

BIS

Department for Business
Innovation & Skills

**IMPLEMENTING THE REVISED EU
ELECTRONIC COMMUNICATIONS
FRAMEWORK**

Overall approach and
consultation on specific
issues

SEPTEMBER 2010

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Foreword from the Minister for Culture, Communications and Creative Industries

Electronic communications are vital to our working and daily lives. In an increasingly digital world we rely on mobile and fixed line phone services, e-mail and internet – it is hard to imagine life without this important sector.

It's a sector which also makes a major contribution to our economy. In its most recent analysis the European Union estimates the value of the electronic communications market in Europe at about £250 billion, (about half of the ICT sector overall).¹ In the UK that market is valued at about £35 billion.

The electronic communications sector has weathered the economic downturn well. But now we must ensure that the regulatory framework is fit for the future and reflects new technologies and changing consumer expectations. Changes to the European Electronic Communications Framework, which we must implement in the UK by May 2011, will bring our regulatory framework up to date and ensure that there is a level playing field in regulation across Europe.

The Government is committed to improving conditions for business by reducing the regulatory burden in the UK wherever possible. We will ensure that our transposition is proportionate and does not gold plate the Directives. We will also take this opportunity to address problems in process and procedure that have come to light since the transposition of the original 2002 Framework.

Implementing these changes should bring about better investment opportunities and encourage greater competition and innovation amongst electronic communications providers. Consumers should benefit from improved choice of supplier and contract terms, strengthened rights on privacy and confidentiality, faster switching processes and improved accessibility. Ultimately, everyone should benefit from access to higher quality and lower cost communications services.

Your views are important. Please do provide input on the specific questions raised in this document so that together we can ensure the regulatory regime in the UK works for everyone's benefit.

Ed Vaizey
Minister for Culture, Communications and Creative Industries

¹ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Progress report on the Single European Electronic Communications Market (15th Report) + ADDS 1 and 2.

Introduction

1. This document sets out the Government's approach to implementation of the revised European Framework on Electronic Communications (referred to in this document as the Framework). On a directive-by-directive basis it outlines:
 - the key changes made to the texts of the European directives;
 - the implications of those changes for UK legislation, regulation and policy making for the electronic communications sector;
 - how we plan to implement those changes; and
 - where we have discretion, questions to help us determine the best way to implement.
2. The full text of the amending Directives is available at: http://ec.europa.eu/information_society/policy/ecom/library/legislation/index_en.htm.
3. Marked up text of the Directives is available at: www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework. These are not legal documents but are for illustrative purposes only.
4. Under EU law, the UK has until 25th May 2011 to implement the revised Framework.²
5. Many of the revisions to the Framework already exist or apply in UK legislation and regulation. This document describes the main material changes that are needed to implement the revised Framework. In the majority of cases the changes are described for information only. Where more substantive material changes are required for implementation, we have set out those changes and their implications in detail.
6. In a limited number of circumstances the UK has some discretion as to how it implements the amendments to the Framework. Where this is the case and there are options available to us, this document sets out questions on approach and how implementation in these areas might best be achieved. These are clearly labelled throughout the text and it is only in these areas that we are seeking the views of stakeholders.
7. This document also sets out the changes we propose to make to the Universal Service Order in order to implement the revised

² Similar to the 2002 package, the revised Framework has a "big bang" date from which the domestic transposition measures in each Member State must apply to ensure consistent application of the Framework across the EU, namely 26th May 2011.

Framework. Government is required to carry out a statutory consultation before amending the Order. This document constitutes that consultation. Further information is contained in 169 -185.

8. The Government is committed to reducing the regulatory burden in the UK. It is especially important in the current climate to ensure that the proposed changes are implemented with the minimum impact on business as well as to create the conditions where business and consumers can make the most of the opportunities the Framework provides.
9. We will ensure that our transposition does not gold-plate the Directives. This includes, in a limited number of areas, amending Ofcom powers to correct failings in process and procedure that have come to light since the original transposition. In particular, these changes relate to Ofcom's information gathering powers and dispute resolution procedures.
10. In this respect, and in the wider context of amendments to the Framework, particularly changes to market reviews and dispute resolution, we will look at the appeals process to ensure that it correctly reflects the intention of Article 4(1) of the Framework Directive.
11. We hope you find this outline of our approach to the implementation of the revised Framework useful. We look forward to receiving your comments and views on the questions which are set out in the document.

The Framework - Overview

12. The Electronic Communications Framework is the regulatory framework that applies to all transmission networks and services (including access) for electronic communications including: telecommunications (fixed and mobile); e-mail; access to the internet; and content related broadcasting. The Framework is intended to raise standards of regulation and competition across all 27 European Member States' communications markets. It consists of five Directives:³
 - the "Framework" directive (2002/21/EC);
 - the "Access" directive (2002/19/EC);
 - the "Authorisation" directive (2002/20/EC);
 - the "Universal Service" directive (2002/22/EC); and
 - the "E-Privacy" directive (2002/58/EC).
13. The original Framework was agreed in 2002 and had in-built provision for review. In November 2007 the European Commission published a series of legislative proposals for updating the Framework. These proposals were contained in the "Citizens' Rights" amending directive and the "Better Regulation" amending directive, together with a regulation establishing the Body of European Regulators in Electronic Communications (BEREC).
14. Much of the 2002 Framework was transposed through the Communications Act 2003 and the Wireless Telegraphy Act 2006. Many provisions in the e-Privacy Directive were captured in the Privacy in Electronic Communications Regulations 2003 and the Data Protection Act 1998
15. In June 2008 the UK Government published its consultation on "EU Proposals for a Revised Regulatory Framework for Electronic Networks and Services". It set out the main features of the proposals at the time: European Commission powers; functional separation; liberalisation of spectrum markets; consumer proposals; security and resilience; access to emergency services; e-privacy; and provisions to

³ Directive 2009/140/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/21/EC on a common regulatory framework for electronic communications networks and services, 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities, and 2002/20/EC on the authorisation of electronic communications networks and services (the so-called "Better Regulation amending directive), and

Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directives 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws.

help people with disabilities. The consultation, responses to it and the Government response can be viewed at:
<http://webarchive.nationalarchives.gov.uk/http://www.berr.gov.uk/wha/twedo/sectors/telecoms/2006review/page26449.html>

16. The subsequent revisions to the Framework agreed in November 2009 are intended overall to improve the regulatory framework for business and consumers and where possible to remove regulation. Specifically, the Framework seeks to enhance competition in the communications sector through furthering the liberalisation of spectrum markets (e.g. promoting spectrum trading) and making express the power of regulators to impose functional separation on dominant operators (a provision inspired by the UK's own experience of functional separation, with Openreach).
17. The amendments to the Framework must be implemented by 25th May 2011. These strengthen consumer protection, through new provisions (mostly in the Universal Service Directive) intended to ensure that consumers are better informed about supply conditions and tariffs and can more easily switch providers, all of which is intended to help promote competition in the electronic communications markets. The revised Framework also provides clarification that national regulators (Ofcom in the UK) are empowered to impose obligations on all operators (not only designated universal service provider(s)) for the provision to disabled users of equivalent access to public electronic communication services, where appropriate.
18. In some instances the obligations on Member States, national regulatory authorities and industry are extended, particularly with regard to: consumer protection; e-privacy; and security and resilience of networks and services. There is the potential that some of these new obligations could create an additional regulatory burden for business. This is assessed as far as possible in our impact assessment⁴ which is published together with this document at:
www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework
19. We are seeking further evidence of impacts through a questionnaire which is contained in the impact assessment and would be grateful for contributions of evidence stakeholders may wish to make.
20. The Framework also extends the powers granted to Member States and national regulatory authorities. In many instances, though the granting of a power is mandatory, the exercise of it is discretionary. For example, the Framework strengthens the enforcement powers of national regulatory authorities. This is intended to improve regulators'

⁴ This document has been published with an overarching Impact Assessment and individual Impact Assessments. These detail the likely impacts of the policy changes the Government is making in order to implement the revised Framework and are supported by an Equality Impact Assessment and a questionnaire.

ability to deal with breaches of regulatory obligations, including in relation to consumer scams. Where Ofcom exercises such powers it is legally bound to do so in a proportionate manner.

21. The European Commission is also granted new powers, including: greater scrutiny over regulators' decisions on how they regulate their national markets (Articles 7 and Article 7a of the Framework Directive), as well as new powers to issue harmonising recommendations and, in some cases, binding harmonising decisions (Article 19 of the Framework Directive).
22. The revised Framework also provides a role for BEREC, the successor to the European Regulators' Group (ERG), with the aim of intensifying cooperation and coordination among national regulatory authorities and providing the Commission with a source of independent technical expertise. This is to help strengthen the consistent application of regulation across the EU.
23. The revised Framework follows the Commission's recommendation in 2007 reducing the number of markets within the electronic communications sector that are presumed to warrant ex-ante regulation from 18 to 7. The impact of that change was to reduce the number of listed markets in which it is presumed that competition problems persist across the EU. The baseline for telecoms regulation by means of "significant market power" (SMP) remedies has therefore been affected, although national regulators, like Ofcom, remain under a duty to continue to regulate markets where SMP is found (even if they are no longer listed), unless competition law can deal with those competition problems.

Implementing the changes

24. Implementation of many of the amendments is mandatory and, for the most part, we have no discretion over how we implement. Powers and duties in the Directives take a number of different forms, they may appear as a power for, or an obligation, on:
 - the UK as a Member State (though in some cases HMG may consider that it is Ofcom or another regulatory authority such as the Information Commissioner's Office, with regard the e-Privacy Directive, that is best placed to comply with the obligation or exercise the power);
 - the UK as a Member State to empower the national regulatory authority to carry out a particular task; or
 - the national regulatory authority to comply with the obligation or exercise the power.
25. We are working closely with Ofcom which derives its functions and duties from statute and has full operational autonomy from Government. Ofcom is accountable directly to Parliament and funded

by fees from industry for regulating broadcasting and communications networks and grant in aid from Government. Ofcom has already taken forward work linked to implementation on spectrum liberalisation, number porting and accessibility.

26. We are also working closely with the Information Commissioner's Office (ICO) on matters relating to the E-Privacy Directive. Like Ofcom, ICO has full operational autonomy and is directly accountable to Parliament.
27. This document sets out the main material changes we are required to make to implement the amendments to the revised Framework where these are not already captured in UK legislation and regulation. Where these changes are minor and/ or operational in nature, we have set out briefly what the change is and what we need to do to implement it. Where changes are more extensive we have set out those changes and their implications in detail.
28. Where there is some discretion and there are options available to us in implementation this document details revised texts, sets out our preferred approach, and seeks your views. Questions for consultation are set out under the relevant texts and commentaries, in bold font on a grey background. Specifically, the sections where we are seeking views are:
 - Appeals;
 - Facilities sharing;
 - Security and resilience;
 - Dissuasive sanctions;
 - Equivalence for disabled end-users;
 - Personal data breach and enforcement; and
 - "Cookies".
29. We plan to use secondary legislation made under section 2(2) of the European Communities Act 1972 to implement most of the required changes, and section 65 of the Communications Act 2003 for amendments to the Universal Service Order. In addition, the implementation of some provisions by the 25th May 2011 will require modifications by Ofcom to some of the "General Conditions of Entitlement", the main regulatory regime for undertakings that operate as electronic communications providers in the UK, and modifications to the "Universal Service Conditions" that apply solely to BT and Kingston Communications. We are working closely with Ofcom in these areas and where changes are required to these conditions, Ofcom will be consulting on the proposals. More details on Ofcom's role in implementing the changes and on the timing of Ofcom's work are at **Annex 1**.
30. ICO will also consult separately where changes to its guidance are required in relation to implementation of the e-Privacy Directive.

What happens next?

31. This consultation will close on 3rd December 2010. The Department for Business, Innovation and Skills will publish all responses received (subject to confidentiality), as well as an official Government Response to the consultation. Responses will inform drafting of the statutory instruments which will be laid before Parliament in April 2011.

How to respond

32. When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.
33. A copy of the Response Form to our proposed approach is available electronically at: www.bis.gov.uk/Consultations/revise-eu-electronic-communications-framework. We would prefer responses to be submitted electronically.
34. The Response Form is also attached **Annex 2**. Should you respond in hard copy, the form can be submitted by post, fax or email to:

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Fourth Floor, 1 Victoria Street
London SW1H 0ET

Tel: 0207 215 4439
Fax: 0207 215 5442
Email: ecommsframework@bis.gsi.gov.uk

35. A list of those organisations and individuals consulted is in **Annex 3**. We would welcome suggestions of others who may wish to be involved in this consultation process.
36. This consultation exercise will run from 13 September until 3 December 2010.

37. Two stakeholder events have been held prior to publication. Further stakeholder events will be organised during the consultation period. For further information about these events please email John Sexton at: ecommsframework@bis.gsi.gov.uk

Additional copies

38. You may make copies of this document without seeking permission.
39. If you have any particular accessibility needs, please contact us to see if we can arrange to meet those needs.

Confidentiality & Data Protection

40. Your response will be made public by BIS. If you do not want all or part of your response, or name, to be made public, please state this clearly in your response and we will take such representations into consideration. Any confidentiality disclaimer that may be generated by your organisation's IT systems or included as a general statement in your fax cover sheet will be taken only to apply to information in your response for which confidentiality has been requested.
41. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes - these are primarily the Freedom of Information Act (FOIA) 2000, the Data Protection Act (DPA) 1998 and the Environmental Information Regulations (EIR) 2004. If you want information, including personal data that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence.
42. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances.

Help with queries

43. Questions about the policy issues raised in the document can be addressed to:

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44. A copy of the Code of Practice on Consultation is in **Annex 4**.

Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (the Framework Directive)

Introduction

45. The revised Framework Directive aims to establish a harmonised framework for the consistent application of regulation in relation to electronic communications networks and services, associated facilities and services and certain aspects of terminal equipment to facilitate access for disabled users.

National Regulatory Authorities' independence

46. Article 3 describes the role of a national regulatory authority. It lays down provision for their independence and places obligations on Member States to ensure that national regulatory authorities are sufficiently resourced and empowered to undertake their duties and deliver effectively.
47. Article 3(a) is a new provision requiring national regulatory authorities to operate independently of political interference. The same provision also requires that the head of the national regulatory authority cannot be removed before the end of their term, unless they have breached the conditions required for the performance of their duties. The conditions must be laid down in advance in national law. The UK is largely compliant with these provisions through the Office of Communications Act 2002. Minor changes to the 2002 Act and the Communications Act 2003 will be needed to fully reflect the new provisions.

Appeals

48. An effective appeal mechanism is an essential part of the regulatory system. Article 4 provides for rights of appeal against the decisions of national regulatory authorities and requires that an effective appeal mechanism exists at a national level for any user or undertaking affected by the decision of an national regulatory authority. The revised Framework includes some minor textual changes to the way the appeal process is described and adds a new provision, Article 4(3), which places an obligation on Member States to collect data on the number, subject and duration of appeals and report this to BEREC and the Commission on request.
49. However, changes we are implementing elsewhere in the Framework will have an impact on appeals. For example, the market review process (set out in paragraphs 66 - 68) will become more onerous for both Ofcom and stakeholders. Ofcom will be required to carry out new market reviews on the specified markets every three years

and regulatory horizons will be shortened as a result. In addition, the dispute resolution requirements are being extended to cover more converged communications providers and other undertakings than is currently the case (see paragraphs 117- 126). There is a risk that these changes, combined with the current appeals process, may lead to an increase in regulatory uncertainty caused by the 'gridlock' of continuous, overlapping appeals and market reviews.

50. The Government also believes that the interpretation of the current transposition goes beyond what is required by the Directive and we propose to clarify the position by amending the relevant section of the Communications Act 2003.

Current implementation of EU requirements

51. Article 4(1) of the Framework Directive (as set out below with amendments tracked) requires Member States to provide for a right of appeal against decisions taken by the national regulatory authority as follows:

Article 4 -Right of appeal

1. Member States shall ensure that effective mechanisms exist at national level under which any user or undertaking providing electronic communications networks and/or services who is affected by a decision of a national regulatory authority has the right of appeal against the decision to an appeal body that is independent of the parties involved. This body, which may be a court, shall have the appropriate expertise ~~available to it~~ to enable it to carry out its functions. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism. Pending the outcome of ~~any such~~ **the** appeal, the decision of the national regulatory authority shall stand, unless ~~the appeal body decides otherwise~~ **interim measures are granted in accordance with national law**

52. This is implemented through section 195(2) of the Communications Act 2003 which provides:

s.195(2): *“The Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal.”*

53. Appeals under section 192 of the Communications Act 2003 are heard by the Competition Appeal Tribunal. Decisions which can be appealed under section 192 are set out in section 192(1) with judicial review being the other route of appeal for Ofcom's decisions under Part 2 of the Communications Act 2003 and Parts 1 to 3 of the Wireless Telegraphy Act 2006. This consultation only relates to appeals under section 192 of the Communications Act 2003.

54. The current transposition has been interpreted by some appellants as requiring a full rehearing of the case and some contend that the UK transposition intentionally goes beyond the requirements of Article 4(1). Ofcom consider that the perception of an ‘enhanced’ appeal right in the UK has resulted in regulatory uncertainty in the UK. They also consider that the burden of repeated appeals diverts resource from performing their statutory duties and impedes their ability to make timely, effective decisions in the interests of citizens and consumers.
55. In our view an effective appeal that complies with the Directive does not require a full rehearing of the case. It is not the Government’s intention to go beyond what the Directive requires - we believe an effective appeal should, as a minimum, consider whether the Regulator acted lawfully, and followed the correct procedures, took relevant issues and evidence duly into account and generally acted in accordance with their statutory duties. In considering these issues, it should take the merits of the case into account.

Recent jurisprudence on JR and merits appeals

56. In December 2008, the question of what is required by Article 4(1) to provide an effective appeal against regulatory decisions by Ofcom was considered by the Court of Appeal in the T-Mobile case⁵ in a judgment by Lord Justice Jacob. The case concerned the question of whether the High Court had jurisdiction to hear a judicial review of an Ofcom decision to hold a spectrum auction and in particular (i) whether Article 4 requires a rehearing and (ii) whether judicial review was capable of meeting the specific requirements of Article 4(1) Framework Directive to duly take account of the merits of a case.
57. Lord Justice Jacob held in relation to the requirements of Article 4(1) that: *“it is inconceivable that [Article], 4 in requiring an appeal which can duly take into account the merits, requires Member States to have in effect a fully equipped duplicate regulatory body waiting in the wings just for appeals. What is called for is an appeal body and no more, a body which can look into whether the regulator had got something material wrong.”*
58. Having determined what Article 4(1) required, he went on to find that judicial review is capable of meeting those requirements:
- “...the common law in the area of [judicial review] is adaptable so that the rules as to [judicial review] jurisdiction are flexible enough to accommodate whatever standard is required by Article. 4”* [para 19]
- “...I think there can be no doubt that just as [judicial review] was adapted because the Human Rights Act so required, so it can and must*

⁵ T-Mobile (UK) Ltd & Telefonica O2 UK Ltd v Ofcom 2008 EWCA Civ 1373

be adapted to comply with EU law and in particular Article. 4 of the [Framework] Directive” [para 29]

59. The Government therefore considers that a narrower form of review such as an adapted form of Judicial Review can be sufficiently flexible to take the merits of the case duly into account. We propose to change section 192 of the Communications Act 2003 to clarify that it is not the Government’s intention to go beyond what is required by Article 4(1). We believe that a more narrowly focussed appeal than that currently employed is better suited to the new regulatory environment where, due to the changes being put in place under the revised Framework, the certainty and timeliness of decision making will be even more important than under the current regime.

Q1 The Government welcomes views on whether an enhanced form of Judicial Review (duly taking account of the merits) would: prevent the risk of regulatory gridlock under the new Framework by reducing the number and nature of appeals against Ofcom decisions; and whether there are any disadvantages in such an approach.

60. In addition to proposing this change to bring UK legislation in line with the requirements of the Directive, we are also considering whether there are steps the Government could take to ensure appeals are focussed more clearly on determining whether Ofcom has made a material error.

Q2 We welcome views on whether there are steps the Government could take to ensure that appeals are focussed on determining whether Ofcom has made a material error.

The Market Review process and notifying the Commission of remedies

61. Article 7 and Article 7a of the Framework Directive set out new obligations on Ofcom around the notification of its proposed ex ante regulation to the Commission and BEREC. The detail of the changes is set out below.
62. Amended Article 7(3) of the Framework Directive places an obligation on Ofcom to notify to the Commission any ‘draft measure’ (to set, modify or revoke SMP conditions and access-related conditions) affecting trade between Member States only once a national

consultation (under Article 6 of the Framework Directive) has been completed.

63. In practice this means Ofcom will have to reach a further provisional view on its consultation proposals after considering every response received during the national consultation before it notifies the draft measure to the Commission. Currently, Ofcom is able to notify the Commission and other regulators at the same time as it consults nationally, so this new requirement is expected to add significant time to Ofcom's market review process.
64. Should the Commission have serious doubts about an national regulatory authority's notification and wish to exercise its veto power, the Commission will have the power to prevent the national regulatory authority from adopting the proposed measure for 2 months, taking utmost account of BEREC's views on the matter. Currently, the veto power extends only to market definition or SMP findings, and it is not available in relation to remedies. However, Article 7a(1) introduces a further notification and standstill procedure designed to ensure the consistent application of regulatory measures. It gives the Commission powers to scrutinise proposed remedies (and not just an national regulatory authority's market definition and SMP assessment). It is worth noting that the Commission has not, to date, ever launched a serious doubts ("Phase II") procedure against Ofcom.
65. Article 7(9) sets out the grounds under which Ofcom can derogate from the process set out in Article 7(3) and Article 7(4). This was previously Article 7(6) of the Framework Directive. However, it was not implemented domestically in 2003. Now, given the changes to Article 7 and the market review process, we feel it is necessary for Ofcom to be able to introduce measures quickly which would otherwise be caught by Article 7, where there is an urgent need to act.
66. It is also worth noting that Article 16 requires Ofcom to carry out market reviews every 3 years (other than in exceptional circumstances), whereas currently Ofcom has the freedom to carry them out less frequently where it believes it to be appropriate. The trigger point for the start of the three year review cycle is given as "from the adoption of a previous measure relating to the market". We interpret that point as taking effect on or after the transposition date of 25th May 2011, and from the day of the publication of a notification relating to the market review in question.
67. Article 16(6) and Article 16(7) set out the two exceptional cases to the market review cycle rule. These are: where the national regulatory authority has notified a proposed extension to the Commission and the Commission has not objected within one month to that notification;

and, where the national regulatory authority has requested the assistance of BEREC in completing that market review.

68. In order to fully implement the new provisions of Article 7, Article 7a and Article 16(6), we propose to make minor amendments to the relevant sections of the Communications Act 2003. We will also need to ensure that the new provisions mesh with the current provisions which implement the existing notification procedure under Article 7.

Spectrum

69. Article 9 of the Framework Directive applies to the management of radio frequencies for electronic communications services based on the principles of technology and service neutrality, which are concepts already embedded in UK policy. These provisions have been added to by Article 9a and Article 9b to cover liberalisation of spectrum usage rights and the promotion of spectrum trading and leasing. The detail of these changes is set out below.
70. The new provisions in Article 9(3) and Article 9(4) require Member States to ensure that, except in certain limited and justifiable circumstances (such as to avoid harmful interference or to ensure efficient spectrum use), all types of technology and services may be used in those frequency bands that have been declared available for electronic communications services in the National Frequency Allocation Plan. In addition, any measure which prohibits the provision of any other electronic communications service in a specific band (ie. exclusive use) can only be justified by the need to protect safety of life services or in exceptional circumstances to fulfill a general interest objective.
71. This is fully consistent with Ofcom's duties as laid out in statute and with its stated policies, but the necessary change here is for current policy to be enshrined in provisions in the Wireless Telegraphy Act 2006. Ofcom will also be required to regularly review the necessity of any restrictions which they impose which fall within Article 9(3) and Article 9(4) and to make the results of the review public. This is a new requirement but not a significant departure from current policy as Ofcom do review licence conditions and restrictions on application from the licence holders. However, the review process will now need to be formalised and the results will be required to be made public.
72. Following a change to Article 6 of the Framework Directive, Ofcom will be required to consult on its proposal to impose any spectrum management restrictions under Article 9(3) and Article 9(4), if those restrictions are likely to have a significant impact on the relevant market.
73. Article 9(3) and Article 9(4) will apply to spectrum licences issued after 25th May 2011. Under new Article 9a Ofcom will be required to

take steps to ensure that any restrictions which fall within Article 9(3) and Article 9(4) and which are contained within licences issued before 25th May 2011, comply with the limited grounds of justification set out in those provisions. This is to ensure that Ofcom has a proper process in place under which certain regulatory burdens can be lifted if they are found to be no longer necessary. An obligation on Ofcom to take these steps will be imposed through an amendment to the Wireless Telegraphy Act 2006.

74. Article 9 also deals with spectrum hoarding and states that Member States may lay down rules in order to prevent such behaviour. Ofcom already has powers to deal with anti-competitive spectrum hoarding and will use these powers where it is appropriate to do so. Any concerns about anti-competitive hoarding should be brought to Ofcom's attention. Ofcom expects to set out its general approach to this issue in greater detail in early 2011.
75. Article 9b seeks to strengthen spectrum markets by requiring that spectrum licences in specific spectrum bands nominated by the Commission must be capable of being transferred or leased. It also provides discretion to Member States to introduce transfer or leasing in any other bands. The UK already provides for spectrum trading, but to date, the system has not functioned effectively.
76. Once these new provisions have been implemented, Ofcom intend to remove those barriers and enable leasing to be introduced in a way that was broadly supported by stakeholders in Ofcom's September 2009 consultation and statement on simplifying spectrum trading.⁶ Ofcom announced on April 2010 its intention to enable spectrum leasing to take place once necessary changes have been made to UK law. The notification procedure dictated for spectrum trades need not apply to leases and therefore Ofcom can introduce a much more streamlined and simplified system for leasing where notification is required only in those circumstances where it is proportionate and justified. This will enable greater regulatory certainty and a less burdensome approach for industry.

Rights of way

77. Article 11 includes a new provision in Article 11(1), requiring certain decisions relating to rights of way to be made within 6 months, except in cases of expropriation. This is intended to streamline the regulatory process. In the UK, rights of way are usually implemented through the Electronic Communications Code, and Ofcom normally process applications for Code powers within 3 months. We consider that the requirement that decisions on rights of way be made within 6 months relates not only to the grant of Code powers but also to all decisions of competent authorities granting rights of way.

⁶ <http://stakeholders.ofcom.org.uk/consultations/simplify/?a=0>

78. The principal relevant provisions are: the right to install apparatus in the public highway; and the right to seek an order from a county court where the network operator wants to install apparatus on private land, where access has been refused. In the latter case, the six month requirement is a challenging timescale, but one which we will work with the Ministry of Justice and the courts to meet.

Infrastructure sharing

Article 12 Co-location and facility sharing of network elements and associated facilities for providers of electronic communications networks

1. Where an undertaking providing electronic communications networks has the right under national legislation to install facilities on, over or under public or private property, or may take advantage of a procedure for the expropriation or use of property, national regulatory authorities shall encourage the sharing of such facilities or property **taking full account of the principle of proportionality be able to impose the sharing of such facilities or property, including buildings, entries to buildings, building wiring, {new} masts, antennae, towers and other supporting constructions, ducts, conduits, manholes, cabinets.**

2. **Member States may require holders of the rights referred to in paragraph 1 to share facilities or property (including physical co-location) or take measures to facilitate the coordination of public works in order to protect the environment, public health, public security or to meet town and country planning objectives and** only after an appropriate period of public consultation, during which all interested parties shall be given an opportunity to express their views. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing.

3. **Member States shall ensure that national authorities, after an appropriate period of public consultation during which all interested parties are given the opportunity to state their views, also have the power to impose obligations in relation to the sharing of wiring inside buildings or up to the first concentration or distribution point where this is located outside the building, on the holders of the rights referred to in paragraph 1 and/or on the owner of such wiring, where this is justified on the grounds that duplication of such infrastructure would be economically inefficient or physically impracticable. Such sharing or coordination arrangements may include rules for apportioning the costs of facility or property sharing adjusted for risk where appropriate.**

79. Infrastructure sharing is consistent with the Coalition Government's policy to reduce the barriers to the deployment of superfast broadband. As up to 80% of the costs involved with the roll out of superfast broadband can be in the civil works, if the need for works can be reduced, the business case becomes much more attractive.
80. Commercial deployment of superfast broadband is making good progress, and we expect approximately 65-70% of the market to be served commercially. However, Government believes this can be extended by reducing the cost of deployment and creating the right conditions for investment.

81. Article 12 allows Member States to require facility sharing between telecoms companies in certain circumstances where this would be proportionate and non-discriminatory. It also empowers Ofcom to impose this facility sharing even in the absence of Significant Market Power (SMP) in order to increase infrastructure competition and lower the cost of the deployment of a new network. This could be in the form of passive infrastructure sharing, such as the re-use of duct and pole capacity. This may increase infrastructure competition, leading to choice and price benefits for consumers. We intend to implement Article 12(1) by amending section 73(3) of the Communications Act to allow access conditions to require infrastructure sharing in all cases where such a requirement would be proportionate, rather than only in cases where there is no viable alternative.
82. However, this only applies to telecoms companies, not other utility companies, which the Government is also examining in a separate consultation.⁷
83. Article 12(2) permits Member States to take measures to coordinate public works in order to protect the environment, public health, public security or to meet town and country planning objectives. In the UK, we already take advantage of this exemption, for example through the New Roads and Street Works Act 1991, which allows Highways Authorities to impose restrictions on repeated road and street works. Although we do not preclude the possibility of relying on this provision to justify future measures, we do not intend to take specific action to implement this provision now.
84. Article 12(3) refers to the sharing of in-building wiring, chiefly in flats, where duplication of infrastructure would be uneconomical. Article 73(3) of the Communications Act already enables Ofcom to take this type of action and, subject to the views of respondents, we do not intend to grant these powers to any other body.

Article 12 Co-location and facility sharing *of network elements and associated facilities for providers of electronic communications networks*

4. Member States shall ensure that competent national authorities may require undertakings to provide the necessary information, if requested by the competent authorities, in order for these authorities, in conjunction with national regulatory authorities, to be able to establish a detailed inventory of the nature, availability and geographical location of the facilities referred to in paragraph 1 and make it available to interested parties.

5. Measures taken by a national regulatory authority in accordance with this Article shall be objective, transparent, non-discriminatory, and proportionate. Where relevant, these measures shall be carried out in coordination with local authorities.

⁷ <http://www.bis.gov.uk/Consultations/broadband-deployment-and-sharing-other-utilities-infrastructure?cat=open>

85. Article 12(4) allows for national authorities, including national regulatory authorities, to request information from undertakings in order to provide a detailed picture of the infrastructure in a Member State. This information will assist regulatory authorities in making a decision on whether to enforce infrastructure sharing. This article raises a number of issues, including who may be granted the powers to require this information, whether a detailed inventory of the network is desirable and how best to ensure that the demands are not too onerous on business and that duplication is avoided.
86. Undertakings are already under a number of obligations to maintain certain records of apparatus installed and to allow inspection by interested parties on request.⁸ We intend to implement Article 12(4) by extending Ofcom's powers under section 135 of the Communications Act 2003 to permit Ofcom to require undertakings to provide further information about the existence, location and capacity of existing infrastructure where requiring this information would be proportionate to its likely use. We propose to require Ofcom to incorporate any information gathered using these powers on an ad-hoc basis into the report produced under section 134a of the Communications Act, with a view to building up over time a detailed inventory of the UK's infrastructure. Alternatively, we are considering whether it would be proportionate to require undertakings to provide information to enable Ofcom to compile a detailed inventory of the nature, location and capacity of all UK infrastructure.
87. We would welcome views on whether a detailed inventory of existing infrastructure is desired by communications providers, whether it is proportionate to require information for this purpose and whether this information would help inform investment decisions and network planning decisions for new build. We would also welcome views on whether it is appropriate for Ofcom to be the sole competent national authority who can request information from undertakings in order to facilitate infrastructure sharing.

Q3 Do respondents believe that a detailed inventory of infrastructure would be desirable in order to facilitate infrastructure sharing and, if granted access, would this inform investment decisions?

⁸ Regulations 11 and 12 of the [Electronic Communications Code \(Conditions and Restrictions\) Regulations 2003 \(SI 2003/2553\)](#) as amended, Street Works (Records) (England) Regulations 2002, Street Works (Records) Wales 2005 and Street Works (Northern Ireland) Order 1995 as amended.

Q4 Do respondents believe that requiring undertakings to provide information to enable Ofcom to compile a detailed inventory of the nature, location and capacity of all UK infrastructure is proportionate, or should the powers only be exercised where there is an imminent prospect of infrastructure sharing in that particular location?

Q5 Do respondents believe it is appropriate for Ofcom to be the sole authority that is able to require this additional information from undertakers in relation to infrastructure? If not, which authorities should be able to require this additional information?

Q6 Do respondents believe that commercial confidentiality could be compromised by a 'national journal' approach and are there ways to mitigate this?

Security and integrity of networks and services

88. Article 13a of the Framework Directive introduces significant new measures to increase the security and resilience of electronic communications networks. These measures are designed to enhance levels of network availability, as well as to protect against and prepare for disruptions to availability. Security requirements will also be imposed on electronic communication service providers. These measures will only apply to publicly available electronic communications services and will not apply to private networks.

89. Enforcement of the new measures, as required by Article 13b, can be seen as an extension of Ofcom's existing remit in relation to networks and services established under the Communications Act 2003. Therefore, the Government considers that Ofcom is the "competent national regulatory authority" described in Article 13a.

90. The Government acknowledges that there is a high level of inherent resilience in electronic communications networks and the services that run over them, especially those which form part of the critical national infrastructure. The Government believes that Article 13a will introduce a more structured approach to ensuring security and resilience and greater accountability for the industry.

91. Each electronic communications service and network provider faces different risks to security and availability of networks and/or services and will employ different and varied ways of mitigating against

such risk. The Government wants to ensure that this is taken into consideration when establishing measures necessary to enhance resilience and mitigate against security risks in the UK.

Article 13a Security and integrity

1. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services take appropriate technical and organisational measures to appropriately manage the risks posed to security of networks and services. Having regard to the state of the art, these measures shall ensure a level of security appropriate to the risk presented. In particular, measures shall be taken to prevent and minimise the impact of security incidents on users and interconnected networks.

2. Member States shall ensure that undertakings providing public communications networks take all appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks.

92. Article 13a(1) imposes appropriate management of risk in relation to the security of electronic communications networks and services on communications providers. Article 13a(1) imposes a requirement on all electronic communications network and service providers to take “appropriate” steps to manage the security of public electronic communications networks and services. The Government believes that the use of the word “appropriate” in relation to technical and organisational measures means that this does not require an approach that ignores the specifics of the networks and the service, nor an approach that supposes that all services require the same degree of protection. The Government believes that the accepted interpretation of the word “security” will apply and the requirement will therefore cover confidentiality, integrity and availability.

93. Article 13a(2) makes provision (solely in relation to networks) to guarantee the “integrity” of public communications networks and “ensure” the continuity of supply. Although the Directive uses the word “integrity” in this context, the Government does not believe that this can be the accepted information security concept of integrity – that is that information is not subject to change while in transit or in store. The Government believes that “integrity” here means maintaining a certainty of supply – and, therefore, more in line with the use of the term “availability” in the traditional security concept.

94. We believe it impossible to provide such a guarantee, as under sufficiently hostile conditions networks will fail regardless of the steps taken to protect them. However, it is possible to move further towards greater certainty with regard to network availability by providing for sufficient resilience and security measures.

95. The Government does not believe that this will require the mandating of a specific process for providers to follow in assessing risk and determining mitigations. What is appropriate will vary according to the network and service and the service level offered to the customer. For services provided to users, there is an argument that the security level adopted should reflect legitimate consumer expectation. This would suggest that there should be transparent security performance details available to the end user and, given the potential complexities involved, there may be benefit in industry adopting a small number of clear standard performance levels (such as, for example, a straightforward low, medium and high level) against which providers can choose to certify their services and networks. The most basic of these would include minimum requirements imposed on all providers of a particular service, for example the provision of reliable emergency service access on voice services. Higher levels would offer additional security and resilience performance to customers who value it.
96. There are challenges in establishing such security standards. For example, with regard to the provision of internet access services for domestic and small business consumers, industry itself could develop a code of practice that sets out the minimum expectation of such services in relation to known threats (spam and malware). Similarly, while some industry standards exist (for example the NICC's Minimum Security Standard, ND1643), these will need to be further developed (by NICC) if they are to be applicable to the full range of types and sizes of network and/or service provider.⁹
97. We expect that any customer or network related standards or performance levels that Ofcom considers appropriate will take time to establish. Consequently, there will not be any definite standards or levels in place by May 2011. Therefore Ofcom guidance is expected to outline plans for developing and/or adopting standards or levels going forward and explain in further detail what it will be looking for in the interim. Ofcom will be seeking input in due course.
98. The UK Government believes there may be some challenges for very small providers of public communications networks and services in meeting such standards. However, where interconnection with public networks is concerned, we see there being a need to ensure that measures are taken to maintain security. Ofcom will need to address these issues further in its guidance.
99. Providers of public electronic communications networks and services will be required to notify Ofcom of a breach of security or loss of integrity which has had a significant impact on the operation of their networks or services. While the Government considers that the reporting function captures events which are significant in scale or raise new

⁹ NICC is a technical forum for the UK communications sector that develops interoperability standards for public communications networks and services in the UK.

issues of general concern with regard to network and service resilience, Ofcom intends to consult on this and how it will normally work in practice, including developing a further understanding on how to measure what is a “significant” event.

Article 13a Security and integrity

3. Member States shall ensure that undertakings providing public communications networks or publicly available electronic communications services notify the competent national regulatory authority of a breach of security or loss of integrity that has had a significant impact on the operation of networks or services.

Where appropriate, the national regulatory authority concerned shall inform the national regulatory authorities in other Member States and the European Network and Information Security Agency (ENISA). The national regulatory authority concerned may inform the public or require the undertakings to do so, where it determines that disclosure of the breach is in the public interest.

Once a year, the national regulatory authority concerned shall submit a summary report to the Commission and ENISA on the notifications received and the action taken in accordance with this paragraph.

100. Under Article 13a(3), Ofcom will be required to inform other Member States and ENISA of such an event as appropriate; this would likely only be exercised should an incident have an impact upon other Member States or internationally.
101. Where it is deemed in the public interest, Ofcom may also inform the public of an incident, or require the relevant provider to do so. The Government notes that setting thresholds for deciding when to inform the public will be difficult. In practice, Ofcom is likely to need to decide on a case by case basis when such notification would be appropriate. The expectation is that this will happen only with strong justification, such as when it would allow customers to take some mitigating action that would otherwise not be available to them.
102. In certain circumstances there could be a link to the requirement to notify subscribers of breaches relating to their personal information under Article 4(1) of the E-Privacy Directive (where there is a loss of personal information) – see paragraphs 217 - 222. Both this notification procedure and that in Article 4(3) of the E-Privacy Directive should be straightforward and avoid duplication as far as possible. Ofcom will need to establish a working arrangement with the Office of the Information Commissioner to avoid duplication of effort and clarify this.
103. Ofcom will be required to provide an annual report to ENISA¹⁰ and the Commission summarising the incidents affecting the availability of communications networks and services and the action taken. ENISA is currently working on the details of how this process will work, in order to

¹⁰ European Network and Information Security Agency

harmonise it across the EU. Further information should be available early next year.

Article 13a Security and Integrity

4. The Commission, taking the utmost account of the opinion of ENISA, may adopt appropriate technical implementing measures with a view to harmonising the measures referred to in paragraphs 1, 2, and 3, including measures defining the circumstances, format and procedures applicable to notification requirements. These technical implementing measures shall be based on European and international standards to the greatest extent possible, and shall not prevent Member States from adopting additional requirements in order to pursue the objectives set out in paragraphs 1 and 2.

These implementing measures, designed to amend non-essential elements of this Directive by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 22(3).

104. The Commission is currently considering the way forward on appropriate technical implementing measures (referenced in Article 13a(4)) but has not announced its timetable for doing so. The Government does not know when this process will start or be concluded. This process will draw on standards as far as possible, but it does not rule out the possibility of Member States applying requirements that are more demanding than the agreed minimum set. Our implementation may need to be revisited in the light of the output of the Commission.

Article 13b Implementation and enforcement

1. Member States shall ensure that in order to implement Article 13a, competent national regulatory authorities have the power to issue binding instructions, including those regarding time limits for implementation, to undertakings providing public communications networks or publicly available electronic communications services .

105. To implement Article 13b(1), Ofcom will be given the power to issue binding instructions to companies. Such instructions could be issued to address perceived failure in relation to risk management (and appropriate actions on resilience for network providers). It would also allow for Ofcom to override a company's decision as to whether a security breach should be reported. The core of Ofcom's role here is to ensure public providers of electronic communications networks and services properly consider the risks to the networks or services and implement any measures appropriate to mitigate these.

Article 13b Implementation and enforcement

2. Member States shall ensure that competent national regulatory authorities have the power to require undertakings providing public communications networks or publicly available electronic communications services to:

(a) provide information needed to assess the security and/or integrity of their services and networks, including documented security policies; and

(b) Submit to a security audit carried out by a qualified independent body or a competent national authority and make the results thereof available to the national regulatory authority. The cost of the audit shall be paid by the undertaking.

106. In order to implement Article 13b(2), the Government will give a power to Ofcom to be able to require the companies to provide appropriate information to enable Ofcom to assess the security and/or integrity of their services and networks. Ofcom will also have a power to require a company to submit to a security audit which would be paid for by the company concerned.

107. If justified, Ofcom may commission a security audit. We believe that the term “security audit” is essentially a compliance audit in relation to the requirements of the Directive on security and resilience. We envisage that the audits will be carried out by private contractors appointed by Ofcom. Additionally it may be appropriate for Ofcom to look to the Centre for the Protection of National Infrastructure (CPNI) to input guidance on matters of national security.

Article 13b Implementation and enforcement

3. Member States shall ensure that national regulatory authorities have all the powers necessary to investigate cases of non-compliance and the effects thereof on the security and integrity of the networks.

108. The new powers for Ofcom described above are expected to discharge the requirements of this Article.

109. This includes the power to investigate cases of non-compliance and their effects under Article 13b(3). The trigger for such an investigation would be if Ofcom had reasonable grounds to believe that a company was in breach of its obligations under the provisions under Article 13a(1) and Article 13a(2).

110. Ofcom intends to provide guidance on how compliance with these new obligations will normally be assessed and will consult on this with a view to publishing the final guidance early in 2011.

111. The Government concludes that to meet the requirements of Articles 13(a) and Article 13(b), changes will have to be made to the

Communications Act 2003 and we will essentially copy out the text of the Articles into the Act, as far as appropriate with further guidance being provided by Ofcom, as discussed above.

Q7 The Government welcomes any general observations on its proposed approach as set out in this section of this document and in particular the proposals in paragraph 111 to implementing Articles 13a and 13b of the Framework directive which address “Security and Integrity of Networks and Services”. We would also welcome your views on what needs to be covered in any Ofcom guidance.

Interoperability of digital television services

112. Article 18 covers the interoperability of digital interactive television services. The existing provisions require Member States to encourage (in accordance with the requirements on technical standards) broadcasters to use an open application programming interface (API) in transmissions and manufacturers to make equipment capable of decoding such transmissions. The new provision requires Member States to encourage broadcasters and manufacturers to work together so that the range of interactive television services available includes those accessible to disabled end users.

113. In the UK we already have statutory requirements relating to the provision of accessibility services including audiodescription, subtitles and signing. We may need to make minor amendments to the Communications Act 2003 to fully implement this provision and are currently exploring options.

114. In practice the Digital Television Group (DTG) -which consists of: manufacturers, broadcasters, retailers, representatives of Government and interest groups- ‘D-Book’ sets out the detailed specification for transmission and reception of digital terrestrial television services in the UK, including services for disabled end-users. The DTG is also developing a ‘U-book’ focusing on requirements for usability and accessibility. Full details are available at:
<http://www.dtg.org.uk/publications/books.html>

Commission harmonisation powers

115. Article 19 deals with harmonisation procedures and grants the Commission powers to issue a recommendation on the harmonised application of provisions within the Framework in pursuit of specified objectives in areas where it considers there has been an inconsistent regulatory approach taken by Member States. Although these recommendations are non-binding, national regulatory authorities must

take utmost account of them.

116. New text intended to improve the consistency of regulatory approaches in Europe grants powers to the Commission to “upgrade” non-binding recommendations to binding decisions in certain circumstances. The Commission can only issue a decision in respect of certain limited areas – market reviews and numbering – and in respect of market reviews, a draft decision can only be proposed after at least 2 years following the adoption of a Commission recommendation on the same subject. At the moment it is too soon to know when and how the Commission will use its powers.

Dispute resolution

117. Articles 20 and Article 21 of the Framework Directive deal with dispute resolution. Specifically, Article 20 covers domestic disputes and Article 21 is in regard to cross-border disputes. It is our view that changes to Article 21 will have no material impact on the UK.

118. Amendments to Article 20(1) clarify the national regulatory authority’s duty to resolve disputes between undertakings providing electronic communications networks or services applies only to existing obligations (under the Framework Directive or the other specific directives). This makes clear that subject-matter of disputes must relate to obligations already imposed on undertakings rather than obligations not yet imposed but which could be imposed. We propose to implement this by amending section 185 of the Communications Act 2003 so that it applies only to disputes in relation to conditions set or modified under section 45 of the Communications Act 2003.

119. Other new provisions in Article 20(1) expand the scope of Article 20 to include disputes between above-mentioned undertakings and undertakings “benefiting from obligations of access and/or interconnection arising under this Directive and the Specific Directives”. This extends the scope of disputes that Ofcom has to resolve within 4 months, by expanding the range of disputing parties to include disputes brought by non-telecommunications network and service operators where they benefit from existing access obligations under the Framework (e.g. channels benefiting from access to a regulated Electronic Programme Guide (EPG) platform).

120. The group of undertakings that could be said to benefit from access or interconnection obligations is potentially very wide. However, we do not think that the purpose of the change is to enable anyone who could be said to benefit from access obligations, no matter how far removed from the undertaking that is subject to the access or interconnection obligation, to refer a dispute to Ofcom.

121. For example, we do not believe that the provision was intended to give an undertaking that purchases downstream services from another

party which relies on regulated access or interconnection to be provided upstream, the right to refer a dispute to Ofcom about that upstream access. That undertaking will have contractual rights with that other party which it should enforce instead through the courts. Rather, in the context of the amended provision, regulatory beneficiaries should be understood as “one step” direct beneficiaries, to which the existing obligation in question refers (e.g. undertakings receiving the access or interconnection which the regulated party is required to provide). In order to implement this change we propose to amend section 185 of the Communications Act 2003 to make clear the intended meaning of regulatory beneficiaries having rights to refer such disputes to Ofcom.

122. Section 185(1) of the Communications Act 2003 was also the provision which implemented the requirement in what was Article 5(4) of the Access Directive that the national regulatory authority be empowered to intervene in disputes on access and interconnection at the request of either of the parties involved in such disputes. That wording has been deleted from Article 5 (now Article 5(3)) and so we propose to amend section 185 of the Communications Act 2003 to only cover the types of disputes referred to in the amended Article 20 of the Framework Directive as discussed above.

123. The remaining obligation in Article 5(3) that the national regulatory authority be empowered to intervene at its initiative on access and interconnection issues has not changed. Ofcom is currently empowered to intervene using its access and SMP condition powers and that will remain the case. We do not find section 105 of the Communications Act to be a meaningful provision given that Ofcom is already procedurally required under section 48 of that Act to publish a notification when they impose access or SMP conditions. We therefore propose to repeal section 105 of the Communications Act 2003.

124. We propose to lift the current restriction on Ofcom in section 190(7) of the Communications Act 2003 so that Ofcom will have a wide discretionary power to recover from the disputing parties, where appropriate, the costs and expenses it has incurred in relation to resolving a dispute. This will, we believe, discourage the referral of disputes to Ofcom that could be resolved without Ofcom’s intervention and encourage disputing parties to seek resolution of their disputes through ADR (alternative dispute resolution) which is both more cost effective and less bureaucratic than the current dispute resolution process.

125. Currently, Ofcom has this power in respect of spectrum disputes, but for all other disputes Ofcom’s costs are recovered through the administrative charges levied across industry under section 38 of the Communications Act 2003. However, we do not think that this charging regime provides the right incentives to encourage disputing parties to seek ADR, nor that there is anything in Articles 20 or Article 21

that would preclude the recovery by Ofcom of its costs. Costs would only normally be recovered from disputing parties where appropriate in cases where ADR has not been pursued, although in some individual cases it may nonetheless be appropriate to recover costs notwithstanding that ADR has been pursued. This should not impact on the ability of undertakings to seek resolution of disputes through Ofcom.

126. This power, coupled with Ofcom's already existing discretionary power to require a party to a dispute to pay another party's own costs and expenses incurred in connection with the dispute, will enable Ofcom to develop proper policies to provide the right incentives and sufficient encouragement for disputing parties to seek resolution of their disputes through ADR. An additional benefit is that in disputes where Ofcom decides it appropriate to recover its own costs and expenses, such costs and expenses will no longer need to be recovered through the administrative charges levied across industry under section 38 of the Communications Act 2003.

Directive 2002/19/EC on access to, and interconnection of, electronic communications networks and associated facilities (the Access Directive)

Introduction

127. The Access Directive harmonises the way in which Member States regulate access to and interconnection of electronic communications networks and associated facilities. The aim is to establish a regulatory framework in accordance with internal market principles to promote competition, interoperability and consumer benefits.

128. A fundamental principle here is the provision of access to incumbents' networks – breaking into the monopolies – and the Access Directive sets out rules on which that access is based. It also covers how the regulator might intervene to bring it about with explicit reference to the availability of functional separation as a market remedy.

Powers of the National Regulatory Authority

129. The early parts of this Directive describe the general framework for access and interconnection, and rights and obligations for undertakings. Article 5 describes the powers and responsibilities of the national regulatory authority in relation to access and interconnection and interoperability of services.

130. A new provision, Article 5(1)(ab), requires Member States to give national regulatory authorities the power to introduce obligations on undertakings that control access to end-users to make their services interoperable. Should Ofcom choose to exercise this power, it would do so through access conditions imposed on those undertakings. As with any imposition of regulation, Ofcom would have to act in a proportionate way, and would in any event have to consult prior to imposing the obligation under section 48 of the Communications Act 2003.

Functional separation

131. Two new Articles, 13a and Article 13b, set out new powers for the regulator, and new obligations for operators with Significant Market Powers, in relation to “functional” or “voluntary” separation. Functional separation is when a vertically integrated undertaking (i.e. an operator which provides both wholesale access and retail services) with SMP is required to separate its wholesale access activities into an independent business entity. Article 13a sets out the procedure that the national regulatory authority must follow when it wishes to impose

functional separation, which includes obtaining the approval of the Commission.

132. Article 13b requires operators seeking to voluntarily separate – either functionally or structurally - to notify the national regulatory authority in advance and in a timely manner. This notification duty is intended to enable the national regulatory authorities to assess the effect of the intended transaction on the regulatory obligations and to propose any regulatory changes that may be necessary as a result of the voluntary separation.
133. Functional separation in the UK (in the case of BT) has already been carried out under UK competition law. However, we will still need to implement these new powers to comply with the Directive.

Directive 2002/20/EC on the authorisation of electronic communications networks and services (the Authorisation Directive)

Introduction

134. The Authorisation Directive simplifies the rules and conditions governing the authorisations required to provide electronic communications services in order to better facilitate the provision of these services throughout the European Community.

135. In so doing it seeks to harmonise what Member States are allowed to do and not allowed to do with an overall goal of levelling the playing field across Europe. The intention is to prevent Member States from introducing rules which prevent other operators from starting up or doing business.

Spectrum

136. The changes to spectrum provisions in the Framework Directive are intended to promote a market-led approach to spectrum management. Article 5 of the Authorisation Directive is intended to promote the use of general authorisations, as opposed to the issuing of individual rights of use for spectrum, as far as possible. It also provides for a review of current individual rights of use. Member States may still grant individual licences for a variety of reasons and the practical effect of this provision does not make any significant change in the application of policy in the UK.

137. Article 5(2) provides that where an undertaking has a licence that has been granted for 10 years or more and where that licence cannot be transferred or leased, Ofcom has to ensure that the conditions which enabled them to issue a licence rather than a general authorisation still apply. If justifications for granting an individual licence no longer apply (eg. technological advancements have reduced the likelihood of harmful interference) the licence has to be changed to a general authorisation, or the licence has to be made transferable.

138. This will require Ofcom to keep these sorts of licences under review and move to a more light touch regime of issuing general authorisations if circumstances change and that becomes more appropriate. This could help lower barriers to entry and promote innovation. The new provisions in Article 5(2) will be implemented through amendments to the Wireless Telegraphy Act 2006.

139. Article 5(6) requires Ofcom to ensure that spectrum is efficiently and effectively used, including in relation to transfers or accumulation of spectrum (Article 9 of the Framework Directive also covers spectrum

hoarding issues). Ofcom already has such obligations but may wish to ensure that a lease of a particular type of licence is notified to them. The notification requirement that applies in respect of transfers of spectrum licences (see paragraph 73) does not apply in respect of leases. Ofcom may need to be made aware of situations where the use of certain types of spectrum changes hands so that it can take any necessary action to comply with obligations imposed by the revised Directives. Ofcom considered possible changes to the regulatory framework for spectrum trading, including leasing, in its *Simplifying Spectrum Trading consultation and statement*¹¹ and, as announced in the statement, intends to consult further in early 2011.

140. Article 7 details a procedure to be applied when a Member State considers whether to limit the number of licences to be granted for radio spectrum. The amendments to this provision now apply a modified version of this procedure to situations where Ofcom is considering whether to extend the duration of existing licences other than in accordance with the terms of the licence. For example, Ofcom will be required to give due weight to maximising benefits for users and to facilitate the development of competition. Ofcom will be required to publish its decisions.

141. Article 17 puts an obligation on Member States to review general authorisations and individual rights of use (licences) in existence on 31st December 2009, and by the middle of December 2011, to have brought them into compliance with Articles 4, Article 5 and Article 6 of the Directive. In the UK it will be Ofcom that is required to carry out this task.

Information gathering powers

142. The revised Framework makes a number of operational changes to the information gathering powers of national regulatory authorities. These are mainly set out in Article 10 of the Authorisation Directive and Article 5 of the Framework Directive. The most substantive of these is Article 10 of the Authorisation Directive which has been amended to strengthen the enforcement powers available to national regulatory authorities to ensure compliance with the conditions of general authorisations.

143. Article 10 sets out new provisions on national regulatory authorities to monitor and supervise compliance with the regulatory regime. It is clear from the role of Ofcom as communications regulator that it supervises and enforces the regulatory framework already and so no new legislation is needed on this point.

144. Article 10(1) also requires national regulatory authorities to have the power to require undertakings providing electronic communications

¹¹ <http://stakeholders.ofcom.org.uk/consultations/simplify/?a=0>

networks and services under the general authorisation, holders of a licence for use of radio frequencies, or, holders of rights to numbers allocated under the National Telephone Number Plan, to provide the national regulatory authority with all information necessary to verify compliance with: the conditions of the general authorisation; the licence; or the allocation of telephone numbers; as well as for assessing such things as, the granting of rights of use and safeguarding the efficient use and ensuring the effective management of radio frequencies.

145. Section 135 of the Communications Act 2003 already gives Ofcom wide information gathering powers to require the provision of such information. However, whilst that power is wide, it does not extend to various matters relating to spectrum. Section 32 of the Wireless Telegraph Act 2006 contains an information gathering power but one that only enables Ofcom to require information to be provided for statistical purposes.

146. Ofcom's power to request information under a licence is limited and does not adequately reflect what is required by the Directive: that the powers for spectrum should be the same as for telecoms to enable Ofcom to do its job in these areas. Therefore, in order to implement the change to Article 10(1) we propose to introduce a new information gathering power into the Wireless Telegraphy Act 2006 to enable Ofcom to request information for the purpose of fulfilling its spectrum-related functions such as ascertaining whether a contravention of a licence condition is occurring or has occurred, or for the purpose of exercising their general spectrum management functions.

147. The new WTA information gathering power will be enforced in much the same way as section 135 of the Communications Act 2003 and new provisions will be inserted into the Wireless Telegraphy Act 2006 to provide for this. Similar to section 138 of the Communications Act 2003, Ofcom will be required to notify an undertaking of a contravention of the information gathering power. Ofcom will then have the power to issue a financial penalty. For serious or repeated contraventions of the new information gathering power, Ofcom will be able to suspend or restrict the use of the spectrum in a similar way to the way they are able to suspend or restrict an undertaking's entitlement to provide an electronic communications network or service.¹²

148. Article 5 of the Framework Directive requires an national regulatory authority to have the power to require electronic communications network and service providers to provide information concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors. In addition, undertakings with SMP in the wholesale

¹² For example see section 140 of the Communications Act 2003

markets may also be required to provide accounting data on the retail markets that are associated with those wholesale markets. We will also be amending section 135 of the Communications Act 2003 to give Ofcom the power to request this type of information as required by the Framework Directive.

149. Given that these new areas where Ofcom has to be given powers to request information are very forward-looking (for example information concerning future network or service developments that could have an impact on the wholesale services) we will also be taking this opportunity to clarify that information requests made by Ofcom under section 135 of the Communications Act 2003 apply both to information that a company holds or that it can reasonably be required to produce or pull together. An equivalent provision will be included in the new Wireless Telegraphy Act 2006 information gathering provision.

150. Under section 145 of the Communications Act 2003, Ofcom is required to publish a statement of their general policy with regard to information requests made under section 135 and 136 of the Communications Act 2003 and also the uses to which they are proposing to put information obtained under those sections. In making an information request, Ofcom is required to have regard to its policy statement. Ofcom intend to consider whether there is a need to update its current statement¹³ in light of the amendments to section 135 of the Communications Act 2003. We will also introduce an obligation on Ofcom to set out a similar policy statement in respect of information requests made under the new Wireless Telegraphy Act 2006 information gathering powers. Ofcom's current statement also covers the more limited power under section 13A of the Wireless Telegraphy Act 2006 to require information for statistical purposes in respect of which Ofcom is obliged to publish a policy statement under section 13B.

Enforcement

151. Ofcom has a range of tools at its disposal to enforce regulations and conditions and impose sanctions when they are breached. Any sanction levied by Ofcom must be appropriate and proportionate to the harm, damage and distress caused. The revised Framework makes a number of changes to the enforcement powers granted to national regulatory authorities to enable them to deal more effectively with cases of breach of regulatory obligations under the Framework. The most important of these changes are set out below.

152. Article 10(2) has been amended so that instead of the need to notify an undertaking of an alleged breach and giving it one month either to state its views or to remedy the breach, the national regulatory authority now just has to allow a reasonable time for the undertaking to

¹³ http://stakeholders.ofcom.org.uk/binaries/consultations/info_gathering/policy.pdf

state its views. Thus, the requirement to give the undertaking an opportunity to remedy the breach before issuing a penalty has been removed. Ofcom will determine what a reasonable time limit is in the circumstances for the undertaking to respond to Ofcom's notification.

153. The national regulatory authority enforcement powers have been strengthened in Article 10(3) so that it has to have the power to require the cessation of the breach either immediately or within a reasonable time limit. To this end, Article 10(3) expressly allows penalties imposed by Ofcom to be periodic and to have retroactive effect. In practice, this means that Ofcom will be able to issue a financial penalty that dates back to the start of the contravention, rather than just the date of the first notification of the contravention. Once a breach has been established, Ofcom will also be able to issue periodic penalties going forward, for example a daily penalty for each day for which the contravention is continuing.

154. Article 10(3) also empowers Ofcom to require an undertaking to cease or delay provision of a service or bundle of services which if continued would result in significant harm to competition, pending compliance with SMP (wholesale) access obligations.

155. Whereas Ofcom already has the power to impose financial penalties, amendments to Article 10(3) (also Article 21a of the Framework Directive) require new powers be granted to all national regulatory authorities to levy dissuasive financial sanctions. The current limit on penalties which Ofcom can impose for non-compliance with information provision requirements under section 135 of the Communications Act 2003 is set out in section 139 of the Communications Act 2003 at £50,000. Ofcom does not consider that this level of financial sanction is sufficiently dissuasive and this is considered below.

156. Article 10(5) used to apply in respect of serious **and** repeated breaches and the Communications Act 2003 and the Wireless Telegraphy Act 2006 both adopted this terminology.¹⁴ Article 10(5) has now been amended to refer to serious **or** repeated breaches and so the corresponding provisions in the Communications Act 2003 and the Wireless Telegraphy Act 2006 will also be amended.

157. The definition of 'repeated contravention' in the Communications Act 2003 and also in the Wireless Telegraphy Act 2006 requires Ofcom to have given at least two notifications of a contravention during a 12 month period. Given the detailed nature of the process which applies before Ofcom issues a notice of contravention, it is rare for Ofcom to be able to meet the test of two notices in twelve months. Due to this timing difficulty, we do not consider that the definition of "repeated contravention" is working effectively and so we propose to amend it in

¹⁴ For example see section 100 of the Communications Act 2003.

all instances in the Communications Act 2003 and the Wireless Telegraphy Act 2006 so that a “repeated contravention” will be one where there have been two notices of contravention in two years, rather than twelve months.

158. Under the current enforcement regime, Ofcom is required to give the operator in breach 1 month to remedy such breach and Ofcom can only impose a fine in relation to the operator’s failure to remedy after those days have elapsed. The current system is widely thought to be ineffective in preventing short-term (often 30-day) scams; e.g. where operators set up premium rate numbers and operate in breach of regulatory obligations/ fraudulently until just before the expiry of the 30-day notification from Ofcom, thereby avoiding any penalty for their actions.
159. As well as being able to issue a penalty having retroactive effect, Article 10(5) now makes it clear that an national regulatory authority may issue a sanction or a penalty even after the breach has been remedied. We propose to amend the Communications Act 2003 and the Wireless Telegraphy Act 2006 to give Ofcom such a power.
160. Lastly, changes to Article 10(6) will require amendments to Ofcom’s existing power in section 98 of the Communications Act 2003 to take interim measures. Article 10(6) currently provides for interim measures, but the changes make it clear that the interim measure is only valid for 3 months unless it is confirmed. In certain circumstances where the enforcement process has not been completed, this three month period may be extended for a further period of up to 3 months. We also propose extending the interim measures power to the Wireless Telegraphy Act 2006.

Dissuasive sanctions

Article 10 Compliance with the conditions of the general authorisation or of rights of use and with specific obligations

3. The relevant authority shall have the power to require the cessation of the breach referred to in paragraph 2 either immediately or within a reasonable time limit and shall take appropriate and proportionate measures aimed at ensuring compliance.

In this regard, Member States shall empower the relevant authorities to impose:

(a) dissuasive financial penalties where appropriate, which may include periodic penalties having retroactive effect; and

(b) orders to cease or delay provision of a service or bundle of services which, if continued, would result in significant harm to competition, pending compliance with access obligations imposed following a market analysis carried out in accordance with Article 16 of Directive 2002/21/EC (Framework Directive).

The measures and the reasons on which they are based shall be communicated to the undertaking concerned without delay and shall stipulate a reasonable period for the undertaking to comply with the measure.

161. Ofcom already has powers to impose financial sanctions for breaches of the information gathering power in section 135 of the Communications Act 2003 (referred to above in paragraph 151). The current limit is set in section 139 of the Communications Act 2003 at £50,000. As mentioned above, Ofcom do not consider that this level of financial sanction is sufficiently dissuasive. The European Commission also believe that sanction powers more generally need to be strengthened. Consequently we are looking to increase the maximum level of the penalty for non compliance with information gathering notifications and would welcome views as to what level of penalty would be dissuasive.

Article 21a FWD Penalties

Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by ...* and shall notify it without delay of any subsequent amendment affecting the Member States shall lay down rules on penalties applicable to infringements of national provisions adopted pursuant to this Directive and the Specific Directives and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be appropriate, effective, proportionate and dissuasive. The Member States shall notify those provisions to the Commission by ...* and shall notify it without delay of any subsequent amendment affecting them.

162. The new information gathering power that we will introduce into the Wireless Telegraphy Act 2006 (see above on information gathering powers) will also need to be backed up by a power to issue a dissuasive financial penalty for breach of that provision. This will mirror the financial penalty in section 139 of the Communications Act 2003. When expressing a view as to what level of penalty would be dissuasive under section 139 of the Communications Act 2003, consultees should bear in mind that the same level of penalty will be applied for a breach of the new information gathering power in the WTA 2006.

163. The UK has no discretion on the implementation of the provisions – we must provide for dissuasive sanctions. The key issue here is the level of sanction and what constitutes ‘dissuasive’. Recent changes to the Ofcom enforcement regime in relation to sanctions for silent calls raised the level of sanction Ofcom can levy to £2m. That change was made through amendments to section 128(1) of the Communications Act 2003.¹⁵

¹⁵ Section 128(1) of the Communications Act 2003 enables Ofcom to issue a notification where Ofcom has determined that there are reasonable grounds for believing that a person has engaged in persistent misuse of an electronic communications network or electronic communications service in a way that causes annoyance, inconvenience or anxiety.

164. The level of the penalty can be amended under section 139(9) of the Communications Act 2003, which gives the Secretary of State the power to amend the maximum level of the penalty by Order. As any increase of the penalty would be part of the wider implementation of the Framework Review the Order will not be made until next year and will not come into force until May 2011.

Q8 What do respondents think would be a dissuasive level of sanction for failure by a person to comply with an information request?

Amendments of rights and obligations

165. Amendments to Article 14 enable minor amendments to rights, conditions and procedures concerning general authorisations and rights of use or rights to install facilities to be agreed with the holder of the right/ general authorisation and no longer to require a consultation. This should speed up the process and be of benefit to industry.

Maximum Retail Tariffs

166. Paragraph 1 of Part C of the Annex to the Authorisation Directive has been amended to clarify that national regulatory authorities have the power to adopt tariff principles or to set retail tariff caps in relation to certain numbers or number ranges. This is intended to create greater transparency for consumers calling (e.g.) non-geographic numbers and to help prevent consumers receiving bills with unexpectedly high call charges ('bill shock'). We propose to amend the Communications Act 2003 to clarify that Ofcom has this power.

Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services (the Universal Service Directive)

Introduction

167. One of the central aims of the Universal Service Directive is to promote the interests of consumers by strengthening regulatory provisions relating to consumer protection. The revised Directive also updates and strengthens provisions in the area of e-Accessibility and the rights of users with disabilities.

Universal service obligations

168. Chapter II of the Directive deals with "Universal service obligations including social obligations".

169. Changes to these provisions relating to universal service obligations will involve some minor amendments to the Universal Service Order,¹⁶ and consequential amendments to universal service conditions. Government is obliged to consult before amending the Universal Service Order ("USO"). The following paragraphs set out the amendments to the Directive and the amendments which we propose to make. We welcome your views on the proposed changes to the USO.

170. The changes to the Directive are set out in the following paragraphs.

171. Article 2 (Definitions) has been amended. The definitions of "public telephone network" and "network termination point" have both been deleted. However, the definition of "network termination point" has been included in the Framework Directive. Amendments have been made to the definition of "publicly available telephone service" including the deletion of the specific wording around what such a service might include.

172. Article 4 has also been amended. "Public telephone network" is replaced by "public communications network" (which is defined in the Framework Directive). Article 4(1) now reads "Member States shall ensure that all reasonable requests for connection to the public communications network are met by at least one undertaking". Article 4(2) and new Article 4(3) set out what that connection must provide. Article 4(2) relates to facsimile and data communications to be supported by that connection and Article 4(3) relates to the public calls to be supported by that connection.

¹⁶ Electronic Communications (Universal Service) Order 2003 S.I. 2003/1904.

173. There are very minor consequential amendments to Article 5 (Directory Enquiries) which update the reference to the “e-Privacy Directive”.
174. Article 6 now refers not only to ensuring that “public pay telephones”, are provided, but also make provision for an alternative of “other public voice telephony access points” (“public pay telephone or other public voice telephony access points”).
175. There are also amendments to Article 7, which deal with measures to be taken by the universal service providers to provide equivalent access to services to end users with disabilities. As set out below, new Article 23a deals with equivalence for all service providers, rather than just the universal service operators. Article 7 now provides that where measures have been imposed on all service providers under Article 23a, ensuring disabled end-users have access to equivalent services and benefit from the choice of undertakings and services available to the majority of end-users, additional equivalence obligations do not need to be imposed on the universal service providers.
176. There are other amendments to the provisions in relation to the universal service providers, which are not relevant for the purposes of amending the USO. However, these changes are outlined in paragraphs 182 - 184 below.
177. Government proposes to amend the USO to take account of the amendments in the Directive. We set out the proposed amendments in the following paragraphs.
178. In Article 2 of the USO (Interpretation), we propose to delete the definition of “network termination point”, since it will be defined elsewhere and need not be defined in the USO. We propose also to amend the definition of “publicly available telephone services” to take account of the deletion of the wording which describes in particular what that service may contain. We propose also to delete the definition of “public telephone network” and where that appears in the USO amend it to read “public communications network”.
179. The amendments to Article 4 of the Directive mean that paragraph 1 of the Schedule to the USO will also need amending to take account of the fact that it currently uses defined terms which have been deleted from the Directive and to reflect the amended Directive text.
180. The amendment to Article 6 of the Directive to permit the alternative offering of “other public voice telephony access points” rather than public pay telephones will require corresponding changes to paragraph 4 of the Schedule to the USO.

181. The new requirement in Article 8(3) of the Directive for designated undertakings (in the UK, the universal service providers) to notify Ofcom in advance of any disposal of network assets will need to be imposed on those undertakings through an amendment to the Communications Act 2003.

Q9 Do respondents have any views on the proposed changes to the Universal Service Order?

182. There are 2 further amendments to matters relating specifically to the universal service which Government does not propose to implement through amendments to the USO.

183. In light of the amendment to Article 7 of the Directive and new Article 23a(1), we propose to amend paragraph 6 of the USO so that a universal service condition on the special measures detailed in paragraph 6 does not need to be imposed if a general condition in relation to equivalence has been imposed which achieves the same end result.

184. In addition, we propose to amend section 68 of the Communications Act 2003 to give Ofcom the power to monitor changes to prices for matters falling within Articles 4 to 7 of the Universal Service Directive in the event that those services are provided by companies which are not the universal service providers.

Increased transparency

185. Changes to Article 20 of the Directive set out new obligations on undertakings to provide consumers with information in contracts. Types of information to be provided to consumers include: whether caller location information is provided; conditions of renewal and termination; charges relating to number portability; and, any traffic management policies and quality of service levels (intended in part to address concerns around net neutrality), among others. Much of this is already provided to consumers in contracts in the UK (and is secured through the General Conditions). Ofcom intend to consult on any changes necessary to the General Conditions.

Minimum quality of service

186. Article 22 of the Directive enables national regulatory authorities to require undertakings to publish comparable, adequate and up-to-date information for end-users on the quality of their services and on

measures taken to ensure equivalence in access for disabled end-users.

187. A new provision, Article 22(3), enables, but does not require, Ofcom to impose minimum quality of service obligations on electronic communications network and service providers. Grounds for doing this include preventing the degradation of service and hindering the slowing down of traffic over networks. Again, this is linked to concerns around traffic management and net neutrality.

188. We propose to implement the changes to Article 22(3) through a minor amendment to the Communications Act to give Ofcom the necessary power. On 24 June 2010, Ofcom published a consultation document on traffic management, where it states that its likely initial view would be to explore existing competition tools and consumer transparency options before considering using these powers.¹⁷ Ofcom's consultation closed on 9th September 2010.

Equivalence for disabled users

Article 23a Ensuring equivalence in access and choice for disabled end-users

1. Member States shall enable relevant national authorities to specify, where appropriate, requirements to be met by undertakings providing publicly available electronic communication services to ensure that disabled end-users:

a) have access to electronic communications services equivalent to that enjoyed by the majority of end-users; and

(b) benefit from the choice of undertakings and services available to the majority of end-users.

2. In order to be able to adopt and implement specific arrangements for disabled end-users, Member States shall encourage the availability of terminal equipment offering the necessary services and functions

189. There are a range of new provisions in the Framework (mostly in the Universal Services Directive (USD) but also in the Framework Directive (FWD)) which strengthen the requirements for equivalent access and choice for people with disabilities. The most significant of the amendments is a new article in the Universal Service Directive, Article 23a (see boxed text above).

190. The text relay services and access to the emergency services that are mandated in the Framework are already available in the UK. The needs of consumers with disabilities are also catered for already through General Condition 15 and the Universal Service Order special measures for end-users with a disability.

¹⁷ <http://stakeholders.ofcom.org.uk/consultations/net-neutrality/>

191. As discussed above, Article 23a(1) obliges the Government to enable Ofcom, where appropriate, to require undertakings to provide equivalent public communication services to disabled users. Whilst Ofcom has already imposed General Condition 15 to require undertakings to offer equivalent services to disabled end users, section 51 of the Communications Act 2003 does not explicitly refer to such measures. In order to remove any ambiguity, we propose to amend section 51 of the Communications Act 2003 to clarify Ofcom's power to impose a General Condition in relation to equivalence. If Ofcom chose to impose the equivalence obligation by way of General Condition, it will need to consider at the same time whether those measures achieve equivalent effect to an obligation on universal service providers and, where this is the case, it may be appropriate to remove the obligation on universal service providers.

192. If Ofcom choose to exercise this power it will need to consult on this in due course. Ofcom is also in the process of reviewing the provision of relay services and is expected to reach its conclusions in spring 2011 (on which it will consult). An amendment to the Universal Service Order may be necessary depending on the outcome of that consultation.

193. Article 23a(2) places a duty on Member States to encourage the availability of terminal equipment suitable for disabled end-users. We consider that the existing duty on Ofcom to promote easily usable apparatus under Section 10 of the Communications Act 2003 provides a sufficient statutory basis for implementation of this provision. In addition, we also intend to use the eAccessibility forum as a primary means of encouraging manufacturers to produce better and more affordable equipment. The Government has set up the eAccessibility forum to draw together Government, industry and voluntary sector to explore and understand issues of e-accessibility and develop and share best practice across all sectors. The membership is open to bodies who are willing to provide support financially or in-kind to help move this agenda forward. Terms of reference for the eAccessibility forum are attached at **Annex 5**.

Q10 Do respondents agree that the approach outlined in paragraphs 189 - 193 is appropriate for implementing Article 23a(2) and encouraging the development of terminal equipment suitable for disabled users?

Directories

194. Article 25 of this Directive places new obligations on undertakings to provide subscriber information (at subscribers' request) to the provider of directory enquiry services. This is to ensure that electronic communications service providers provide subscriber information to new providers of directory enquiry services, in order to promote competition in the provision of directory enquiry services. We consider that *ex ante* regulation in the UK is already consistent with the amendments to Article 25. Ofcom intend to give further consideration as to whether any revised Community obligations under other Articles of the Universal Service Directive that relate to directories and directory enquiry services require any changes to, in particular, the General Conditions.

Access to emergency services

195. Article 26 provides for better access to emergency services by: extending the access requirements from traditional telephony to new technologies (though this is already in place in the UK); amending operators' obligation to pass on information about caller location to emergency authorities; and by improving general awareness of the European emergency number '112'. The changes to the provision will be made by Ofcom through a minor amendment to General Condition 4.

196. Article 26(4) places an obligation on Member States to ensure that disabled consumers have access to emergency services equivalent to that enjoyed by other end-users. We will reflect this obligation through an amendment to section 51 of the Communications Act 2003 and any necessary changes to General Condition 4 required as a consequence of this Article will be made subject to consultation by Ofcom. Implementation should not have resource implications for the UK, as equivalent access to the emergency services by SMS for people with disabilities is already provided by undertakings in the UK on a voluntary basis. Ofcom also mandates text relay access (both fixed line and mobile) to the emergency services.

Facilitating change of provider

197. Changes to Article 30 of the Directive are intended to improve the customer experience of switching supplier (providing faster switching).

198. Number portability is already a regulated facility that enables subscribers of publicly available telephone services (PATS), including mobile services, to change their service provider, whilst keeping their existing telephone number. Its purpose is to foster consumer choice

and effective competition by removing the costs and inconvenience of changing telephone number. Its advantages also include the retention of corporate identity for business consumers.

199. The revised Directive text requires that “porting of numbers and their subsequent activation shall be carried out within the shortest possible time”. It further sets a maximum time limit for activation of the number of “within one working day” from when an agreement to port has been concluded. The provision makes no distinction between types of services or end-users.
200. Ofcom has already, in effect, implemented the one working day requirement in terms of consumer Mobile Number Porting (MNP). Ofcom consulted on the issue and on proposed changes to General Condition 18 (GC 18) and published its final statement in July 2010.¹⁸
201. The Government considers that the new obligation to conclude porting within one working day applies also to bulk porting (i.e. as defined in the above Ofcom statement as the porting of 25 numbers or more at once).
202. The priorities of consumers porting multiple numbers simultaneously are often different from those porting one or few numbers. Research undertaken by Ofcom shows that, in many cases, the priority for bulk porting is a smooth migration process, whereby the practical logistics of the process (such as having phones and SIM cards in the right locations) can be completed before the numbers are ported (always minimising loss of service), rather than the speed at which the numbers are ported.
203. Similar to the porting of fewer than 25 numbers, the obligation to offer mobile porting within one business day will start when subscribers provide their PAC¹⁹ to the recipient operator. This will require both the recipient and the donor operators to take steps to ensure that a consumer can exercise the right to port within one working day. In practice, it is likely that consumers porting 25 numbers or more simultaneously will want to arrange a date to port that offers them enough time to plan ahead for smooth implementation (e.g. to arrange for employees to collect new handsets or SIMs).
204. The intention of the Directive is not to deny consumers the right to request an alternative port date that is later than one working day. Indeed, it is probable that many business consumers who are porting in bulk will require this flexibility. MNOs may decline a request to bulk port within one working day and risk losing the business, if they feel they are unable to meet this requirement.

¹⁸ <http://www.stakeholders.ofcom.org.uk/consultations/mnp/statement>

¹⁹ A “PAC” is a code which needs to be obtained from a subscribers existing provider and given to their new provider in order to ensure they retain the same telephone number after moving networks.

205. In relation to fixed porting, the porting requirement is currently subject to a verification/ authentication stage and, where the subscriber is switching between different types of local access provision (e.g. between cable and copper), it is also subject to lead-in times to enable the local access arrangements to enable switching to be in place before porting can be activated. BIS believes that the new obligation does not prevent this stage and lead-in times to continue under the one working day requirement. However, once the porting process has been initiated, it should not take more than the one working day specified to activate the number unless otherwise is agreed by the parties. The amendment to GC 18 to implement the one working day requirement will apply to fixed porting too. The approach to bulk porting of fixed numbers should be similar to that of mobile.
206. It should be noted that the revised Article 30 does not apply to the porting of numbers between networks providing services at a fixed location and mobile networks.
207. It is intended that this obligation will be reflected in the Communications Act 2003 and that Ofcom intend to consult on the modifications necessary to GC 18 to give effect to this implementation. Other ancillary changes will be needed to GC 18 in order to properly implement Article 30. In particular, in the revised text of Article 30, the right to number portability is no longer limited to PATS, but it will instead apply to subscribers (as defined in Article 2(k) of the Framework Directive) with numbers from the UK national telephone numbering plan. Ofcom intend to consult on such changes too.
208. Article 30(4) also includes provision to ensure that “Member States shall ensure the appropriate sanctions on undertakings are provided for, including an obligation to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf”. This provision will in part be met by Ofcom’s existing powers with regard to breach of General Conditions under sections 94 to 104 of the Communications Act 2003.
209. Those sections permit Ofcom to give notices, financial penalties or suspend service for non-compliance with the General Conditions. If a financial penalty is to be levied, then the amount of that penalty is for Ofcom to decide. Ofcom must ensure that any financial penalty that it levies for breach of general conditions is appropriate and proportionate to the breach.
210. We propose to make new provision in the Communications Act 2003, to ensure that companies are obliged to compensate subscribers in the event of delay of porting or abuse of the porting process.
211. Additionally, in order to implement Articles 30(5) and (6) of this Directive, section 51 of the Communications Act 2003 will need to be

amended to reflect that conditions for minimum contract period and that conditions and procedures for contract termination do not act as a disincentive against changing service provider.

“Must carry” obligations

212. Article 31 has been amended to make it clear that accessibility services can be included in the obligations for “must carry services”. Section 64 of the Communications Act 2003 provides for Ofcom to impose a condition, if necessary, for securing that the particular broadcasting services listed in the section (“the must-carry services”) are carried on networks used by a significant number of end-users as their principal means of receiving television programmes.
213. While primarily aimed at cable networks, must-carry conditions could in theory be applied to other types of platform. Ofcom’s powers are constrained by the power of the Secretary of State to specify by order the maximum and minimum amount or proportion of a network’s capacity that may or must be devoted to must-carry services, but in making any such order the Secretary of State must (in particular) ensure that the burden of complying with the must-carry obligation is proportionate to the objective of securing that the must-carry services are carried.
214. The Communications Act 2003 already provides for accessibility services, through the definition of ancillary services, to be included in “must carry” obligations. The amended Directive also requires that the list of “must carry” services and any “must carry” obligations imposed must be reviewed periodically by the Secretary of State. This too is already provided for in the Communications Act 2003. However, we propose to make a minor amendment to that Act to fully implement the changes to this provision.

Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (the e-Privacy Directive)

Introduction

215. This Directive sets out the fundamental rights and freedoms of EU citizens when using electronic communications. In particular, it strengthens rights to privacy and confidentiality with respect to the holding and processing of personal data by network and service providers.

216. There are a number of amendments to this Directive, most of them are not substantive, however, the most significant changes and our approach to implementing them, are outlined in the following paragraphs.

Personal Data Breach

217. Significant expansion to Article 4 of this directive sees the introduction of a specific reference to “personal data breach”, defined in Article 2(h) and including a duty on providers of electronic communications services to notify such breaches to the competent national authority. For the purposes of this Article, as for much of this Directive, the competent national authority is the Information Commissioner’s Office (ICO). In certain circumstances, providers are also required to inform the data subject of a personal data breach.

Article 4(1) + Article (1)(a) Security of processing

4.1. The provider of a publicly available electronic communications service must take appropriate technical and organisational measures to safeguard security of its services, if necessary in conjunction with the provider of the public communications network with respect to network security. Having regard to the state of the art and the cost of their implementation, these measures shall ensure a level of security appropriate to the risk presented.

4.1a. Without prejudice to Directive 95/46/EC, the measures referred to in paragraph 1 shall at least:

– ensure that personal data can be accessed only by authorised personnel for legally authorised purposes;

– protect personal data stored or transmitted against accidental or unlawful destruction, accidental loss or alteration, and unauthorised or unlawful storage, processing, access or disclosure; and

– ensure the implementation of a security policy with respect to the processing of personal data.

Relevant national authorities shall be able to audit the measures taken by providers of publicly available electronic communication services and to issue recommendations about best practices concerning the level of security which those measures should achieve.

218. The amended Directive makes provision for a system of notifications to be made to the Information Commissioner in the event of a “personal data breach” (as defined).
219. The Information Commissioner may issue guidance on notification of data breaches. In addition, ICO must be able to audit whether providers are complying with their obligations under the Directive.
220. We propose to largely copy out the provisions in this article, as with the rest of the Directive. However, we are considering whether the Information Commissioner has appropriate powers to permit him to audit the compliance with both Article 4 and other Articles within the Directive.
221. We propose to ensure that the regulations make provision for ICO to issue guidance in relation to the notification mechanism for personal data breaches. The content of that guidance will be the subject of a separate consultation by the Information Commissioner.
222. Article 15a of the Directive requires that there must be effective sanctions on providers which do not comply with the requirements in the Directive. We propose to make provision in the implementing regulations to ensure that ICO has access to effective sanctions and so it properly able to enforce the rights of individuals under the Directive.

Penalties

Article 15a - Implementation and enforcement

1. Member States shall lay down the rules on penalties, including criminal sanctions where appropriate, applicable to infringements of the national provisions adopted pursuant to this Directive and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive and may be applied to cover the period of any breach, even where the breach has subsequently been rectified. The Member States shall notify those provisions to the Commission by 25th May 2011 and shall notify it without delay of any subsequent amendment affecting them.

2. Without prejudice to any judicial remedy which might be available, Member States shall ensure that the competent national authority and, where relevant, other national bodies have the power to order the cessation of the infringements referred to in paragraph 1.

3. Member States shall ensure that the competent national authority and, where relevant, other national bodies have the necessary investigative powers and resources, including the power to obtain any relevant information they might need to monitor and enforce national provisions adopted pursuant to this Directive.

4. The relevant national regulatory authorities may adopt measures to ensure effective cross-border cooperation in the enforcement of the national laws adopted pursuant to this Directive and to create harmonised conditions for the provision of services involving cross-border data flows

.Directive 95/46/EC, make comments or recommendations thereupon, in particular to ensure that the envisaged measures do not adversely affect the functioning of the internal market. National regulatory authorities shall

The national regulatory authorities shall provide the Commission, in good time before adopting any such measures, with a summary of the grounds for action, the envisaged measures and the proposed course of action. The Commission may, having examined such information and consulted ENISA and the Working Party on the Protection of Individuals with regard to the Processing of Personal Data established by Article 29 of Directive 95/46/EC, make comments or recommendations thereupon, in particular to ensure that the envisaged measures do not adversely affect the functioning of the internal market. National regulatory authorities shall take the utmost account of the Commission's comments or recommendations when deciding on the measures.

223. Article 15a is new. The previous Directive didn't include any enforcement or penalty provisions. The amended Directive calls for 'effective, proportionate and dissuasive' penalties to be introduced for any infringement of the provisions of the revised Directive.

224. Presently there is an enforcement regime which is mapped onto Part V of the Data Protection Act 1998. Government and ICO are currently reviewing the effectiveness of this enforcement regime to ensure that ICO are able to effectively regulate this area as required by the amended Directive.

225. We consider that there are elements of the current regime which could work more effectively if they were more tailored to the electronic communications industry. In particular, we consider that the enforcement notice is useful, but could be made more effective. We also consider that there is scope for a civil monetary penalty for certain breaches.

226. We will need to make provision in the regulations to give ICO an audit power, to allow it to audit procedures and compliance with the provisions of the revised Directive.

227. Article 15a also calls for criminal penalties, which we consider should be retained only for the most serious breaches.

Q11 We welcome suggestions as to how the provisions of the Directive could be better enforced.

Cookies

228. The provisions of the amended Article 5(3) refer to any attempt to store information, or gain access to stored information, in a user's equipment. As Recital 66 explains, this can refer to both legitimate and illegitimate practices. Illegitimate practices, such as spyware and viruses, are addressed in other legislation and we do not propose to introduce further measures to deal with them as a result of this amendment. The main legitimate practice is the use of small text files, known as 'cookies', which have a wide range of uses on the Internet.

Article 5

5.3. Member States shall ensure that the ~~use of electronic communications networks to store~~ **storing of** information or ~~to gain~~ **the gaining of** access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is **has given his or her consent, having been** provided with clear and comprehensive information in accordance with Directive 95/46/EC, inter alia about the purposes of the processing. ~~and is offered the right to refuse such processing by the data controller.~~ This shall not prevent any technical storage or access for the sole purpose of carrying out ~~or facilitating~~ the transmission of a communication over an electronic communications network, or as strictly necessary in order ~~to provide~~ **for the provider of** an information society service explicitly requested by the subscriber or user **to provide the service.**

229. The internet as we know it today would be impossible without the use of these cookies. Many of the most popular websites and services would be unusable or severely restricted and so it is important that this provision is not implemented in a way which would damage the experience of UK Internet users or place a burden on UK and EU companies that use the web. The Directive acknowledges this by saying that consent is not required when the cookie is strictly necessary to deliver a service which has been explicitly requested by the user.

230. Given the fast-moving nature of the Internet, it would be very difficult to provide an exhaustive list of what uses are strictly necessary to deliver a particular online service and if we implemented in this way it would risk damaging innovation. We therefore propose to implement this provision by copying out the relevant wording of the Article, leaving ICO (or any future regulators) the flexibility to adjust to changes in usage and technology. Recital 66 of the amending Directive provides useful clarification of the Article text. We are considering including appropriate elements of this in the implementing regulations.

231. Internet companies are aware that not all consumers are fully aware of how cookies are used on today's websites and so are exploring ways to provide more information. The Government supports these efforts and will look to work at both UK and EU levels to

encourage such self-regulation. We believe that this will add significant value to the legislative implementation of this provision of the Directive.

Q 12 We welcome views on our proposed approach to implement the amendments to the Directive in relation to cookies by way of copying out the Directive text.

232. There are other amendments to the Directive, which will require either no further implementation (since domestic legislation already makes provision for them) or which will require minor amendments to the previous implementing regulations. These include provisions on the use of personal data for marketing certain services and using automated systems to make unsolicited marketing communications.

Additional Questions

Impact Assessments and Equality Impact Assessment

Q13 The Government invites respondents views and comments on the impact assessments and equality impact assessment which have been produced to support implementation of the revised electronic communications Framework.

General comment

Q14 Do respondents have views on the technical and practical issues that Government will need to take into account when implementing the review, bearing in mind that many of the changes are mandated?

Summary of Questions

Appeals

- Q1** The Government welcomes views on whether an enhanced form of Judicial Review (duly taking account of the merits) would: prevent the risk of regulatory gridlock under the new Framework by reducing the number and nature of appeals against Ofcom decisions; and whether there are any disadvantages in such an approach.
- Q2** We welcome views on whether there are steps the Government could take to ensure that appeals are focussed on determining whether Ofcom has made a material error.

Facilities Sharing

- Q3** Do respondents believe that a detailed inventory of infrastructure would be desirable in order to facilitate infrastructure sharing and if granted access, would this inform investment decisions?
- Q4** Do respondents believe that requiring undertakings to provide information to enable Ofcom to compile a detailed inventory of the nature, location and capacity of all UK infrastructure is proportionate, or should the powers only be exercised where there is an imminent prospect of infrastructure sharing in that particular location?
- Q5** Do respondents believe it is appropriate for Ofcom to be the sole authority that is able to require this additional information from undertakers in relation to infrastructure? If not, which authorities should be able to require this additional information?
- Q6** Do respondents believe that commercial confidentiality could be compromised by a 'national journal' approach and are there ways to mitigate this?

Security and Resilience of Networks and Services

- Q7** The Government welcomes any general observations on its proposed approach as set out in this section of this document and in particular the proposals in paragraph 111 to implementing Articles 13a and 13b of the Framework directive which address "Security and Integrity of Networks and Services". We would also welcome your views on what needs to be covered in any Ofcom guidance.

Dissuasive Sanctions

Q9 What do respondents think would be a dissuasive level of sanction for failure by a person to comply with an information request?

Universal Service Obligations

Q10 Do respondents have any views on the proposed changes to the Universal Service Order?

Equivalence of Access for Disabled Users

Q11 Do respondents agree that the approach outlined in paragraphs 189 - 193 is appropriate for implementing Article 23a (2) and encouraging the development of terminal equipment suitable for disabled users?

Breach of Personal Data and Penalties

Q12 We welcome suggestions as to how the provisions of the Directive could be better enforced.

Cookies

Q 13 We welcome views on our proposed approach to implement the amendments to the Directive in relation to cookies by way of copying out the Directive text.

Impact Assessments and Equality Impact Assessment

Q14 The Government invites views and comments from respondents on the impact assessments and equality impact assessment which have been produced to support implementation of the revised electronic communications Framework.

General comment

Q 15 Do respondents have views on the technical and practical issues that Government will need to take into account when implementing the review, bearing in mind that many of the changes are mandated?

Annex 1: Ofcom's Role in Transposing the Framework

1. Ofcom's role in implementation can be divided into three broad areas:

- making necessary modifications to the General and Universal Service Conditions (including definitions) in order to implement the amended Framework by 25 May 2011;
- changing its internal operations and procedures as a consequence of the modifications not only to the pre-mentioned conditions but also to the discussed Communications Act amendments (e.g. in relation to Information Gathering); and,
- considering the exercise of any new powers granted to it by the implementation (e.g. in relation to the management of the radio spectrum, Security and Resilience, Quality of Service, Duct Sharing).

Looking at each of these in turn:

2. Regarding modifying General and Universal Service Conditions, it is Ofcom's current thinking that changes are necessary to at least:

- a) various definitions in the Universal Service/General Conditions (e.g. to delete the references to *public telephone network*); and,
- b) the following General Conditions:
 - GC 3 (Proper and Effective Functioning of the Network);
 - GC 4 (Emergency Call Numbers);
 - GC 9 (Requirement to Offer Contracts with Minimum Terms);
 - GC 10 (Transparency and Publication of Information);
 - GC 15 (Special Measures for End-Users with Disabilities); and,
 - GC 18 (Number Portability);

as well as modifications to Universal Service Condition 1 (Provision of Telephony Services on Request).

This list is not exhaustive and will be subject to change as Ofcom's thinking in these areas develops.

3. By the end of October 2010, Ofcom intend to publicly set out in detail its approach to making these changes and will include Ofcom's assessment of which conditions will need to be amended by that time and a timeline indicating when Ofcom intend to consult stakeholders on such changes.

4. To adapt to new requirements under the Framework related to market reviews, enforcement and information-gathering, Ofcom intend to also need to make some changes to its internal operations and procedures. Again, by the end of October 2010, Ofcom intend to publicly set out in detail its approach to making these changes.

5. Finally, transposition of the revised Framework will also mean that Ofcom are granted new powers, which will need to be implemented by the Government through changes to the Communications Act. Once these powers are available to Ofcom, Ofcom intend to then consult as and when it believes it should use these new powers

Annex 2: Response Form

It is for the individual to decide whether they respond using this form or not. An electronic form is available at: www.bis.gov.uk/Consultations/revised-eu-electronic-communications-framework

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

The closing date for this consultation is 3rd December 2010.

Please provide your name and contact details:

Name:

Organisation (if applicable):

Address:

Please return completed forms to:

John Sexton
Department of Business, Innovation and Skills
Communications Regulatory Policy Team
Fourth Floor, 1 Victoria Street
London SW1H 0ET
Tel: 0207 215 4439
Fax: 0207 215 5442
Email ecommsframework@bis.gsi.gov.uk

To enable us to assess the impact of proposed implementation on different groups of respondents it would be helpful if you could indicate the kind of organisation on behalf of whom you are responding;

	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association
	Other (please describe):

Appeals

Q1 The Government welcomes views on whether an enhanced form of Judicial Review (duly taking account of the merits) would: prevent the risk of regulatory gridlock under the new Framework by reducing the number and nature of appeals against Ofcom decisions; and whether there are any disadvantages in such an approach.

Comments:

Q2 We welcome views on whether there are steps the Government could take to ensure that appeals are focussed on determining whether Ofcom has made a material error.

Comments:

Facilities Sharing

Q3 Do respondents believe that a detailed inventory of infrastructure would be desirable in order to facilitate infrastructure sharing and if granted access, would this inform investment decisions?

Yes

No

Not sure

Comments:

Q 4 Do respondents believe that requiring undertakings to provide information to enable Ofcom to compile a detailed inventory of the nature, location and capacity of all UK infrastructure is proportionate, or should the powers only be exercised where there is an imminent prospect of infrastructure sharing in that particular location?

Yes

No

Not sure

Comments:

Q5 Do respondents believe it is appropriate for Ofcom to be the sole authority that is able to require this additional information from undertakers in relation to infrastructure? If not, which authorities should be able to require this additional information?

Yes

No

Not sure

Comments:

Q6 Do respondents believe that commercial confidentiality could be compromised by a 'national journal' approach and are there ways to mitigate this?

Yes

No

Not sure

Comments:

Security and Resilience of Networks and Services

Q7 The Government welcomes any general observations on its proposed approach as set out in this section of this document and in particular the proposals in paragraph 111 to implementing Articles 13a and 13b of the Framework directive which address “Security and Integrity of Networks and Services”. We would also welcome your views on what needs to be covered in any Ofcom guidance.

Comments:

Dissuasive Sanctions

Q8 What do respondents think would be a dissuasive level of sanction for failure by a person to comply with an information request?

Comments:

Universal Service Order

Q9 Do respondents have any views on the proposed changes to the Universal Service Order?

Comments:

Equivalence

Q10 Do respondents agree the approach outlined in paragraphs 189-193 is appropriate to implementing Article 23a (2) and encouraging the development of terminal equipment suitable for disabled users?

Yes

No

Not sure

Comments:

Breach of Personal Data

Q 11 We welcome suggestions as to how the provisions of the Directive could be better enforced.

Comments:

Cookies

Q 12 We welcome views on our proposed approach to implement the amendments to the Directive in relation to cookies by way of copying out the Directive text.

Yes

No

Not sure

Comments:

Impact Assessments and Equality Impact Assessment

Q 13 The Government invites respondents views and comments on the impact assessments and equality impact assessment which have been produced to support implementation of the revised electronic communications Framework.

Comments:

General comment

Q 14 Do respondents have views on the technical and practical issues that Government will need to take into account when implementing the review, bearing in mind that many of the changes are mandated?

Comments;

Annex 3: List of Individuals/ Organisations consulted

The following individuals/organisations have been approached at some stage over the course of this consultation and implementation exercise;

Business

Acer UK Ltd	Everything, Everywhere (Orange & T –Mobile)	Pixsan
Apple	Five	Portset
Ashurst	Freeview	Post Office
Associated News	Global Crossing	RIM (Blackberry)
AT&T	Google	Samsung
BBC	Gradwell/TSL	Sanyo
BSkyB	Harvard plc	Seagate Technology
BT	Hewlett-Packard Limited	Sharp
BT Retail	Hitachi	Skype
Buffalo Technology	Humax Digital	Slater Electronics
Cable and Wireless	IBM	Sony UK Ltd
Cabot	Intel	Symantec
Canon Consumer Imaging	ITV	Talk Talk
Caroline Chamberlain	JVC	T-Mobile
Carphone Warehouse	Lenovo Technology	Telefonica (O2)
Channel 4	Lexmark	The Number (118118)
Cicero Strategy	LG Electronics	Thomson
CISCO	Microsoft	Three
Connexion	MSI Computer UK Ltd	Tiscali
Cullen International	News International	Toshiba
Dell	Nortel	Tvonics
DigiTV	Orange	Virgin Media
Dixons store group	Panasonic	Vodafone
Easynet	Philips	Yahoo!
eBay	Phorm	
Epson	Pioneer	

Interest Groups

Advertising Association	British Screen Advisory Council	Citizens Advice
Alliance for Inclusive Education	Broadcasting & Creative Industries Disability Network	Consumer Focus
Association for Interactive Media and Entertainment (AIME)	Citizens Advice	Digital Inclusion Team
Direct Marketing Association (DMA)	Communications Consumer Panel	Digital Inclusion Technology Group
Equalities National	Internet Advertising	Phone Pay Plus

Council	Bureau (IAB)	
European Publishers Council	Internet Services Providers' Association (ISPA)	Public Utilities Access Forum
Federation of Communication Services	Internet Telephony Service Providers Association (ITSPA)	Publishers Association
Equalities National Council	Media Trust	Publishers Licensing Society
European Publishers Council	Mobile Broadband Group	Radio Regulatory Associates (RRA)
Federation of Communication Services	Museums, Libraries and Archives Council	Telecoms Industry Forum on Disability & Ageing
Future Inclusion	National Consumer Federation	Which?
Information Society Alliance	National Council for Voluntary Organisations	
Intellect UK	Newspaper Society	
	UK Digital Champion	

Third Sector

AbilityNet	Leonard Cheshire Disability	RNIB
Age Concern England	MENCAP	RNID
AgeUK	Mind	SCOPE
British Deaf Association	National Blind Children's Society	Sense
Childnet International	National Centre for Independent Living	Spinal Injuries Association
Deafblind UK	National Deaf Children's Society	TAG
Disability Awareness in Action	National League for the Blind and Disabled	The National Federation of the Blind of the United Kingdom
Disability Wales	People First	The Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA)
Dyslexia Action	PhoneAbility	UK Disabled People's Council
Hearing concern LINK	RADAR	Wireless for the Blind
HumanITy	Ricability	

Other

Bird and Bird

Field Fisher

Waterhouse

Kemp Little LLP

Luther

Olswang

Onslow Partnership LLP

Pinsent Masons LLP

Taylor Wessing

Towerhouse

Annex 4: The Consultation Code of Practice

Formal consultation should take place at a stage when there is scope to influence policy outcome.

1. Consultation should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible.
2. Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals.
3. Consultation exercise should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach.
4. Keeping the burden of consultation to a minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained.
5. Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation.
6. Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Comments or complaints

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

Tunde Idowu,
BIS Consultation Co-ordinator,
1 Victoria Street,
London
SW1H 0ET

Telephone Tunde on 020 7215 0412
or email: Babatunde.Idowu@BIS.gsi.gov.uk

Annex 5: Terms of Reference of the e-Accessibility Forum

1. Purpose of the Group.

To explore and understand issues of e-accessibility and develop and share best practice across all sectors.

2. Aims and Objectives

- To produce and implement an eAccessibility Action Plan that addresses the issues of **people** with particular needs so that they can partake fully in the UK digital economy.
- To support **business** in exploiting expertise in e-accessibility in the EU and globally.
- To help establish a **UK position** on the implementation of EU Directives, and on the negotiation of proposed EU regulatory measures, affecting access to ICT networks, services and equipment.

There are a number of issues the group could look at such as inclusive design, cost of equipment, assistive technologies, software, technical support, skills and a one-stop shop for information.

The Forum will operate in a way that supports the work of Government, including as appropriate through the Devolved Administrations and the UK Digital Champion.

3. Membership of the Group.

Government will lead a group that draws together Government, industry and voluntary sector to explore and understand issues of e-accessibility and develop and share best practice across all sectors. The membership will consist of members who are willing to provide support financially or in-kind to help move this agenda forward.

4. Reporting and accountability

The group will report to the Minister for Culture, Communications and Creative Industries.

The group will normally be chaired by a member of the BIS Information Economy team.