasting, a consortium consisting of the two largest commercial terrestrial broadcasters in the UK - Carlton and Granada - and (to most commentators great surprise) BSkyB. Another from the Digital Television Network (DTN), a subsidiary of CableTel (a US based company with UK cable franchises and the owner of NTL, the company contracted to provide analogue terrestrial transmission services for Channels 3, 4 and 5.)

⁴⁵For an illustration of the types of argument made by BSkyB in relation to the government's DTT policy initiative see D. Elstein, (then Head of Programming for BSkyB), *Stimulating Digital Development: A Presentation for the Westminster Media Forum*, 6 February 1996.

⁴⁶See R. Williams, 'Part III: Issues of Industrial Policy: the UK as an example', *Intermedia, Special Report on Digital Terrestrial Television*, Vol. 25, No.2, 1997, p.29.

The 1996 Broadcasting Act gave the responsibility of deciding between the bids to the ITC. According to the Act the ITC was to judge the rival applicants on the basis of six criteria: the extent of coverage, the proposed speed of roll out, the ability to establish and maintain the proposed service, whether the proposed services would appeal to a variety of tastes and interests, any plans to promote the take up of digital decoders and whether the proposed services would ensure fair and effective competition in programmes and services. As well of course as the general requirement to promote the development of digital TV in the UK otherwise than by satellite.

Generally speaking, the DTN bid remained closer to the intent of the 1996 Broadcasting Act in declaring its plan to act as 'a facilitator to programming clients'. In contrast, the BDB consortium clearly attempted to reintegrate the separated process, bundling their programming into a carriage franchise bid. Moreover, serious concerns were voiced in relation to the competition problems raised by BSkyB's involvement in the BDB consortium by DGIV, the Competition Directorate of the European Commission and by Oftel.⁴⁷ Crucially, however, the BDB bid was deemed to have more reliable financial backing.

Consequently, in June 1997, whilst acknowledging the quality of the programming proposed by DTN, the ITC awarded control of the three commercial multiplexes to the BDB consortium, but only on the grounds that BSkyB withdrew from the consortium and still agreed to honour the long term programme supply contracts originally set out in BDB's application. DTN was reported to be considering an application for judicial review. However, given the courts' track record of reluctance in overturning ITC licence awards it came as no great surprise that no such challenge materialised.⁴⁸

⁴⁷ See N. Buckley and R. Snoddy, 'EU Raises Doubts on Digital TV Licence Bid', *Financial Times*, 4 June 1997, p.11 and R. Snoddy, 'ITC Faces Challenge Over Award of Digital Licences', *Financial Times*, 25 June 1997, p.1.

⁴⁸ When Virgin Television challenged the ITC's decision on the allocation of the Channel 5 analogue terrestrial licence the judgement concluded that judicial review of programming judgements is 'both impermissible and hopeless' For more details see C. Marsden, 'Judicial Review of the Channel 5 licence award' *Nottingham Law Journal*, Vol. 5 , part 1, p.86.

Despite BSkyB's withdrawal from the consortium, Oftel and others have continued to express concern regarding BSkyB's likely position of dominance in relation to programme supply to the new channels, especially in the key areas of sport coverage and movie premieres. Oftel noted that even with BSkyB excluded from holding a share in multiplex licences,

'the participation of BSkyB ... as a long term programme supplier of certain pay TV services, in particular sports programming, raised substantial competition concerns in the pay TV network and conditional access markets'⁴⁹

The ITC's licencing decision, even with the divestiture of BSkyB from BDB, has meant that the market power of already dominant players has been further consolidated. The crucial loci of BSkyB's market power, control of conditional access systems and of premium content remain untouched. In fact, in the case of content BSkyB's position was consolidated.⁵⁰ In short, the future of DTT is at least as dependent upon on the actions of BSkyB as of UK government.

Conclusion

The future of digital television in the UK is surrounded by uncertainty. In this paper it has been argued that, at least in part, this has been the product of the changing politics of UK television policy. The end of spectrum of spectrum scarcity has undermined the ability of UK government to dictate policy outcomes through the control of market entry. As a result, the power to determine policy outcomes in UK digital TV has become increasingly concentrated in the hands of a small number of commercial companies. Furthermore, the increasing reliance of UK government on economic regulation by independent regulatory agencies together with the more prominent role of the European Commission has led to the 'hollowing out' of UK government. Clearly, the future of digital television in the UK is not in the hands of UK central government.

⁴⁹ Oftel, Conditional Access: Consultative Document on Draft Oftel Guidelines, 1997.

⁵⁰ R. Collins, 'Back to the Future: Digital Television and Convergence in the United Kingdom', Telecommunications Policy, Vol. 22, No.4/5, p.395.