

REINVENTING THE MARKET? COMPETITION AND REGULATORY
CHANGE IN BROADCASTING

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Abstract

The reforms instituted by the Broadcasting Act 1990 led to a period of turbulence and upheaval within British broadcasting with results that were at best unintended and, at worst, seriously undermined the ideal of public service broadcasting. A Hayekian economic perspective would suggest that the reforms failed because they did not go far enough in the direction of full 'marketisation'. The paper develops an alternative perspective, based on an adaptation of systems theory within the context of law and economics. This approach offers a broader methodological foundation for the understanding of 'economic law' and a different normative perspective on the broadcasting reforms. It is suggested that the difficulty with these reforms was not their failure to go further in the direction of the market, but rather their lack of clarity in articulating a clear alternative to the market as the basis for the organisation of television production.

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1. Introduction

Since the mid-1980s in Britain, numerous economic reforms have been instituted with the general aim of stimulating competition in the provision of goods and services which were once the preserve of state-run monopolies or near-monopolies. This process of 'marketisation' began as a consequence of the privatisation of certain industries, in particular in transport and the utilities,¹ but has since spread to activities which remain within the public sector, such as health and education.² In local government services and broadcasting, complex arrangements have emerged as part of which public sector providers compete both 'internally' amongst themselves and also 'externally' with private-sector rivals.³

These reforms all rest upon the apparent paradox that regulation can be used to institute a market order in place of a bureaucratic system of governance. In the utilities, the sources of regulation include legislation providing for vertical and horizontal separation between entities within the chain of supply, a pricing formula (RPI-X) contained in the licenses of certain providers which is intended to incorporate incentives for organisations to make efficiency gains, and statutory controls over the quality of services. The delegation of considerable discretion to individual regulators has not, in itself, negated the public-regulatory character of this form of intervention. In the public sector, legislation requires that certain services and products be subjected to competitive tendering and lays down conditions for the granting of licences and franchises to private-sector providers. Internal contracting within the public sector is regulated by rules governing the separation of purchasers and providers and the conditions under which internal transactions are conducted; these rules derive from a combination of statutory regulation and managerial decision-making.

Much of the legal debate over the growth of these forms of economic regulation has focused on their implications for public-law concepts of accountability and transparency.⁴ While these issues are undeniably important, much less attention has been paid to the emergence of a new type of competition policy or *economic law* which attempts to regulate economic activity in such a way as to meet a number of often potentially disparate policy objectives. Thus the promotion of competition has been advanced both as a means of enhancing efficiency in the allocation and organisation of economic resources, and, at the same time, as a means of achieving more traditional, 'social' goals of regulation, in particular the maintenance of universal access to essential goods and services. This attempt to use regulation to foster competition – *regulating for competition* - raises a host of theoretical and practical questions. In particular, the prominent role for regulation seems to be contradicted by the influential notion that the market is, in Hayek's phrase,⁵ a form of self-constituting 'spontaneous order'. Systems theory, with its emphasis on the inherent limits to legal control of the economy, also casts doubt on the likely effectiveness of regulation, while nevertheless holding out the prospect of some kind of process of mutual reception and recognition between the legal and economic systems.

In this paper, the recent experience of the broadcasting sector in Britain is examined in order to shed light on these issues. We first of all analyse in more detail the nature of objections from both economic theory and legal theory to the idea of regulating for competition. This is followed by a brief account of relevant features of the regulatory framework which emerged from the Broadcasting Act 1990 and from the introduction of Producer Choice and related internal reforms within the BBC in the 1990s. We argue that these institutional changes modified but did not abandon the ideal of public service broadcasting. The introduction of market and market-like relations were seen as means to an end: they were aimed at achieving greater economic efficiency and cost-effectiveness while also continuing to support cultural diversity and quality in television production. We then draw on case-study evidence to discuss the nature of the

competition which has emerged as a result of changes in contractual relations between broadcasters and producers of television programmes. Here we focus on the growth of the independent television production sector and on the forms of internal contracting inside the BBC. We conclude by examining how far the broadcasting reforms can be seen to have been successful in meeting the economic and cultural goals set for them, and by considering what the experience of British broadcasting tells us about the relationship between competition and regulation.

2. Regulating for Competition – A Fundamental Contradiction?

2.1. Law as completing or perfecting the market: competition and regulation in the economic analysis of law

Although the theory of competition occupies a central place in contemporary economic thought, the same cannot be said of the relationship between competition and the legal system. The law is loosely understood to have a role in allocating property rights as a precondition of exchange, but the particular distribution of rights and entitlements is seen as exogenous, that is, it is taken as given for the purposes of explaining the operation of the competitive process. Under conditions of pure or perfect competition of the kind assumed by mainstream neoclassical theory, the price mechanism alone is sufficient to ensure that resources flow to their most highly valued uses. Where competition operates unimpeded, a state of general equilibrium ensues which may be thought of as a position in which all potential gains from trade have been made. This is an example of a ‘Pareto-optimal’ allocation of resources, in other words, a distribution which cannot be altered in favour of one or more of the parties concerned except by making at least one other worse off.

The outcome of free exchange under conditions of perfect competition – allocative efficiency – follows necessarily (and tautologically) from the behavioural and institutional assumptions used to set up the model of pure competition. In particular, it is assumed that economic agents

act with perfect 'rationality' to maximise their utility under conditions of costless contracting, where information and resources are able to flow freely in response to changes in prices. From this starting point, it is possible to construct a role for law in overcoming barriers to exchange. This is because only slight departures from the preconditions of competitive equilibrium are needed in order for the 'fundamental theorems' of welfare economics – the basis for the view that pure competition results in efficient outcomes – to fail.⁶ Market failures capable of obstructing the competitive process include transaction costs (understood in a narrow sense as the costs of negotiating, monitoring and enforcing contracts), barriers to contractual cooperation (such as 'opportunism' or self-seeking behaviour on the part of contracting parties), and externalities (which arise where various costs and benefits of activities are not fully captured by market prices, with the result that third parties incur losses or make gains which are not fully contracted for).⁷

The modern economic analysis of law is replete with examples of legal interventions which, it is argued, may enhance economic efficiency by various means. These are not limited to those 'liability rules' of contract and tort which are said to 'mimic the market' by allocating rights to the parties who would have acquired them but for the presence of transaction costs,⁸ but can also extend to public-regulatory interventions which may formally limit freedom of contract. This was recognised by Coase who wrote in 'The problem of social cost' that 'there is no reason why, on occasion, such governmental administrative action should not lead to an improvement in economic efficiency' (Coase, 1960: 18), and who has recently described as 'misleading' suggestions that his work should be read as inherently hostile to government intervention (Coase, 1996: 106).

It is not our intention here to revisit the debate over the normative significance of the 'Coase theorem', but rather to note some methodological implications of the predominant Coasean approach to the economic analysis of legal rules. The world of perfect or costless contracting – the 'zero transaction cost world' of Coasean analysis – is

properly to be understood *not* as a description of any observable economic reality. Rather, Coase himself appears to have thought of it as a heuristic device which could be used to study the effects of transaction costs in concrete market settings (Coase, 1988: ch. 1). However, the use of the ZTC world as a benchmark has some problematic consequences. One is that many law and economics scholars are beguiled into thinking that the purpose of legal intervention should be to reproduce as far as possible the conditions of the ZTC world, despite Coase's own warnings (*ibid.*) that this state of the world is not only unattainable but, most likely, undesirable. Even if this approach is resisted,⁹ there is still a tendency to see the role of the law as 'corrective' rather than 'constitutive'. In this view, the law intervenes to correct market outcomes which are the result of imperfections in the process of exchange, either by allocating property rights *ex ante*, or through *ex post* redistribution based on liability rules and/or regulation. The purpose of legal intervention is to bring about particular states or allocations which can be viewed as superior, in terms of allocative efficiency, to alternative situations in which no legal intervention takes place.

This gives rise to a view that legal regulation can be used to adjust economic outcomes in a way which is consonant with the goal of allocative efficiency. Hence Prosser¹⁰ attributes to leading policy makers the following goal of the system of utility regulation in Britain which was instituted following the privatisations of the 1980s and 1990s: 'the task of the utility regulators is to apply economic criteria with the goal of increasing efficiency in the sense of Pareto efficiency with its goal of a state of the economy in which no reallocation of resources could make anyone better off without making someone else worse off'. This use of regulation is, of course, qualified by the objections raised by public choice theory, in particular the danger of 'regulatory capture' through which self-interested pressure groups or other interested parties organise to take over the regulatory process for their own ends. The granting of a high degree of autonomy to independent regulators in the utilities and other regulated industries in the UK was designed to overcome this problem. The point we wish to

emphasise here is that under this approach, subject to the need to guard against regulatory capture, it is assumed that regulatory intervention can effectively perform a 'market-perfecting' or 'market-completing' function.¹¹

2.2. Private law as underpinning the process of competition: Hayek's theory of the market order

It is instructive to compare this conception of the law-economy relation with that found in Hayekian or 'Austrian' economic theory. A fundamental aspect of Hayek's theory of competition is that legal and social rules have a central, constitutive relationship to the market order. Economic agents, while still acting according to self-interest as in mainstream neoclassical theory, do not operate in a contractual environment in which information and resources flow freely in response to market signals. Rather, they are faced with a complex external environment about which they necessarily have limited information. Under these circumstances, Hayek argues that individual action, including economic behaviour, presupposes the existence of a body of social and legal norms, which serve to coordinate the expectations of individual agents. The market order, or *catallaxy* rests on rules of a particular kind, the 'abstract rules of just conduct', which Hayek associates with private law. Private law and the market order are, then, mutually supportive elements of a 'spontaneous order' which is both the foundation of a society's well being and also the necessary condition for the freedom of its individual members.

More precisely, Hayek's starting point is the decentralised nature of knowledge and information within complex societies (Hayek, 1973: 10). Given this fragmentation of knowledge and information, the contribution of the market, as a mechanism of coordination, is to enable each individual to benefit from the possession and use of information *by others* (ibid., 10-17). As in neoclassical thought, the general well being of society is enhanced through individual action. However, this is achieved less through the realisation of allocatively efficient *states*, than via a process of 'market discovery' which is

based on competition. The market operates through an evolutionary process involving the mutual adjustment of agents' expectations, the end of state of which cannot be known in advance. Hence, the orthodox neoclassical ranking of different states for the purposes of welfare comparisons is inappropriate (Krecké, 1996).

The market is a type of system or 'order' in the sense of being 'a state of affairs in which a multiplicity of elements of various kinds are so related to each other that we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest, or at least expectations which have a good chance of proving correct' (Hayek, 1973: 36). For this purpose, an essential distinction is drawn between 'spontaneous order' or (in Hayek's terminology) *cosmos*, on the one hand, and a made or imposed order, *taxis*, on the other. A *taxis* is an order which is purpose-orientated and is the result of conscious planning or organisation; as such, there is a limit to the degree of complexity which it can achieve. By contrast, 'very complex orders, comprising more particular facts than any brain could ascertain or manipulate, can be brought about only through forces inducing the formation of spontaneous orders' (ibid., 38).

The distinction between *cosmos* and *taxis* corresponds to a distinction between types of norms, that is, between the abstract rules of just conduct (*nomos*) and the rules of organisation (*thesis*). Although a spontaneous order cannot be consciously planned, it nevertheless depends on the abstract rules of just conduct in the sense that 'the formation of spontaneous orders is the result of their elements following certain rules in their responses to their immediate environment' (ibid., 33).¹² The principal features of the rules of just conduct are firstly, that they are purpose-independent; secondly, that they apply generally across a large range of cases and situations whose nature cannot be known in advance; and thirdly, that 'by defining a protected domain of each, [they] enable an order of actions to form itself wherein the individuals can make feasible plans' (ibid., 85-86). By contrast, the rules of organisation are concerned with the internal ordering of governmental and similar bodies; they are 'designed to

achieve particular ends, to supplement positive orders that something should be done or that particular results should be achieved, and to set up for these purposes the various agencies through which government operates' (ibid., 125). Here 'the distinction between the rules of just conduct and the rules of organisation is closely related to, and sometimes explicitly equated with, the distinction between private and public law' (ibid., 132).

This distinction is important because in Hayek's view, public law cannot substitute for private law as the basis for a spontaneous order; nor can the two forms be combined. This is because private law respects, where public law does not, the autonomy and capacity for action of individuals:

'It would... seem that wherever a Great Society has arisen, it has been made possible by a system of rules of just conduct which included what David Hume called 'the three fundamental laws of nature', *that of stability of possession, of its transference by consent, and of the performance of promises*, or... the essential content of all contemporary systems of private law.' (Hayek, 1976: 140)

Although he does not undertake a detailed examination of juridical structures, Hayek implies that the relationship between contract, property and tort is determined by their respective roles in defining and protecting the autonomy of individual agents. Private law is the precondition of the market order in the sense that without it, individuals would not be free to use their own information and knowledge for their own purposes. Although market transactions may be supported by conventions or social norms which are the consequence of interaction between individuals, these norms are not sufficient for the preservation of the spontaneous order of the market: 'in most circumstances the organisation which we call government becomes indispensable to assure that those rules are obeyed' (Hayek, 1973: 47). Hence the exercise of 'coercion' or legal enforcement of norms is justified within a spontaneous order 'where this is necessary

to secure the private domain of the individual against interference by others' (ibid., 57). While a given rule of just conduct almost certainly has a spontaneous origin, in the sense that 'individuals followed rules which had not been deliberately made but had arisen spontaneously' (ibid., 45), such rules do not lose their essential character merely by virtue of being systematised: '[t]he spontaneous character of the resulting order must therefore be distinguished from the spontaneous origin of the rules on which it rests, and it is possible that an order which would still have to be described as spontaneous rests on rules which are entirely the result of deliberate design' (ibid., 45-46).

In other words, the market order cannot operate effectively in the absence of the foundation provided by the rules of just conduct. However, these norms do not seek to direct resources to particular uses; nor do they seek particular distributive outcomes. Public or regulatory law, by contrast, is understood to consist of specific commands and directions which, in aiming at certain substantive redistributions of resources, undermine the autonomy of economic agents. What is illegitimate and counter-productive, in Hayek's view, is not legal ordering of the market as such – this is essential at the level of the rules of private law – but rather the application of public law to the regulation of the market, understood as a spontaneous order:

"This is the gist of the argument against "interference" or "intervention" in the market order. The reason why such isolated commands requiring specific actions by members of the spontaneous order can never improve but must disrupt that order is that they will refer to a part of a system of interdependent actions determined by information and guided by purposes known only to the several acting persons but not to the directing authority. The spontaneous order arises from each element balancing all the various factors operating on it and by adjusting all its various actions to each other, a balance which will be destroyed if some of the actions are determined by another agency on the basis of different knowledge and in the service of

different ends... What the general argument against “interference” thus amounts to is that, although we can endeavour to improve a spontaneous order by revising the general rules on which it rests, and can supplement its results by the efforts of various organisations, we cannot improve the results by specific commands that deprive its members of the possibility of using their knowledge for their own purposes.’ (ibid., 51)

This has the effect that interventions which seek to correct for ‘market failure’, in an attempt to bring about a more allocatively efficient state of the world, merely block the *process* of competition as discovery which provides the means by which dispersed knowledge and information are put to use. Those responsible for designing regulations can never expect to possess the information and knowledge which is in the hands of individual economic agents and have no means of mobilising it through centralised commands; hence, ‘attempts to “correct” the market order lead to its destruction’ (Hayek, 1976: 142).

The normative implications of Austrian analysis for economic regulation may now be considered. An essential point to make is that there is little or no role in this type of analysis for the ‘market perfecting’ or ‘market completing’ role of law which is identified by the economic analysis of law. This is because interventions of this kind, as we have just seen, block the process of discovery on which competition is based. Indeed, without the existence of so-called imperfections – such as imperfect transmission of information – opportunities for profit from entrepreneurial activity or, more generally, from innovation in organisation and design of goods and services, would not exist. In a world of pure competition, in which information and resources moved perfectly freely in response to the price mechanism, such opportunities would be instantly competed away. In the real world, it is precisely the possibility of capturing ‘supra-competitive rents’ or surpluses representing a competitive advantage over their rivals which motivates potential entrepreneurs or

innovators and which, as a result, ensures long-run technological and organisational progress (Kirzner, 1997).

It further follows that the law can most appropriately support economic progress by protecting private property rights and by ensuring that returns accrue to those who make investments in the process of discovery. This is so even though certain gains may accrue by chance, leaving some agents with 'undeserved disappointments' (Hayek, 1976: 1127). Ex-post redistribution of resources blunts incentives for individuals to invest in their own skills and efforts.

This implies that the state should adopt a policy of deregulation in the sense of instituting a 'return to private law'; stripping away regulatory interventions to restore the foundational law of property, contract and tort. Although a limited role for competition policy is not ruled out in order to address particularly egregious restraints or distortions of competition, on the one hand, and the regulation of true natural monopolies on the other, as we have seen it is a mistake to use it to intervene against supposed market failures on the grounds merely that they depart from the model of competitive equilibrium (Kirzner, 1997: 37). In so far as a more extensive role for public intervention may be envisaged at all, it is to ensure that economic agents have the right to participate in the market process; in other words, a right of equal access to the market (Hayek, 1976: 129-130).¹³

In short, Austrian economics places the law-economy relation at the centre of its analysis of the market order, in contrast to mainstream neoclassical thought, but heavily qualifies this by confining the role of public law or regulatory intervention to the margins of the economy. Like the alternative of 'market perfecting' laws, this idea, or a variant of it, may also be found in the modern debate over economic regulation in the UK, in particular in the rationale for regulation put forward in the Littlechild reports on the privatisation of the gas and water industries.¹⁴ In the case of water, continuing regulation was justified on the grounds that the supply of water truly

was (where gas was not) a natural monopoly, meaning that the introduction of competition in this case would result in duplication of supplies and waste. However, according to Littlechild, regulation was necessary in the case of gas only as a holding operation until competition could become effective. It was partly on this basis (and also to avoid over-heavy legal scrutiny of regulatory decision-making) that the RPI-X pricing formula was put forward, but this was done in the expectation that as the monopoly position of the privatised gas industry was whittled away, the role of the regulator would itself become redundant.

2.3. Systems theory and reflexive law: legal 'steering' of the economy?

The concept of 'order' on which Hayek relied in *Law, Legislation and Liberty* drew on early developments in cybernetics and systems theory,¹⁵ and, while he could not have anticipated the later use by Luhmann, Teubner and others of the idea of 'autopoietic' or 'self-reproducing' systems in the context of social and legal theory, there are sufficient continuities between his thinking and these more recent developments to make it feasible to examine some potential links between them. In common with Hayekian economic theory, systems theory clearly addresses the question of whether and how legal regulation of the economy can be made effective. It is precisely this question which, as we have seen, the orthodox economic analysis of law tends to push to one side.

For systems theorists, the problem is addressed at the level of the 'closure' of both the legal system and the economic system. Essentially, it is argued that *direct* intervention by one in the other is impossible given the existence, in each 'sub-system', of internal, recursive processes of self-reproduction. This does *not* mean that there are no causal links of any kind between law and the economy, nor that interactive effects of various kinds cannot be observed in practice. What is being suggested is that causal effects of legal regulation are often indirect and unintended; conversely, changes in

the economy do not invoke automatic adjustments within the legal system:

‘there has to be a move away from the simple logic of cause and effect towards a logic of “perturbation”... Legal autonomy in this sense thus does not exclude the possibility that law, economics and politics are interdependent. In fact, it assumed that they will be interdependent to a considerable extent, with the proviso that this be seen as a problem of how circular, causal processes are subject to external influences.’ (Teubner, 1993: 34-35).

To say, then, that a system is ‘closed to its environment’ in this sense is not to deny the possibility that the system responds to environmental change at some level. However, what is being rejected here is the suggestion that there is a process of smooth adjustment of the kind which is posited by neo-Darwinist theories of the ‘natural selection’ of rules according to their survival value. Hence from a systems-theory perspective, we would not expect the rules of company law (for example) to be ‘efficient’ as a result of competition between jurisdictions to attract investments (Easterbrook and Fischel, 1991). Although company law systems might well be responsive at some point to external economic circumstances (such as shifts in investor opinion), changes in legal rules are most likely to occur on a sporadic and uneven basis as a consequence of external ‘shocks’, and hence to be ‘out of synch’ with equivalent developments within the economy. The trajectory of legal system will be ‘path dependent’ in the sense of being heavily influenced by past choices and institutional ‘lock in’ of the kind which rules out various kinds of adaptation (Roe, 1994). For those who see the law as an autopoietic or self-referential system, this is the consequence of the autonomous and self-reproductive character of legal discourse.

Systems theory counter-balances the notion of the ‘operational closure’ of systems with the idea that systems are at the same time ‘cognitively open’ to their environment. This means that each system contains mechanisms by which it may observe and receive

communications (such as signals, incentives or norms) from the other. Reception, however, presupposes a process of translation or internalisation as part of which the original communication is, necessarily, subject to re-interpretation. In the context of the legal system, this implies a process of 'normativisation' whereby economic concepts are given a specifically legal, normative form. Hence, when engaging in economic regulation, the legal system must 'construct' a version of the external, economic world:

'From the constructivist point of view, the interventions of law in the economy have to be regarded as reciprocal observations between two autonomous, hermetically sealed communication systems. The law "invents" an image of the economy, and formulates its norms by reference to this image. The economy "invents" an image of the law and processes its payment procedures by reference to it. These internal models of the outside world can be constantly refined as in today's economic analysis of law. However, this procedure does not lead from legal conceptions of the economy to the reality of the economic system itself.' (Teubner, 1993: 79)

An improvement in the conceptual language employed by the law to 'observe' the economy would therefore seem to be a minimum prerequisite for the use of the law as instrument of economic regulation. Teubner (*ibid.*, 81) suggests that 'the law must improve its knowledge of the processes, functions, and structures within the field of regulation. It must develop scientifically grounded models of the surrounding systems, and tailor its norms accordingly'. However, in attributing this view to 'the approach adopted by sociological jurisprudence or the economic analysis of law' (*ibid.*) he appears to imply that it underestimates the problem of normative closure which systems theory identifies. Elsewhere, he suggests that the following approach is feasible as a basis for 'reflexive law':

‘Jurists should not hesitate in accepting what is offered by the economic analysis of law and exploiting it for their own regulatory purposes. One can reject the imperialistic claims of “efficiency” and at the same time use economic knowledge in order to understand what happens when the logic of legal structures and that of economic structures impinge on each other. In particular, it can help us learn something about how and to what extent contracts and rights are open to political and legal regulation.’ (ibid., 93)

In Hayek’s account of regulatory law, the market may be understood as a type of self-organising system which is resistant to external regulatory intervention because of the type of ‘closure’ problem identified by systems theory. In so far as regulatory rules meet their initial goals, they give rise to second-order effects which undermine the operation of the market and frustrate the intentions of regulators. Reflexive law, by contrast, holds out the possibility that regulatory law can be made effective by seeking to induce *desired* second-order effects at the level of self-regulatory systems. It thereby seeks to avoid the disruptive and counter-productive effects which ‘direct commands’ or prescriptions could be expected to have on economic processes. This implies, however, that a two-way process of translation and reception between legal norms and economic action is possible. In other words, it would be necessary not simply for legal doctrine to construct conceptual ‘analogues’ to economic processes (the distinctive approach of ‘economic law’), but also for the economic system to develop internal mechanisms of its own by which legal norms could be understood and implemented.

How far does the idea of reflexive law offer a rationale for contemporary systems of economic regulation? Regulation of this kind has acquired a stability and permanence which was not anticipated by the original architects of the post-privatisation regulatory system. Not only have price controls been retained using variants of RPI-X, but wide-ranging regulation of quality has been introduced following the Competition and Utilities Act 1992. In the

public sector, the installation and operation of quasi-markets has required continuing regulatory intervention. Economic regulation has ceased to be confined to putting in place the minimal preconditions for the process of competition as conceived by Hayek and his followers. On the contrary, this form of regulation represents an attempt to 'harness' or 'steer' economic forces to the achievement of a mixture of public policy goals – typically, some combination of economic efficiency on the one hand and the maintenance of public service provision on the other. Thus, as Prosser argues (1997: 19), 'in all four of the main utility regulation statutes... there is no suggestion that the maximisation of economic efficiency is to be the overriding regulatory goal; indeed, the concept of universal service looms large in those duties'. Similarly, in the context of broadcasting, the aims of the Independent Television Commission include not just economic regulation but also regulation of the contents of programmes and of cultural diversity. The promotion of diversity in programming, by seeking to meet a wide range of tastes, is the equivalent for broadcasting of the universal service obligation imposed, in various forms, on the utilities (*ibid.*, 15).

Modern economic regulation, then, runs strongly counter to Hayek's insistence that specific regulatory intervention is incompatible with the preservation of a market order (let alone with its *creation*). The idea of reflexive law corresponds more closely to regulation of this type. But at the same time, systems theory also shares with Austrian economics an emphasis on procedure or process, rather than the direction by law of specific, substantive outcomes. This implies a 'procedural orientation' to reflexive law which makes it appropriate as a basis for underpinning economic relations of various types (Deakin and Hughes, 1999).

The key difference between reflexive law and a Hayekian account of private law is that reflexive law is not confined to the 'foundational' function identified by Hayek for the abstract rules of just conduct, namely that of supporting the purely competitive and rivalrous behaviour of self-interested agents. Rather, reflexive law envisages

types of public-regulatory intervention which operate by encouraging a wider range of responses within self-organising systems. Hence a particular feature of reflexive law, which is found in company law and labour law, is to support mechanisms of economic coordination which involve collective economic actors. The role of auxiliary labour legislation in indirectly underpinning the collective institutions of the labour market has long been recognised.¹⁶ Many company law rules can be thought of in a similar way as supporting internal systems of monitoring and accountability within organisations (Deakin and Hughes, 1999). Although collective actors were regarded by Hayek with suspicion as forms of collusion (see in particular, Hayek, 1988), it has been argued that they may play a particularly important role in mediating between legal regulation and the micro-level of interaction among economic agents.¹⁷

The effectiveness of reflexive law depends, then, on its capacity to 'reconstruct' a wider range of economic relationships and processes than those allowed for by private law; or, as we might put it, it rests on a richer *ontology* of economic forms. In assessing any attempt at reflexive regulation, then, two levels of analysis are implied. The first involves reconstructing the way in which the legislation or other regulation in question 'views' the economic relations which it seeks to regulate. What is the internal legal understanding or representation of the economic actors, entities and processes which are the subject of regulation? The second level involves an examination of the implementation and operation of the regulation in practice. What are the mechanisms by which the legal norms in question are received within the economic system? In the next two sections we consider each of these issues in turn in the context of the broadcasting reforms.

3. Imagining Markets: the Broadcasting Act 1990 and the BBC Reforms

The origins of the Broadcasting Act 1990 lie in the 1986 Peacock Report on *Financing the BBC*¹⁸ and the White Paper of 1988, *Broadcasting in the 90s: Competition, Choice and Quality*.¹⁹ The

Peacock Report advocated the introduction of competitive forces into British broadcasting with the aim of instituting 'a sophisticated system based on consumer sovereignty', which it defined as one 'which recognises that viewers and listeners are the best ultimate judges of their own interests, which they can best satisfy if they have the option of purchasing the broadcasting services they require from as many alternative sources of supply as possible'.²⁰ In order to achieve the goal of meeting viewers' preferences, the report acknowledged that certain institutional reforms would be needed. These were identified in the following terms:

- (i) Viewers must be able to register their preferences directly and register the intensity of their preference. The only system which will fulfil these conditions is 'pay per view'.
- (ii) Effective provision of services presupposes freedom of entry for any programme maker who can cover his or her costs or otherwise finance his or her production.
- (iii) Operators of transmission equipment, where monopoly elements are likely to prevail, must have common carrier obligations to transmit programmes at prices regulated on public utility lines.²¹

This schema contains within it the formal requirements for the establishment of a market order along Hayekian lines: viewers would have paid directly for programmes and the role of the legal system would have been confined to ensuring equal access by producers and regulating the natural monopoly of the transmission facilities. This would have implied the breaking-up of the BBC and the unbundling of programme production from both broadcasting and the organisation of the transmission facilities. This was the model being prepared around the same time for electricity privatisation, which eventually saw the separation of generation and supply (each of which became subject to the introduction of competition) from distribution

and transmission through the national grid (which remained under monopoly ownership but subject to regulatory control).

Given this clear indication of the Committee's thinking, it is all the more surprising that it should then have gone on to argue that there was still a place for regulation aimed at upholding the traditional conception of 'public service broadcasting'. The way in which the Committee expressed this idea was to argue, firstly, that a system based on consumer choice alone would not 'satisfy desires of which people were not previously conscious'. It also suggested that there was evidence that consumers were willing to fund television production 'in their capacity as voting taxpayers' in order to achieve greater diversity and quality of programme production. On this basis, the Committee argued that 'public support of programmes of this type can be accepted by those who believe that viewers and listeners are in the last analysis the best judges of their own interest'.²²

The White Paper of 1988 and the Broadcasting Act 1990²³ which followed it also stopped well short of moving towards a fully-fledged market system. Essential aspects of the traditional duopoly in terrestrial broadcasting between the BBC and ITV were retained, but with market substitutes of various kinds being introduced at points in the system. The first of these was the establishment of an auction process for the granting of broadcast licences on Channel 3 (ITV). This went along with changes to the orientation of the regulatory body with responsibility for regulation of the non-BBC sector, the Independent Television Commission (the successor to the Independent Broadcasting Authority). The aims of regulation were altered to include more explicitly economic objectives but these were placed alongside, and did not replace, the traditional goals of regulation of programme content. Hence in their supervision of the auction process, the ITC were required 'to discharge their functions... in the manner which they consider is best calculated - (i) to ensure that a wide range of services is available throughout the United Kingdom, and (ii) to ensure fair and effective competition in the provision of such services and services connected with them'.²⁴ A

quality threshold was incorporated into the bidding process by barring the Commission from considering a bid which did not satisfy a number of minimum requirements relating to proposed programme content.²⁵ In addition, although the Commission were required under normal circumstances to grant the franchise to the bidder making the highest cash bid, they could disregard this requirement 'under exceptional circumstances' which included a proposal to provide programming of 'exceptionally high quality' or, alternatively, of quality 'substantially higher' than that proposed by the highest bidder. In the more general discharge of their licensing functions, the ITC were also required to take steps to 'ensure the provision of such services which (taken as a whole) are of high quality and offer a wide range of programmes calculated to appeal to a variety of tastes and interests'.²⁶

The second step was the imposition of a requirement that the BBC²⁷ and Channel 3 licensees²⁸ should each contract out 25 per cent. of programming to independent producers. The Director-General for Fair Trading was given responsibility for policing the BBC's quota; in the case of the ITV companies, this rested with the ITC. The independent production sector had grown rapidly since the early 1980s largely thanks to encouragement from Channel 4 which had no production facilities of its own and operated a 'publishing house' model under which all its production was bought in.²⁹ The BBC and ITV companies operated a voluntary quota for independent production from 1987. The thinking behind compulsory outsourcing of production to the independent sector again linked economic factors to cultural ones: 'independent producers constitute an important source of originality and talent which must be exploited and have brought new pressures for efficiency and flexibility in production procedures'.³⁰

Outsourcing was part of a more general move towards vertical disintegration, presaged in the 1988 White Paper which proposed that 'there should be a greater separation between the various functions that make up broadcasting and have in the past been carried out by

one organisation'.³¹ As part of this process, the 1990 Act set in train the establishment of independent networking arrangements within Channel 3. Part of the aim here was to enable the ITV companies to function as an integrated national network. This was intended to stimulate competition with the BBC and other national broadcasters. At the same time, the goal was the introduction of more equal access to the central network both by Channel 3 licensees and by the independents. After the 1990 Act the ITV Network Centre was set up as a central scheduler. At first it required an independent producer to approach the Centre via one of the Channel 3 licensees with whom the producer had to have a pre-existing production contract but following an investigation by the Director General for Fair Trading, the Monopolies and Mergers Commission recommended that independent producers be allowed to contract with the Centre direct, and this change was implemented from 1993.

Vertical separation in the BBC took the somewhat different form of internal reforms under which a series of producer-provider splits were implemented (see Deakin and Pratten, 1998). These were similar to measures first adopted in the National Health Service following the National Health Service and Community Care Act 1990. The first stage, known as Producer Choice, was introduced in April 1993. It essentially consisted of a purchaser-provider split at the level of the relationship between programme makers and suppliers of production resources. The purpose was two-fold: to enable the BBC's management to obtain information on the indirect, overhead costs of its programmes, in particular accommodation and capital depreciation, and to benchmark the costs of internal resource provision against those of external providers, so making it possible to carry out market testing. The aim here was to bring costs under control by identifying potential inefficiencies in the use of internal resources and to target areas for cost reduction.

The second stage involved the introduction of a number of separate internal units or 'directorates' in the autumn of 1996. This time the split was made between programme makers (mainly located in the

Production directorate) and commissioners (located in the Broadcast directorate). The Broadcast directorate put in place an internal commissioning system operating within the overall statutory requirement of the 25 per cent. quota for independent production, in addition to a self-imposed quota to the effect that 10 per cent. of radio output would also be bought in from the independent sector, as well as a pledge made by the BBC governors that 33 per cent of Broadcast's total funding would be spent outside London and the South East.

We may now return to the question we posed at the end of the previous section: what conception of economic relations and processes did these regulatory reforms embody? We would suggest that in none of the three cases – the auctioning of Channel 3 franchises, outsourcing to independents, and the BBC internal reforms – were the changes premised on a model of the self-organising market order. The auction process established by the 1990 Act, although it introduced a formal element of competition into the award of licenses, is best understood as establishing a series of monopolies (albeit limited in space and time) over the use and exploitation of the broadcasting infrastructure. During the lifetime of a license, the licensee is effectively insulated from direct competitive pressure, and it is partly for this reason that close monitoring by the ITC is imposed. The requirement that the ITC should grant the license to the highest bidder, subject only to the quality threshold and to the 'exceptional circumstances' proviso, was designed less with a competitive bidding process in mind than the need to maximise returns to the Treasury.

A further limitation on the market arose from the particular way in which the 1990 Act has parcelled up rights of access to the broadcasting infrastructure (the right to use the transmission infrastructure and broadcast spectrum). Unlike the situation in electricity (after 1990) and gas (after 1995), where production, transmission and supply were separated in such a way as to allow for separate pricing, in broadcasting they were (and are still) 'bundled' together. As a result there is only an incomplete separation of the

markets for programmes and the use of transmission facilities (including use of the broadcast spectrum). Partial unbundling has occurred in the form of the 25 per cent. quota for independent production and the introduction of the ITV Network Centre. However, these fall a long way short of complete unbundling: this would have meant allowing open access to the transmission system, with producers and broadcasters free to buy slots on the network by contracting with the broadcasting equivalent of the national grid.³² This would have made it possible for markets in the buying and selling of television programmes to emerge involving the three elements identified by the Peacock Report – pay-per-view, free entry to the system for producers, and the transformation of the broadcasting organisations into ‘common carriers’ of programmes operating under obligations to provide open and equal access.

Whether or not what some see as the full benefits of market ordering would in practice have ensued – the discovery and dissemination of prices based on product standardisation leading on to arbitrage and derivative trading as means of managing risk (De Vaney, 1996: 630) – is beyond the scope of our present discussion (although it should not be simply assumed that these benefits, which depend to a high degree on the absence of significant barriers to exchange in the form of transaction costs, would follow from unbundling). What we wish to emphasise instead is that the broadcasting reforms were based on a particular conception of a regulated, quasi-competitive system which bore little resemblance to a self-organising market. Moreover, the justification for rejecting this form ultimately lay in the Peacock Report’s belief that full marketisation which it briefly contemplated would undermine the ideal of public service broadcasting.

The same point applies to the BBC’s internal reforms. As BBC insiders recognised, the aim of Producer Choice was not (at least directly) the privatisation of the BBC, but rather ‘to use the market to contribute to the realisation of public service programme purposes’ (Starks, 1993: 37). However, this was a ‘market’ constituted and controlled by central BBC management for purposes mainly related to

internal cost cutting. The public expenditure agenda of central government was again a major motivation, this time in the form of Treasury demands for reduced costs as a quid pro quo for the renewal of the BBC's Charter in 2001. As a result, 'trading' relations between the internal units were mediated by intensive managerial and bureaucratic processes. Prices were set not on the basis of market discovery but through the entirely 'visible hand' of an internal managerial review team consisting of 'pricing specialists' (McDonald, 1995). Although the internal units were benchmarked against suppliers, they were prevented from competing with them in external markets on the grounds that as public sector providers, secured through taxation, they would enjoy an unfair competitive advantage. The separation of the Broadcast and Production directorates was implemented on the basis of an extensive internal commissioning process involving several layers of management, the effect of which was that the commissioning managers of the Broadcast directorate increasingly assumed centralised control over programme making (Deakin and Pratten, 1998).

In short, the broadcasting reforms rested on a mixture of competition and regulation which from a Hayekian perspective would be thought of as inherently unstable. Competitive forces were invoked not in order to institute a process of market discovery, since the preconditions for the spontaneous emergence of prices and market signals were not put in place. Rather, certain elements of competition – periodic bidding for licenses, forced separation of purchasers and providers – were imposed upon existing organisational forms through a mixture of regulation and managerial control. These quasi-competitive elements were introduced as means to various substantive ends which included cost cutting, raising revenue for central government, promoting cultural diversity in programme production, and ensuring the survival of the ideal of public service broadcasting. We now turn to a consideration of how the reforms were received and implemented.

4. The Impact of Marketisation on Programme Production

The reception of the broadcasting reforms by those involved in the process of programme production can be examined at a number of levels. In particular, the implications of marketisation for the use of freelance labour, training, and employee relations have been extensively studied, and many negative effects of casualisation in terms of the quality and reliability of skilled labour have been noted (see Coffee *et al.*, 1997; Dex *et al.*, 1999). The confusion which surrounded the auctioning of the Channel 3 licences and some unintended effects which ensued have also been described (Prosser, 1997: ch. 9; Bonner and Alston, 1998: chs. 10 and 11). Here, for reasons of space, we wish to focus on one particular aspect of the reforms, namely their impact upon contractual relations between producers and commissioners at various points in the chain of supply leading up to the transmission of programmes. Given the market-orientation of the reforms, two critical issues are: how effective in practice were the splits between purchasers and providers which the reforms entailed; and how did the introduction of contracts in place of vertical integration affect flows of information between the different parties?

The issue of the effectiveness of the purchaser-provider split concerns relations within the terrestrial broadcasting organisations on the one hand and between them and the independents on the other. Both the BBC and the ITV companies responded to the 25 per cent. quota by putting in place formal procedures for programme commissioning which were meant to guarantee open and equal access by independents (although, as we saw above, the intervention of the Director-General for Fair Trading was required to bring about a change in the ITV rules which allowed independents to approach the Network Centre without first going through one of the Channel 3 licensees). The ITV Network Centre adopted a Code of Practice which, in addition to embodying the principle that '[b]oth licensees and independents will have equal access to the Centre for submitting programme proposals', also committed the Centre to using 'all

reasonable endeavours to ensure the even-handed dissemination of information concerning programme requirements to all relevant persons'. The internal commissioning documents of the BBC Broadcast directorate, likewise, committed itself to the maintenance of equal access for all suppliers, whether they were in-house or independent, and laid down a number of formal procedures for channelling programme commissions (Deakin and Pratten, 1998). The split between Broadcast and Production within the BBC, in addition to being intended to generate internal efficiency gains, was seen by BBC managers as a pre-condition for a 'level playing field' between its own in-house producers and the independents:

'We are currently [1997] in the process of forming into a group which will include the independent commissioning units for factual, drama and entertainment.. I think in due course this will give independents a more powerful place within the BBC. Originally these independent commissioning units were set up after the introduction of the 25 per cent. quota in order to provide a separate channel through which independents could approach the BBC. The hope was to create a level playing field. However until broadcast and production were split this was, of course, difficult to achieve in practice.'³³

However, these formal splits did not, in themselves, address the question of how information flows were to be generated. In principle, the thinking behind the introduction of competition into the system was that information on consumer wants and tastes would flow to producers who would then respond to the expressed preferences of viewers. In practice, however, in the absence of pay-per-view and completely open access by producers to the broadcasting infrastructure, there were no *direct* mechanisms by which consumer tastes could be expressed and then translated into action by producers responding to signals sent out by the market. What occurred instead was that a new layer of bureaucratic procedures had to be put in place to simulate market demands. This began with a new emphasis on

market and audience research. A 'Programme Strategy Review' was instituted inside the BBC by the controllers of the television and radio channels, the aim of which was 'to understand our audiences and to connect them with the talent and enthusiasm of producers'. The aim of this process was 'to capture [viewers'] interests and attention and to serve them, not to defer to them' (Yentob, 1997: 30).

The next stage was to transfer effective decision making over programme content from producers to commissioners. The explicit intention of this change was to restrict the autonomy of programme producers who had previously enjoyed considerable protection from external pressures and who had, to a large extent, been able to develop their own strategies and priorities for production. According to one of the BBC's senior managers whose own background lay in production, the traditional ITV-BBC duopoly which had operated more or less up to the time of the 1988 White Paper had resulted in 'a captive audience, and a privileged, protected species of programme maker' (ibid.). Other critics of the post-war system identified the problem as one of 'producer elites,... self perpetuating oligarchies which shared a common value system, supported by managements and regulators who themselves started their careers in the broadcasting organisations' (Cox, 1997: 22). The solution lay in requiring that 'the broadcasters - those commissioning the programmes from the producers - [should] make their programme choices based on a sense of what the audience wants to watch, not what is good for them or what seems like a good idea to the producers' (ibid.). For the BBC, then, splitting broadcasting from production was the means by which the system of producer-driven television would be brought to an end:

'Owing in part to technological and regulatory changes the industry has become audience driven. BBC broadcast represents part of the BBC's response to those changes.'³⁴

But for free-market critics of the notion of public service broadcasting, these changes inevitably fell far short of what would

have been necessary to enable the benefits of competitive forces to be felt. Consumer sovereignty would not be achieved by simply interpolating an additional layer of administrators – the internal commissioners – between consumers and producers:

‘Direct payment for services can improve, rather than reduce, the welfare of consumers if it increases their ability to secure the supply of the services they wish to see. Under public service broadcasting, consumers may be able to try services at no cost, but they can only try those services that the producers think they ought to see. These producers may be influenced by the audience figures or other market research on the viewers’ desires, but they have less incentive to meet these desires than the managers of a commercial service, which has to satisfy viewers to earn a living. The public service system of establishing consumers’ desires by market research is that used so unsuccessfully to plan the production of consumers’ goods in the Soviet Union.’ (Sawers, 1996: 90)

At the same time, the view was increasingly expressed that the empowerment of the commissioners was having potentially detrimental effects in terms of reducing the creative autonomy which producers had previously enjoyed.³⁵ Although this argument was put initially by BBC insiders with a background in production, it was taken up by free-market critics who noted that ‘the present emphasis on stricter and more centralised controls over expenditure can be expected to drive out some of the BBC’s creative staff and thereby reduce its creative output’ (Sawers, 1996: 100). For them, this was a positive development since it implied that the BBC’s market share would decline and the case for it continuing to receive public funding would be reduced. At the same time, the public interest would be served by the departure of talented individuals to work in smaller, more efficient organisations: ‘[t]he value of the BBC lies in the abilities of its staff; the public will gain if these people are freed to

work in more favourable surroundings, rather than held inside the BBC' (ibid.).

To argue that the reforms were working *because* they were undermining the sense of purpose of the BBC was an argument confined to those advocating the end of public service broadcasting. However, all sides in the debate, for various reasons, saw the independent sector as having a vital role in meeting consumer demands while also maintaining diversity in programme outputs and raising production standards. For many, the experience of Channel 4, which had depended entirely on external supplies of programming since its inception in the early 1980s, was evidence that the independent sector could indeed meet these objectives. Early on, however, difficulties emerged in the way the BBC and the ITV companies operated the 25 per cent. quota. In other contexts, it has been suggested that introducing compulsion into the process of outside sourcing of supplies and services can lead to an unnecessary degree of adversarialism in contractual relations and may make cooperation difficult to achieve (Vincent-Jones, 1994). In the case of the BBC and ITV, the 25 per cent. quota was effectively compulsory from 1987 as a result of indirect government pressure, before it became formally mandatory as a result of the Broadcasting Act 1990. This, added to difficulties in adapting to the new process, meant that the commissioning process operated by the main terrestrial broadcasters appeared unwieldy by comparison to that of Channel 4. For independent producers, the decision-making process within the BBC is 'difficult to understand. We have never had a considered "no" from the BBC'.³⁶ This is because ultimate responsibility for commissioning lies with senior management who are not always in a position to delegate in such a way as to allow for quick decision-making:

'The Commissioning Editor at Channel 4 clearly has the power to make decisions. It is true that once the decision has been made it has to be confirmed at the "Programme Funding Council" but this is simply a rubber stamp. At the

BBC the power lies with the Channel Controllers, they make the real decisions. So in dealing with a commissioner at the BBC even if they are interested in your idea this can mean a number of different things. It can mean that they are really interested in your idea and the Controllers also support it. There might be internal conflicts and the commissioner is trying to persuade others within the organisation. Alternatively it might mean that the commissioner is just minding their own backs and don't want you to take it elsewhere.'³⁷

The split between independents and broadcasters also suffers from the problem that many independent production companies are too small to operate on a genuinely 'independent' basis. The pool of UK-based independents consists of several hundred companies only a few of which have attained sufficient size to avoid dependence on one or two main commissions each year. For the vast majority of companies, relations with the terrestrial broadcasters are based on 'an illusion of independence' (Garnett, 1997: 133). This raises the question of how far these relations are capable of embodying the 'strong' commercial incentives for efficient organisation and production which the advocates of the free market associate with the introduction of competition.

This has wider implications for the quality of production and for the ability of the independent sector to compete not just with in-house producers but also with overseas (mainly American) suppliers. The independent sector has been compared to a 'cottage industry' (Gutteridge, 1995) akin to that which has long existed in British film production, and which is widely identified in that context as having induced a lack of competitiveness in both domestic and international markets (Pratten and Deakin, 1999). Similar concerns have been expressed in the context of television programmes, following the discovery by the Department of Culture, Media and Sport that the UK is running a sizeable trade deficit in television production (£272 million in 1997) (DCMS, 1998). This was an unpleasant surprise

given that the Secretary of State for Culture had shortly before announced that

‘Britain continues (as it has always done) to produce the best radio and television in the world... I want to see the industry – the independent production sector just as much as the big broadcasters – working together to ensure British programming is in the best possible position to find overseas markets.’³⁸

Research carried out for DCMS by independent consultants in 1998-99 found amongst other things that ‘Britain is not perceived by people in other countries to produce “the best television in the world”’ and that failure in export markets was not the result of distribution, which was ‘efficient and competitive’, but rather of programme production: ‘the main problem is a lack of suitable programmes to sell’ (David Graham Associates, 1999: 9). British-made programmes had a high reputation in areas of traditional strength such as documentary and natural history, but in previously strong areas such as situation comedy and drama they had suffered a decline.

Although the problem of weak export performance is by no means a problem solely for the independent sector, it needs to be read alongside other evidence which suggests that very few UK independent producers are in a position to export a significant proportion of their output.³⁹ This is a feature of the ‘cottage industry’ nature of the industry, as noted above, but is also linked to the difficulty many independents face in obtaining control over the rights to programmes (which they need in order to build up reliable future income streams) and in obtaining long-term supply contracts from UK broadcasters, who tend to prefer to contract on the basis of one-off sales. These factors combine to place many independent production companies in a highly precarious and often barely profitable position.⁴⁰ In other respects, too, there are links between the reception of the broadcasting reforms and the apparent lack of competitiveness of British producers. On the one hand, free market critics can point to evidence which suggests that the lingering effects of the post-war

duopoly continue to insulate domestic producers from competitive influences. Hence the research carried out for DCMS argues that the emergence in Germany of strong internal competition between commercial channels had put pressure on internal budgets and led organisations to seek co-productions and export-led growth (David Graham Associates, 1999: 39). On the other hand, this research also points up the consequences of short-term contracting and endemic uncertainty and instability in the television supply chain:

‘We commission in short runs, we do not make off-air pilots and we do not contract performers for potential second and third runs... Long runs provide benefits from economies from scale, which can improve production values and help to finance extended development. Our major European competitors are operating on a different model of production and commissioning, and gaining the benefits from it.’ (ibid., 33)

Although the research carried out for DCMS speculates that this is a consequence of scheduling practices and possibly of content regulation which disables UK broadcasters ‘from commissioning genuinely commercial programmes’, short-term contracting is a pervasive feature of contractual relations between broadcasters and producers which has been exacerbated by the push towards marketisation and by its association with ‘hard splits’ between purchasers and providers, a tendency which has only recently been offset by the emergence of longer-term contractual arrangements involving some output guarantees (Deakin and Pratten, 1998).

5. Conclusions

This paper has sought to throw light on the nature of ‘economic law’. This type of law has come to prominence in recent years as a consequence of the introduction of regulation aimed at promoting competition in a number of services and industries in the wake of privatisation and reforms to the public sector. We saw that a defining

characteristic of this type of legal regulation is not simply that it aims to promote certain economic goals, such as greater efficiency in organisation and exchange, accountability, and transparency of costs, but that it seeks to harness economic processes to the achievement of other objectives of public policy, such as universal provision of goods and services which are in some way deemed essential or fundamental to citizenship. What we observe, therefore, is the emergence of a particular regulatory technique which might be thought of in terms of *market steering*. Hence in the case of the media industries, which has formed the basis of our case study, the introduction of competition into relations between programme producers and broadcasters was undertaken in order to preserve and strengthen the idea of public service broadcasting and not, as some thought, to undermine it.

It is clear that the changes which followed on from the Broadcasting Act 1990 led to a period of turbulence and upheaval within broadcasting with results that were at best unintended and, at worst, may indeed have undermined the public service broadcasting ideal. Concerns about the quality of television production have emerged not just in the form of complaints about the reforms from broadcasting insiders, but from evidence of a deterioration in the balance of trade in television programmes. From a Hayekian perspective, the apparent failure of the reforms to realise their goals points up the fundamental paradox in the idea of regulating for competition. The solution, from this point of view, lies in the complete marketisation of broadcasting. This would imply the complete unbundling of programme production from the broadcasting and transmission infrastructure, the elimination of state subsidies for production, and the introduction of subscription and pay-per-view.

In this paper we have sought to acknowledge the importance of this Hayekian critique while at the same time developing an alternative approach, based on an adaptation of systems theory within the context of law and economics. This approach offers a broader methodological foundation for the understanding of economic law and a different normative perspective on the broadcasting reforms. The two-fold

method through which we used to evaluate the reforms was, firstly, to reconstruct analytically the internal (legal or regulatory) conception of economic processes on which the changes were based. The second level involved an assessment of the reception of the reforms by the agents and institutions who were affected by them. Here we drew on case-studies of the contractual process involving broadcasters and programme makers.

On this basis, we would suggest that the difficulty with the broadcasting reforms was not their failure to go further in the direction of full marketisation. Rather, the problem lay in their lack of clarity in articulating a clear alternative to the market as the basis for the organisation of television production. What the reforms represented was not a return to a foundational private law of the kind which, from a Hayekian perspective, forms the underpinning of the spontaneous market order. Instead, as we have seen, the regulatory framework retained many elements of near-monopoly control and external supervision of quality from the 'traditional' system. These were coupled with crude attempts to mimic competitive forces, in the form of compulsory outsourcing and internal contracting. The decision to choose a 'mixed' or 'hybrid' system of this kind was informed by the view that complete liberalisation was not compatible with the goal of public service broadcasting – in other words, that the free market alone could not achieve the aims of cultural diversity in programming (a form of universal provision) which remained a goal of public policy. Nor was this by any means an unjustifiable view. The alternative position – namely that the market would indeed meet consumers' diverse wants while also achieving important efficiency gains – depends on some quite heroic assumptions being made about the absence of transaction costs and other barriers to exchange within the broadcasting context.

Under these circumstances, complete liberalisation would simply have been a step into the unknown, which the Peacock Report and the White Paper of 1988 were right to reject. Where they failed, however, was in not offering a clearer conception of the mixed system which

eventually emerged. It was assumed that certain benefits of market ordering could be captured through the introduction of quasi-competitive mechanisms. But even partial liberalisation created problems involving the transaction costs of administering new forms of commissioning and contracting, incomplete and unreliable information flows, and an all-pervasive uncertainty which undermined long-term contractual planning.

The recent experience of economic regulation in Britain suggests that the idea of the market as a self-organising system resting solely on the foundations of private law is an inappropriate model to take as a basis for the implementation of regulatory systems with multiple objectives. Rather, these complex forms of economic law presuppose a kind of economics which can more adequately capture the great variety of processes and relations through which exchange and production are organised in contemporary societies. That is an urgent task of intellectual reconstruction.

Notes

1. For recent contributions to what is now a very extensive literature, see Bishop, Kay and Mayer (eds.), 1995; Helm (ed.), 1995; and Beesley, 1997.
2. See, for a recent collection covering the whole field of quasi-market reforms, Bartlett, Roberts and Le Grand (eds.), 1998.
3. This theme has been a particular focus of the work of Peter Vincent-Jones on compulsory competitive tendering. See Vincent-Jones, 1994, 1998; Vincent-Jones and Harries, 1998.
4. See, in particular, Black, Muchlinski and Walker (eds.), 1998.
5. See Hayek, 1973 and 1976, discussed below.
6. See generally Stiglitz, 1994.
7. The categories of 'strategic action' and 'externalities' can also be classified as transaction costs so that the latter category then embraces all forms of barriers to exchange (see Dahlman, 1979). We do not address here the question of whether the term 'transaction costs' should be used in a specific or generic sense, but on transaction cost economics in general see Pratten, 1997; Deakin, 1999.
8. See generally Posner, 1992.
9. On the need for a 'comparative' analysis of real-world situations which are each, to some degree, 'imperfect' by the standards of pure competition, see Williamson, 1996: ch. 1. On this basis, for example, market competition may be compared against institutional alternatives, such as those based on the firm or on inter-organisational 'hybrids' which combine elements of market and hierarchy.

10. See Prosser, 1997: 11. Prosser attributes this view to Foster, 1992: ch. 9.
11. By a slight extension, the focus may shift to norms which complete the terms of near-complete *contracts*: see Easterbrook and Fischel, 1991, *passim*.
12. For further discussion on the nature of Hayek's conception of social rules, see Fleetwood, 1996.
13. It may also be noted that the risk-spreading functions of many rules of modern private law systems would be seen as illegitimate under Hayek's conception of private law. In fact, Hayek's rules of just conduct bear very little resemblance to any *extant* system of private law. See Deakin, 1997, for further development of this point.
14. *Regulation of British Telecommunications' Profitability* (1984); *Economic Regulation of Privatised Water Services* (1986).
15. See the preface to the 1982 one-volume reprint of *Law, Legislation and Liberty* (Hayek, 1982: xviii-xix): "Though I still like and use the term "spontaneous order", I agree that "self-generating order" or "self-organising structures" are sometimes more precise and unambiguous and therefore frequently use them instead of the former term. Similarly, instead of "order", in conformity with today's predominant usage, I occasionally now use "system".
16. See Kahn-Freund, 1983, ch. 1, for the classic exposition of the distinction between auxiliary and regulatory legislation in labour law; see also Rogowski and Wilthagen (eds.), 1994 for development of similar themes from the point of view of reflexive law.

17. From a systems-theory perspective, the idea that rules of commercial law may become effective through a process of mediation involving 'intermediate level' institutions such as trade associations (see Deakin, Lane and Wilkinson, 1997) would imply that the latter are themselves 'sub-systems' which translate or re-interpret the norms in question. In principle, however, we see no reason why this might not enrich legal rules rather than distorting them. We are grateful to Hugh Collins for discussion and advice on this point.
18. Cmnd. 9824.
19. Cm. 517.
20. Peacock Report, para. 592.
21. *Ibid.*, paras. 547-548.
22. *Ibid.*, paras. 550-551.
23. The Act was amended by the Broadcasting Act 1996. See generally Gibbons, 1998, in particular ch. 5.
24. Broadcasting Act 1990, s. 2(2)(a).
25. *Ibid.*, s. 16(2). These requirements made reference, among other things, to news and current affairs programming, regional programmes, religious programmes, programmes for children, and 'programmes... calculated to appeal to a wide variety of tastes and interests'. On content regulation in general, see Gibbons, 1998.
26. *Ibid.*, s. 2(2)(b). This involved only a slight departure from the equivalent formula in the Act of 1981 which had referred to programmes of 'a high general standard in all respects (and in particular in respect of their content and quality)'. Since in each

case the discretion accorded to the ITC (previously the IBA) was very broad and virtually non-reviewable (see *R. v. ITC, ex parte TSW Broadcasting Ltd.* [1996] EMLR 291) it is not at all clear that this change of wording has made much difference in practice.

27. Broadcasting Act 1990, ss. 186-187.
28. *Ibid.*, s. 16(2)(h), (3).
29. See Deakin and Pratten, 1998.
30. *Broadcasting in the 90s*, at 41.
31. *Ibid.*
32. See De Vaney, 1996, who makes this point in the context of the US system.
33. BBC manager, interviewed by the authors in 1997/8.
34. BBC manager interviewed by the authors in 1997/98.
35. For example, the 1995 Huw Weldon Memorial Lecture given by the playwright Andrew Davies (see Sawers, 1996).
36. Independent producer interviewed by the authors in 1997/98.
37. Independent producer interviewed by the authors in 1997/98.
38. Chris Smith MP, speech to Royal Television Society Biannual Convention, 18 September 1997.
39. A. Cosh and A. Hughes, 'CBR Survey of Independent TV Programme Makers', mimeo, ESRC Centre for Business Research, 1998.

40. Ibid.; see also Deakin and Pratten, 1998.

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