



# **Post Implementation Review of the EU Electronic Communications Regulatory Framework 2009**

Presented to Parliament  
by the Secretary of State for Culture, Media and Sport  
by Command of Her Majesty

April 2017



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# A POST IMPLEMENTATION REVIEW (PIR) OF THE UK'S DOMESTIC IMPLEMENTATION OF THE 2009 REVISIONS TO THE EU ELECTRONIC COMMUNICATIONS FRAMEWORK

## INTRODUCTION:

This document provides a high level overview of the Post Implementation Review (PIR) of the UK's implementation of revisions to the EU Electronic Communications Framework in May 2011. The revisions, agreed under the European co-decision process in 2009, were transposed into UK legislation using four negative resolution statutory instruments:

- The Privacy and Electronic Communications (EC Directive) (Amendment) 2011<sup>1</sup>;
- The Electronic Communications (Universal Services) Amendment (Order 2011<sup>2</sup>);
- The Electronic Communications and Wireless Telegraphy Regulations 2011<sup>3</sup>; and,
- The Communications Act 2003 (Maximum Penalty for Contravention of Information Requirements) Order 2011<sup>4</sup>.

A large number of changes which did not require statutory intervention, or which were left to the discretion of the independent national regulatory authority (NRA), were implemented by Ofcom by making changes to their General Conditions of Entitlement (GCEs), a regulatory, open licence regime, that all communication providers in the UK must abide by under the General Authorisation provisions.

This Command Paper, the PIR and the associated supporting "Evaluation Summary" evidence the Government's continued commitment to better regulation, which the UK government had placed at the core of the next round of renegotiation of the Framework. This PIR examines the extent to which the UK Government's implementation has impacted upon business and consumers; the extent to which changes are achieving their original objectives; and the extent to which the effects anticipated in the original impact assessments (IAs) materialised and whether or not there were any unintended consequences.

It is important to note at this point that this PIR does not, of itself, aim to propose the repeal of, or amendment to, any existing legislation. Nor is it the intention to propose the introduction of any domestic legislation as a direct consequence of this PIR. However, its production has informed the UK's policy position towards developing a future electronic communications regulatory Framework that remains fit for purpose. The Commission published proposals for that future Framework (to be known as the Electronic Communications Code) on 14th September 2016 and DCMS has submitted the necessary Explanatory Memoranda to Parliament.

On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full

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<sup>1</sup> [The Privacy and Electronic Communications \(EC Directive\) \(Amendment\) Regulations 2011](#)

<sup>2</sup> [The Electronic Communications \(Universal Service\) \(Amendment\) Order 2011](#)

<sup>3</sup> [The Electronic Communications and Wireless Telegraphy Regulations 2011](#)

<sup>4</sup> [The Communications Act 2003 \(Maximum Penalty for Contravention of Information Requirements\) Order 2011](#)

member of the European Union and all the rights and obligations of EU membership remain in force. During this period, the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

## **BACKGROUND TO THE FRAMEWORK:**

The EU adopted the original Electronic Communications Regulatory Framework in 2002 and amended it, through negotiation of two amending directives, in 2009<sup>5</sup>. It currently consists of the following EU directives and regulations:

- the Framework Directive (2002/21/EC) - (*Directive 2002/21/EC on a common regulatory framework for electronic communication networks and services*);
- the Access Directive (2002/19/EC) - (*Directive 2002/19/EC on access, to and interconnection of, electronic communication networks and associated facilities*);
- the Authorisation Directive (2002/20/EC) - (*Directive 2002/20/EC on the authorisation of electronic communication networks and services*);
- the Universal Service Directive (2002/22/EC) - (*Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services*);
- the E-Privacy Directive (2002/58/EC) - (*Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector*); and,
- the BEREC Regulation - (*Regulation (EC) No 1211/2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office*).

The Framework currently regulates all transmission networks and services for electronic communications, including fixed and mobile telecommunications, email, access to the internet and some content related broadcasting.

The overarching aim of the Framework remains to harmonise regulation of electronic communications services across all EU Member States and specifically to:

- strengthen competition in the electronic communications sector;
- stimulate investment; and
- foster freedom of choice for consumers, provide additional sector-specific consumer protection and enable them to benefit from innovative services, quality and lower prices.

To ensure the Framework continues to deliver on these objectives, and keeps up with and reflects the pace of technological development within the sector, and takes account of changing market dynamics, the directives which have constituted the “specific” directives of the Framework contain an Article with inbuilt provision for regular review.

Sector-specific legislation in the UK is, for the most part, overseen by the NRA, Ofcom, consistent with Article 3 of the Framework Directive (2002/21/EC).

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<sup>5</sup> The Commission amended the original Framework in 2009 with two amending directives, the better Regulation amending directive (2009/136/EC) and the Citizens' Rights amending directive (2009/140/EC)

<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=OJ:L:2009:337:FULL&from=EN>

Ofcom draws its powers from and operates under a number of Acts of Parliament and other regulatory interventions. These include the Communications Act 2003, the Wireless Telegraphy Act 2006, the Broadcasting Acts 1990 and 1996, the Digital Economy Act 2010 and the Postal Services Act 2011 - though not all of these impact directly on the electronic communications sector. Ofcom is the regulator for the UK communications industries, with responsibilities across television, radio, on demand, postal, telecommunications and wireless communications services.

In the UK everyone is 'generally authorised' to operate as a telecommunications provider subject to adherence to Ofcom's GCEs; these conditions apply to all persons providing electronic communications networks and services.

## **OBJECTIVES OF THE 2009 REVISIONS TO THE FRAMEWORK:**

In November 2009, following a two-year review and renegotiation process, a revised Framework was agreed upon in the European Parliament and Council. Two amending directives, the "Better Regulation" Directive (Directive 2009/140/EC) and the "Citizens' Rights" Directive (Directive 2009/136/EC) were agreed in co-decision reforming the original telecommunications regulatory package, ensuring it remained fit for purpose and delivering on its original intention of providing for more competition, better regulation, strengthening of the internal market and consumer protection.

The specific objectives for the 2009 revisions were established by the Commission as part of its in-built process for regular review of the Framework. They applied at a cross-European level, and were addressed in the European Commission's IA. These objectives were to:

- foster investment and growth in the e-communications market – examples from the main 2009 changes which illustrate pursuit of this objective include revisions to Art 12 Framework directive (FWD) seeking to simplify access in infrastructure sharing.
- promote more efficient and flexible spectrum management - changes to Art 9 (FWD) illustrate the intention to streamline and coordinate spectrum management procedures.
- increase the consistency of regulatory actions, in line with the wider objective of creating a single e-communications market in Europe - examples which illustrate this include changes to Art 16 (FWD), Market Analysis Procedures and Art 20 (FWD) Dispute Resolution.
- reduce red-tape and administrative costs - changes to Art 10 Authorisation directive (AuthD) address compliance with general authorisations and rights of use, and the introduction of "dissuasive sanctions" under Arts 10 and 11 (AuthD) relate.
- reinforce user rights and consumer protection - changes to the USD directive including changes to Art 20 (contract information); Art 22 (quality of service information); Art 23a (provisions for disabled end-users) and Art 30 (switching provider) all contribute to delivery here.
- improve network security with, amongst other changes, the introduction of Art 13a & b, Access directive (AccD)

## **THE ELECTRONIC COMMUNICATIONS SECTOR IN THE UK:**

The UK has a thriving and competitive telecoms market - arguably, the most competitive electronic communications market in Europe. The current communications regulatory framework has, in general, worked well by offering communications providers a good degree of regulatory certainty across the EU while allowing the flexibility for Member States to adopt their own solutions. For instance, by encouraging competition in their national markets through an appropriate balance between end-to-end infrastructure and service-based competition, as unique national circumstances and Member States' digital strategies dictate.

The UK is one of the most developed digital economies in the world. It is boosted by around £145bn a year from digital technology, with the average British person spending around £1,500 online for goods each year. The digital sector supported 1.3 million jobs in the UK economy in 2014, around 4% of the total workforce. The growth of a fully digital economy is inextricably linked to productivity and growth. Just a 10% increase in the UK's digital density - the extent to which digital has penetrated economic activity - could add £40bn to GDP by 2020.

## **IMPLEMENTING MEASURES (2011):**

The European Commission gave Member States a deadline of 26th May 2011 to implement the 2009 revisions into national legislation. The UK was one of only five Member States, and the only large Member State, to implement in full and on time. These changes were primarily delivered by laying three statutory instruments (SIs) in the UK, amending provisions transposed into national law from the original five directives that comprise the Framework. Implementing measures consisted of:

- Privacy and Electronic Communications (EC Directive) (Amendment) 2011;
- The Electronic Communications (Universal Services) Amendment (Order 2011); and
- The Electronic Communications and Wireless Telegraphy Regulations 2011.

These SIs all contained the statutory requirement for five-yearly reviews that is being addressed through this PIR.

A further SI, the Communications Act 2003 (Maximum Penalty for Contravention of Information Requirements) Order 2011, subsequently brought in penalties associated with failing to respond in an accurate or timely manner, or providing false or misleading information, in response to an information request from Ofcom issued in the course of their regulatory duties associated with spectrum management. This SI introduced consistency to Ofcom's powers across the whole of the information gathering regime.

## **SCOPE OF THE PIR:**

In reviewing UK implementation of revisions made to the Framework in 2011, we have been mindful of Better Regulation Executive (BRE) guidance on proportionality for the review, including advice on any contentious and novel changes which may have given, or continue to give, cause for concern.

We have concentrated on the key changes that impacted in the UK. For example, new Articles 13 a & b introduced into the Access directive (AccD), 2002/19/EC, requiring functional separation of network management and retail operations in previously monopoly-owned providers, or the voluntary separation of such organisations with significant market power (SMP), although significant, were not relevant to the UK market where such arrangements were already in place.

There was very little scope for discretion in meeting the general targets set out in the changes last time round, although Member States were allowed some flexibility in introducing the necessary changes within the context of their own national regulatory regimes. Some of the smaller scale measures (e.g. speeding the process of porting mobile numbers and switching service providers) were implemented by making changes to Ofcom's GCEs. This PIR does not consider the implementation of the revisions that either did not require statutory intervention, or that did not directly apply or make a difference in the UK.

## **APPROACH TO RESEARCH AND ANALYSIS:**

We have consulted key stakeholders (across industry, consumers, regulators and other European Member States) with individual and group-tailored questionnaires, focusing on the estimates included in the original series of impact assessments, and on the costs and benefits of introducing and complying with new or altered regulation. The PIR review and the associated evidence summary report have been a significant focus of stakeholder engagement.

Industry has been asked to identify costs associated with complying with new regulation, specifically new reporting requirements, security audits and reporting security breaches, and the technological implementation of provisions related to consent for cookies.

Working with our own internal Economics and Analysis Unit (EAU), our questionnaires set the costs and benefits of the 2009 changes against the objectives for the Framework changes. Generally, feedback has reflected "that the approach taken to the implementation of the Framework Review in 2011 by government and Ofcom supported these ambitions. We also recognise that in many areas the government's implementation was light touch, and was broadly successful in minimising any unnecessary impacts on business" (from a communications provider).

We have not been able to obtain a lot of quantifiable data from industry - much of the data is commercially sensitive and the sector is a particularly competitive one, with many multinational operators. However, we have interpreted the fact that industry has not provided evidence of substantial costs to mean that industry has not been unnecessarily or substantially burdened by implementation measures.

It should be noted also that our request for information coincided with the Ofcom review of the Digital Communications Market (DCR), a review that addresses the general direction of the regulatory landscape for the next ten years or so. This is only the second time it has been undertaken since Ofcom was established in 2003.

Consequently, we have also drawn on responses to that review and other published data, including regular market reviews by Ofcom; data published by the European

Commission, (particularly their independent report on the implementation of the cookies provision, Art 5.3a, ePrivacy directive, 2002/58/EC), and extrapolated material from the UK responses to the Commission's 2015 consultation for the next round of review.

## **CONCLUSIONS AND NEXT STEPS, INCLUDING THE 2015 REVIEW:**

For the most part, the Government's 2011 implementation in of 2009 revisions was received as light touch, and without disproportionate burden on industry. Two key areas consistently emerged in the feedback we received, although in the majority of cases these assertions were not supported with significant quantifiable evidence.

In 2011, a revised Art 16 (6) FWD introduced changes to the frequency of market reviews (of designated markets), requiring review on a three-yearly cycle. Industry and the regulator made the case that this change increased the administrative burden on them both, required reviews to be conducted before the full implications of the last review could be measured, and generally jeopardised regulatory certainty. The government has noted this feedback as it prepares its position for a future revised Framework.

There was also a general consensus that the cookies provision (introduced under Art 5.3 of the ePrivacy directive, 2002/58/EC), which was intended to secure prior, informed consent to the storing and removing of data from a user's terminal, has proved disproportionate, ineffective, spoiled the user's experience of navigating the internet and not succeeded in delivering against its objective.

A review of the ePrivacy directive is being considered as a separate strand of the Commission's Digital Single Market (DSM), to ensure its consistency with the new General Data Protection Regulation. The PIR evidence we have received has been passed to the policy teams in this area.

**It is important to note that no UK legislation will be introduced, amended or repealed as a direct consequence of this PIR.** Government continues to consider its priorities for a revised Framework for the future.



<p><b>Title: Implementing 2009 revisions to the EU Electronic Communications Framework</b></p> <p>PIR No: Click here to enter text.  Original IA/RPC No: Click here to enter text.  Lead department or agency: DCMS  Other departments or agencies: N/A</p>	<div style="background-color: #333; color: white; text-align: center; padding: 5px;"><b>Post Implementation Review</b></div> <hr/> <p>Date: November 2016</p> <hr/> <p>Type of regulation: Choose an item.</p> <hr/> <p>Type of review: Choose an item.</p> <hr/> <p>Date measure came into force: 26<sup>th</sup> May 2011</p> <hr/> <p><b>Recommendation:</b> Renew</p> <hr/>
<p>Contact for enquiries: John Sexton, DCMS  john.sexton@culture.gov.uk or 0207 211 6540</p>	<p><b>RPC Opinion: <u>Green</u></b></p>

<p><b>1. What were the policy objectives of the measure?</b></p> <p>This Post Implementation Review (PIR) assesses the implementation of 2009 changes to the EU Electronic Communications Framework (effective from 26<sup>th</sup> May 2011).</p> <p>The European Electronic Communications Framework regulates all transmission networks and services for electronic communications, including fixed and mobile telecommunications, email, access to the internet and content related broadcasting. The Framework, comprising the current component directives, was originally agreed in 2002 and revised in an EU co-decision agreement in May 2009. Two amending directives, the “Better Regulation” Directive (Directive 2009/140/EC) and the “Citizens’ Rights” Directive (Directive 2009/136/EC)<sup>[2]</sup> were agreed in co-decision reforming the original telecommunications regulatory package, ensuring it remained fit for purpose and delivered on its original intention of providing for more competition, better regulation, strengthening of the internal market and consumer protection.</p> <p>The main objectives of the regulatory framework, as defined by the European Commission are: to create an open and competitive single market for electronic communications services and networks in Europe, and thereby; to encourage</p>
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innovation in communications networks and services, by both new entrants and existing operators, for the benefit of European businesses and citizens.

The specific objectives for the 2009 revisions were established by the Commission as part of its in-built process for regular review of the Framework. Applying across the Digital Single Market and fully articulated in the European Commission's impact assessment (IA)<sup>[3]</sup> these objectives were to:

- foster investment and growth in the e-communications market – examples from the main 2009 changes which illustrate pursuit of this objective include revisions to Art 12 Framework directive (FWD) sought to simplify access in infrastructure sharing.
- promote more efficient and flexible spectrum management - changes to Art 9 (FWD) illustrate the intention to streamline and coordinate spectrum management procedures.
- increase the consistency of regulatory actions, in line with the wider objective of creating a single e-communications market in Europe - examples which illustrate this objective include changes to Art 16 (FWD), Market Analysis Procedures and Art 20 (FWD) Dispute Resolution .
- reduce red-tape and administrative costs - changes to Art 10 Authorisation directive (AuthD), compliance with general authorisations and rights of use and the introduction of “dissuasive sanctions” under Arts 10 and 11 (AuthD), relate.
- reinforce user rights and consumer protection - changes to the USD directive including, changes to Art 20 contract information, Art 22 quality of service information, Art 30 switching provider and provisions for disabled end-users, see Art 23a Universal Services directive (USD) illustrate. I
- improve network security - changes to Art 13a & b Access directive (AccD), amongst others refer here,

## **2. What evidence has informed the PIR?**

For the PIR we have consulted key stakeholders (across industry, consumers, regulators and other European Member States) with individual and group-tailored questionnaires, focusing primarily on the trying to explore estimates that were included in the original series of impact assessments. Consequently, we have not, for example, undertaken a large scale consumer research project (eg, a substantial public consultation), merely to confirm data already available elsewhere. For example, Ofcom's annual publication on consumer attitudes addresses the benefits that consumers rate, some of which are introduced as a consequence of Framework revisions last time round (eg; faster switching) - many of which can be delivered by industrial in cost neutral ways.

Our stakeholder questionnaires, which issued to several categories of key stakeholders, explored in a targeted way the principle aspects of implementation from each key stakeholder's perspective. Our targeted research bore a direct correlation with the key changes introduced last time round and on which we had previously undertaken impact assessments. Questions were asked on identified key changes and the associated costs and benefits of introducing and complying with new or altered regulation.

In addition to the questionnaires, we arranged stakeholder workshops, the first of which focussed on gathering information to populate our PIR (as part of the process of informing our objectives and priorities for the next round of the Framework review).

The Framework team has undertaken 1-2-1 meetings with key stakeholders, where we have been able to discuss in a more private environment, past impacts, current concerns and future priorities. Such engagement remains a key plank of our stakeholder communications plan.

In collating information to assess UK implementation of revisions to the Framework we have attempted to evaluate outcomes and lessons learned at four levels:

- i) the effectiveness of the implementation process last time round;
- ii) delivery of the business and consumer benefits anticipated by the Citizens' Rights and Better Regulation amending Directives;
- iii) the contribution changes have made to economic growth in the UK; and
- iv) the contribution changes have made in delivering the Digital Single Market (DSM).

We have looked to achieve this four tiered evaluation by targeting a PIR consultation on those 100 identified key high interest/high influence contacts, who contributed consultation responses for the last review or have identified themselves as active participants in our plans for this review.

We have asked industry what work up costs they experienced associated with complying with new regulation, most notably new reporting requirements and the technological implementation of provisions related to consent for cookies, security audits and reporting security breaches.

To enable the easy exchange of information we created and publicised a dedicated e-mail address [EUFrameworkConsultation@culture.gov.uk](mailto:EUFrameworkConsultation@culture.gov.uk) for PIR contributions. We asked stakeholders to share their responses to the Commission's "fitness for purpose" consultation and Ofcom's DCR consultation via this dedicated address.

### **3. To what extent have the policy objectives been achieved?**

In assessing whether the regulation has achieved its policy objectives, it is important that 2011 implementation is assessed against the objectives for the review at that time, including the prevailing circumstances then (the context in which the objectives were set), in terms of the technology available, the dynamics of the marketplace and the overall prevailing economic climate, rather than against challenges that have emerged since.

An example of the feedback we received to our PIR questionnaire included a communication provider's comments that "that the approach taken to the implementation of the Framework Review in 2011 by government and Ofcom supported these ambitions. We also recognise that in many areas the government's implementation was light touch, and was broadly successful in minimising any unnecessary impacts on business"

Elsewhere, the impact of some of the more substantial and longer term changes (eg; the shortening of the cycle for regulatory market reviews, changes to spectrum authorisations and measures to promote investment, competition and consumer choice), are sometimes only measurable and can be evaluated over a longer term review of the market place.

In indicating that it wishes to prioritise investment and competition for the next round of revisions, the European Commission has indicated that the general consensus, borne out in European-level discussions is that headline objectives have been, for the most part, met. For example, end-to-end infrastructure competition is desirable, and is already happening, partly as a consequence of revisions introduced to the access provisions in 2009 . It is right, though, to consider whether Member States and regulators can do more to incentivise it further.

To help gauge the impact of the 2011 revisions it might be helpful to examine the overall state of the communication sector, specifically, and the digital economy, generally, in the UK. Many respondents to our PIR evaluation exercise, at least in part, attribute the positive developments in the market to the framework and the Government's light touch implementation of its requirements in the UK. The UK government, industry regulator and industry all report that, generally, they feel that the UK's 2011 implementation of Framework revisions has achieved its objectives.

The digital sector supported 1.3 million jobs in the UK economy in 2014, around 4% of the total workforce. However, when we talk about the digital economy nowadays, we're not just referring to the tech sector. Digital technologies are pervasive in all sectors of the UK economy and the digitisation of sectors is having a transformative effect on growth and productivity.

The UK is one of the most developed digital economies in the world - it is boosted by around £145bn a year from digital technology, with the average British person spending around £1,500 online for goods each year.

The growth of a fully digital economy is inextricably linked to productivity and growth. Just a 10% increase in the UK's digital density - the extent to which digital has penetrated economic activity - could add £40bn to GDP by 2020 .

That said, as the UK government set out in its non-paper detailing its priorities for this review (UK Non Paper: Review of the Electronic Communications Regulatory Framework<sup>[4]</sup>, published on 1st October 2015 and shared with the Commission and all other Member States) there are ambitions and targets which remain and have not yet been fully achieved, including in terms of encouraging non-State investment in the sector. Our paper quotes the Boston Consulting Group research paper "Five Priorities for Achieving Europe's Digital Single Market"<sup>[5]</sup> and an estimated, although disputed Euro 200bn shortfall in investment in infrastructure across Europe.

On spectrum management, the Commission has recently indicated dissatisfaction with the roll out of 4G across Europe<sup>[6]</sup> and made spectrum "harmonisation" a priority for the next round of review, although Ofcom announced the Government had raised £2.34bn from its auction of 4G mobile spectrum in February 2013 and the UK government continues with its plans to free the 700MHz Band (695MHz-790MHz) which is currently used by DTT (Digital Terrestrial Television) so that we can allocate it for mobile broadband.

This work is based on a decision at the World Radiocommunications Conference to harmonise the band for mobile in Europe (everywhere else in the world has already done it). We support this harmonisation and are getting on with the programme as quickly as we can even though it has not been officially mandated yet.

The revisions last time round also adjusted the requirement for NRAs to undertake market reviews of designated markets every five years and shortened the review cycle to every three years. This was to help promote consistency of practice and regulatory certainty. However, the reality of regulatory obligations being reconsidered every three years creates a degree of uncertainty in itself which could impact on industry stakeholders' investment plans. The intensive schedule (on which operators have to respond to large-scale information requests to inform the NRA's market analysis) is also extremely burdensome, imposing a significant regulatory overhead on both industry and regulators. The current three year requirement for relevant markets is particularly onerous in relation to markets that are characterised by stability and maturity (such as termination markets).

UK consumers enjoy the benefits of a highly competitive telecoms market, some of which can be attributed to Ofcom's rigorous attention to the consumer orientated conditions in their General Conditions of Entitlement (GCE)[7], the rules by which all communications providers in the UK must operate (covering contracts, transparency of information, customer service, switching, billing, accessibility and access to the emergency services, and much more).

In relation to consumer provisions we should also note that the majority of PIR respondents came from industry (despite consultation with consumer representative groups) and consequently we have limited feedback, for example, on the benefits of new disability provisions as a consequence of the revisions to Article 7 and the new Article 23a. None of the consumer groups, nor specific disability representative groups, responded to our PIR consultation. However, the Emergency- SMS service was launched in 2012 for disabled end-users to access the emergency services. 180,860 phone numbers were now registered to the scheme, with around 200 new registrations per day at the start of 2016.

96% of people who started to register completed the process, i.e. texted 'yes' to accept the terms and conditions. In March 2016, there had been 481 contacts via eSMS, which equated to roughly 12 eSMS conversations (i.e. series of messages) per day. Some of these involve more than one call, meaning that there are around 7 unique users of the service per day. Around a third of eSMS conversations result in the despatch of an emergency vehicle.

Finally, there was very limited national discretion in implementation of the revisions to the Framework in 2011. Several factors contributed to this; not least the Commission ambition for a Digital Single Market and the objective of ensuring consistency of regulatory intervention across all 28 Member States. Where the detail of implementation was left to national competence there was often very limited scope given domestic circumstances to provide for substantially differing options on implementation to achieve the pre-set EU objectives. For example, where new Articles 13a & b of the Framework directive required notification of a security breach the UK government had a choice on which authority that notification should go to (Ofcom, the Information Commissioner's Office, ICO or the Government itself). In the UK we choose Ofcom as the notification authority.

However, Ofcom's role is an essentially reactive one. Providers are required to report security breaches, and Ofcom has the power to audit providers (at the provider's expense). It also has powers of enforcement which can include the imposition of a fine not exceeding £2 million. These arrangements have been subject to separate review in the UK in 2016.

Similarly with the cookies Article (Article 5.3 of the e-Privacy directive), the Government worked with ICO to agree an industry wide approach to securing a “prior, informed consent” process for the placing, storing and retrieval of information on a user’s terminal, while causing the least disruption to the user’s experience and minimising work up and implementation costs and burdens on industry.

No regulation or legislation will be introduced, amended or repealed as a direct consequence of this PIR. As a matter of best practice some of the government’s implementation of the 2009 revisions is subject to periodic review. For example, DCMS are re-assessing whether the light-touch implementation of Articles 13A and B (Articles) of the Framework Directive (Security and Resilience of Networks) remains fit for purpose.

For the remainder of the regulatory Framework, we have used this PIR assessment to inform our negotiating position on the Commission’s proposals for recasting this existing Framework as a new Code, which it hopes will be negotiated by the end of 2017.

The Framework (future Code) – and electronic communications regulation with it – will not cease to exist but instead will be renewed in due course. This will not just be an immediate “rollover” renewal (or straight extension) of the existing provisions. The existing regulation will be revised in key parts to maintain its fitness for purpose (with the inclusion, amongst other changes, of amended consumer rights and protections for, eg; cross border operations and innovative, substitute “Over the Top (OTT)” technologies). Proposals published on 14th September 2016 also include changes to spectrum management, incentivising investment in infrastructure and proposals to re-establish BEREC, the Body of European Regulators for Electronic Communications, as a Commission agency.

Sign-off For Post Implementation Review: Chief economist/Head of Analysis and  
Minister

I have read the PIR and I am satisfied that it represents a fair and proportionate  
assessment of the impact of the measure.

Signed:

Date:

## Further Information Sheet

Please provide additional evidence in subsequent sheets, as required.

### 4. What were the original assumptions?

Given the vast range of circumstances and factors that the revised Framework had the potential to impact upon, the variables within costs and benefits where they could be roughly estimated, and the range of impacts that could not be definitively or even loosely estimated (simpler spectrum leases over extended, often unlimited periods for example) the original overarching IAs did not attempt to give a consolidated estimate of costs and benefits of implementation.

The original IA described the potential costs as *“There will be a cost to business from being required to take appropriate measures to manage risk to the security of networks and services; taking steps to guarantee the integrity, and help ensure continuity, of supply of service. There will also be costs if Ofcom requires them to provide information, submit to a security audit or issues binding instructions.*

*There will be a cost of notifying Ofcom of breaches of security or loss of integrity. There will be a cost to Ofcom of notifying ENISA, other regulators and the public of breaches of security or of loss of integrity. There will be a cost associated with producing an annual report on breaches for the Commission and ENISA. There will also be a cost to Ofcom of using their powers to investigate cases of noncompliance.*

*There will be a cost to businesses involved in dispute cases if Ofcom choose to use their discretionary power to recover their costs. There will be a new cost to Ofcom to collect data on the number, subject and duration of appeals and report this to BEREC and the Commission on request and to notify the Commission and BEREC of its proposed ex ante regulation.*

*There will be an increased cost to Ofcom from the requirement to review markets every three years.*

*“Requirement for Ofcom to conduct market reviews every 3 years instead of 4-5 years may increase burden on Ofcom by 187k-£1.3m per year and industry by £1.6m-£10.6m per year. Requirement for industry to notify ICO of data breaches could cost £240k-£2m per year. Other costs are mostly associated with enhanced information gathering powers for both Ofcom and ICO, with industry needing to spend £380k-£750k responding to information requests, particularly on location of infrastructure.*

*Ofcom may face some implementation costs to introduce spectrum leasing. There may be a cost to Ofcom if the requirement to regularly review the restrictions imposed on allocations, licenses and general authorisations leads to them having to carry out more reviews.*

*The ‘competent national authority’ will face a cost if it is required to provide an inventory of infrastructure in the UK, this could potentially pose a large increase in administrative burdens.*

*The increase in the number of undertakings with access to Ofcom’s dispute resolution system has the potential to increase the number of disputes they have to deal with, which could increase the cost to Ofcom”.*

In addition to these mostly non-monetised costs it assessed the non-monetised benefits of proposed revisions as:

*“The harmonised Framework will increase the benefits that the single market brings, including an increase in competition and price transparency throughout the MSs. This provides benefits to consumers through lower prices and a wider choice of services available. The harmonised Framework should also provide businesses operating in the market with greater certainty and consistency when they are operating within the MSs.*

*Harmonisation of the application of the regulatory Framework within MS should encourage competition as part of the single market because network and service providers will face similar conditions in each MS which should produce a level playing field. There should also be a benefit to business, especially businesses that operate in more than one MS, because they will operate under the same regulatory framework in each MS which should simplify any changes they need to make to comply with the provisions of the Framework, as they should be similar in each State.’*

## **5. Were there any unintended consequences?**

The e-Privacy directive is being considered outside of the scope of the next round of Framework review, following on from agreement on the EU’s General Data Protection Regulation (GDPR) in 2015. The Commission published its proposals for the review of the e-Privacy directive on 10 January 2017.

Perhaps the most notable change in the last round of revisions to the Framework was implementation of the so-called “cookies article” (Art 5.3 of the e-Privacy directive), because of its novelty and the consumer impact. This regulation was intended to seek prior, informed consent for the storing of data on a user’s terminal (cookies). Industry warned of the vast costs associated with the introduction of this requirement - a reality not borne out in our PIR data gathering. PIR returns allude to lower development and implementation costs but the biggest unanticipated impact has been the consumer reaction which ranges from apathy to frustration, but nowhere near the positive reassurance that introduction of the requirement was expected to deliver.

A second unintended consequence of changes in 2011 arose as a result of the shortening of the market review cycle. As signposted to elsewhere, the Framework currently requires market reviews to be conducted every three years, which often does not provide enough time for NRAs to assess the impact of previous changes in regulatory policy (and therefore to assess potential areas for deregulation).

The NRA might not be able to take account of specific anticipated changes in market characteristics beyond the three-year horizon currently provided for regulatory interventions before a further follow up review is required (eg; it might be unable to design remedies that provide for more appropriate migration signals to alternative services or technologies beyond three years before it is required to review the success, or otherwise, of the previous regulatory intervention).

Regulatory obligations being reconsidered every three years also creates a degree of uncertainty which could impact on industry stakeholders’ investment plans. Finally, this intensive schedule (on which operators have to respond to large-scale information requests to inform the NRA’s market analysis) is also extremely



burdensome, imposing a significant regulatory overhead on both industry and regulators. The current three year requirement for relevant markets is particularly onerous in relation to markets that are characterised by stability and maturity (such as termination markets)".

Many in industry also make the case for less frequent market reviews stating, "the existing requirements for market reviews to be undertaken every three years creates a significant administrative burden and can lead to less regulatory certainty".

## **6. Has the evidence identified any opportunities for reducing the burden on business?**

So, for the most part, implementation of the last round of Framework revisions has achieved its objectives. However, during the course of the last negotiations, the Commission was swayed by the case made for shorter term reviews, including that a quicker cycle of market review would help react to fast-changing market circumstances across the four designated retail and wholesale markets. Specifically, the Commission supported arguments that more frequent review cycles presented the potential for faster removal of remedies, as competition increased to deliver the desired market outcomes, and in doing so contributed to regulatory certainty.

Evidence in the UK, however, as well as some anecdotal accounts from industry, and the NRA's response to engagement in the next round of revisions suggests that the current requirement that NRAs carry out market reviews every three years has in some cases made it difficult to assess the impact of regulation (and thus the scope for deregulation), undermined regulatory stability and acted as a consequent disincentive to investment, and created a significant administrative burden for industry and NRAs. The UK, with support from the vast majority of Member States, has successfully lobbied for the reversal of this change and the restoration of the five-yearly timetable for undertaking market reviews.

## **7. For EU measures, how does the UK's implementation compare with that in other EU Member States in terms of costs to business?**

We have consulted all 27 other Member States (OMS) on their implementation of 2009 Framework revisions (the revisions contained some scope for discretion in national implementation strategies) to gauge whether there was any suggestion of the UK having gold-plated any of the requirements, or whether we could have done anything differently.

We are confident, as we were on completion of implementation in 2011, and as has been confirmed by annual Commission Implementation visits since then, and our PIR consultations, that we have not gold-plated, that our approach is considered "light touch" and appropriate, and that our implementation has delivered on the objectives behind the revisions.

We received eight responses from OMS, mostly describing the domestic legislative vehicles and Acts used to implement revisions in those other Member States. None of the other OMS have undertaken an evaluation, either post implementation last time round, or prior to the next round of negotiations. There is a consolidation of the

Member State feedback we received in the additional evaluation summary which accompanies publication of this Command Paper and PIR.

For the most part other MSs agree with the UK that is that the Framework is not intrinsically flawed, but does need updating to reflect changing market circumstances, including a range of new and innovative consumer OTT services. The most comprehensive MS responses came from Sweden and Belgium (both co-signatories to the UK's like-minded letter to the Commission<sup>[8]</sup>).

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[1] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0037:0069:EN:PDF> - The Better Regulation amending directive

[2] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:en:PDF> - The Citizens' Rights amending directive

[3] <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52007SC1473> - SEC(2007) 1473 – Commission Staff Working Document – Summary of Impact Assessment

[4] UK Non Paper : Review of the Electronic Communications Regulatory Framework  
<https://www.gov.uk/government/publications/uk-non-paper-review-of-the-electronic-communications-regulatory-framework>

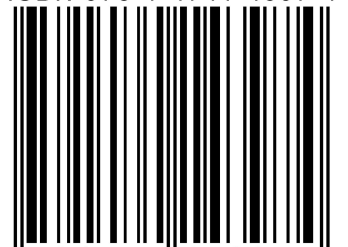
[5] Boston Consulting Group research paper “Five Priorities for Achieving Europe’s Digital Single Market  
[https://etno.eu/datas/publications/studies/FINAL\\_BCG-Five-Priorities-Europes-Digital-Single-Market-Oct-2015.pdf](https://etno.eu/datas/publications/studies/FINAL_BCG-Five-Priorities-Europes-Digital-Single-Market-Oct-2015.pdf)

[6] Amsterdam high level event, 20<sup>th</sup> April 2016

[7] Ofcom’s General Conditions of Entitlement (GCEs), as at May 2015:  
[http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/CONSOLIDATED\\_VERSION\\_OF\\_GENERAL\\_CONDITIONS\\_AS\\_AT\\_28\\_MAY\\_2015.pdf](http://stakeholders.ofcom.org.uk/binaries/telecoms/ga/CONSOLIDATED_VERSION_OF_GENERAL_CONDITIONS_AS_AT_28_MAY_2015.pdf)

[8] <https://www.gov.uk/government/publications/electronic-communications-framework-review-update>

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