

Representing the Communication Services Industry



Implementing the revised EU Electronic Communications Framework
BIS consultation on the overall approach and specific issues

FCS response- December 2010

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Introduction

The [Federation of Communication Services](#) represents over 300 businesses delivering products and services via wireless, copper and fibre technology. The member companies are listed on the [FCS website](#).

We welcome the pan EU approach of the revised Framework and the ongoing EC Digital Agenda. Providing a consistent approach to regulation helps UK businesses more easily enter other markets within the EU. We particularly welcome the Minister's encouragement of the consumer benefits of better competition, improved choice of supplier and faster switching processes

We welcome the approach by BIS to encourage the industry to focus on the changes introduced in the revised Framework, although there are additional points we would like to comment on that are not included within the questions. We would like to thank BIS for holding 3 stakeholder meetings during the consultation period and for attending the FCS CP10 event in October; these have helped the industry to understand the wide ranging implications of the new regulations.

Different aspects of the revised Framework apply to different sectors within the FCS membership and in this response we refer to the major issues that apply to each sector. The UK market appears to be more diverse within the distribution chain than other Member States and we encourage Government to take this diversity into account as it implements the Framework.

We are concerned however that Ofcom will not be consulting on changes to the General Conditions until 2011, which gives industry very little time to respond prior to the implementation date for the Framework of 25 May 2011, and we would have welcomed some earlier insight.

The changes outlined in this consultation expose the UK telecoms industry's need for much more joined up thinking to implement the changes. The proliferation of uncoordinated Ofcom or industry committees that currently exist can lead to a duplication of effort or decisions being made in one area that affect players not included within the decision making group. A co-regulatory Telecoms Forum, open to all CPs with oversight of all relevant retail communications products, might lead to a more coherent, inclusive and efficient method of implementing regulatory change.

Key issues

The FCS in conjunction with its members has identified the following policy principles which form the basis of this response:

- Ease of customer migration is essential for maintaining competition and should be recipient led; fixed number portability processes need to be addressed;
- A wide range of customer contracts assists the competitive market;
- Contract length limitations in the USO must clearly refer to services to consumers that are natural persons and not the Communications Act 2003 definition that also includes small businesses with up to 10 employees;
- BIS and Ofcom should clarify whether the new minimum security standards apply to PECNs or extend to PECS; there should be no undue burdens on operators, Service Providers and resellers arising from the new standards;
- The use of Ofcom's new powers on leasing and hoarding of radio spectrum should be handled carefully and not used to disrupt existing business methods such as Spectrum Management Organisations, hire and public access services;
- The appeals process requires review to identify what an optimal appeals regime should look like ensuring proportionality, reasonable costs and processes for all participants.

1 NRA independence- Article 3a

The new provision requiring NRAs to operate independently of political interference may have been included to bring other member states into line with the UK. However we are concerned that there may be national imperatives that the UK Government might identify but Ofcom acting independently would not have to take into account, such as ensuring access to radio spectrum for the Critical National Infrastructure.

The limitations of the current and possibly future planned appeals process for smaller communications services companies with the already limited role of Government and MPs to direct Ofcom would provide less oversight that we would think reasonable.

2 Appeals- Article 4

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 of such an approach

We agree that there should not be frivolous appeals against Ofcom decisions and note that in recent years frequent appeals to the CAT have slowed down regulatory change, such as an auction of the 2.6 GHz spectrum block and improvements to the number portability regime. The consultation proposes that the scope for appeals should be limited which is of concern to many and in our view no dilution of the current appeals process should take place.

FCS is equally concerned that there should be a proportionate appeals process for smaller companies in the communications services sector, which is absent at the moment. Examples of Ofcom decisions where members wished to appeal were the auction rules for the UHF1 auction in 2006, the incomplete analysis of costs of clearing the L band spectrum prior to auction and Ofcom's decision on 0870 regulation and pricing. The threshold for appeal to the CAT proved too high a barrier for the companies concerned.

Article 4 states: *Member States shall ensure effective mechanisms exist at a national level which any user or undertaking providing electronic communications networks or services who is affected by a decision of a NRA has the right of appeal against the decision to an appeal body.*

We suggest that for the UK to come in line with the Article there is a review of what an optimal appeals regime should look like, including proportionality, costs and processes for all participants. Such a review should be conducted in a careful manner with full consultation with all parties concerned and not hastily introduced.

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

Our members report that frequently their concerns arise because they believe that an inadequate regulatory impact assessment was conducted. To improve this perhaps a more formulaic approach could be put in place supported by a more comprehensive database of interested parties- something that one of the consultants working for Ofcom could possibly help to put in place.

3 Article 12- 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 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 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 undertakings in relation to infrastructure? If not, which authorities should be able to require the information?

Q6: Do respondents believe that commercial confidentiality could be compromised by a “national journal” approach

Our members who have infrastructure have voiced caution about the confidentiality of the data in such an inventory, particularly as Ofcom can be asked to disclose information under Freedom of Information requests. Their concerns are both on national security and commercial confidentiality grounds. If Ofcom has the authority to require information perhaps the data should be held by a trusted third party, such as the CPNI, so that the data is protected. It would appear proportionate for data to be required only when there is a need, such as the imminent prospect of sharing in a specific location; otherwise data collection could be unnecessarily costly and appear to be gold plating of the Directive. Commercial confidentiality should not be threatened provided no specific locations are identified.

It would be prudent for an obligation to be placed on CPs to advise Ofcom of any significant changes to network infrastructure. There appears to be no requirement at present.

Our members have asked whether facilities sharing is to be a condition of operating as a CP i.e. will there be a mandate to open up and share duct and poles to competitors.

If an infrastructure company experiences a breach of security and passes such information to Ofcom and ENISA, we would like to know who else will see the information.

4 Article 13 Security and Resilience of Networks and Services

Q7: The Government welcomes any general observations on its proposed approach to implementing Articles 13a and 13b of the Framework which address “Security and Integrity of Networks and Services”. We welcome your views on what needs to be covered in any Ofcom guidance

The communications services industry in the UK comprises many hundreds of companies who deliver services to customers. Some have physical infrastructure- such as national networks or just an individual hard or soft switch- and others resell services from a wholesale provider. Implementation of Articles 13a and 13b in the UK should be proportionately applied to the different players in the market.

Small resellers can receive services from their wholesaler that are no different from the services the wholesaler provides via his direct sales arm to consumers. Since the Government is not requiring consumers and end user customers to carry out security audits, similar rules should be in place for small resellers. The proportionate implementation of Article 13 would be to apply the rule down to the level of the wholesaler, in whose interests it is that no security breaches derive from any of its customers. A reappraisal of the definition of a PECS service to resolve this inconsistency may be required or exemptions put in place; for example there is a threshold proportionate to size of company in the Metering and Billing regulation and a similar threshold could apply here. We suggest that in addition to transcribing Article 13 into UK law there is an additional requirement on Ofcom to consult on changes necessary to reflect the changing market.

Reference is made to use of the Minimum Security Standard developed by NICC for the LLU/BT interface. However this is inappropriate for very small resellers who are not generally able to be part of the NICC. Any standards development must be open to those that need to use them.

The definition of PECN is wrapped around the existence of a TDM interconnect agreement with the lead provider (typically BT). This is in need of review. Many CPs, have exactly the same commercial agreement but because they have soft switches and not a legacy switch they are not treated the same way.

5 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?

Ofcom does not consider the sanction level of £50,000 adequate and is seeking to increase it to become dissuasive. Article 21a stresses that sanctions must be proportionate which we welcome.

Any sanction should be appropriate to the importance of the information request and rather than suggest an upper limit we think that Ofcom should research similar sanctions and develop a schedule of fines vs CP action and CP size. There is probably sufficient evidence across the UK regulatory compliance regime in different industries for a compliance and fines table to be developed. This proposal could then be subject to consultation for the communication sector.

The UK is planning to extend the sanctions and requirement to provide information to WT Act spectrum licensees as well as the current obligations on Communication Providers.

We would like to know more details about Ofcom's proposed use of such sanctions. Many WT Act radio licences are for the end user community such as Shopwatch schemes, schools or hospitals. We caution Ofcom to be very careful when applying draconian rules for example for non payment of a licence fee; the reason for non payment may lie with administrative processes within Ofcom or elsewhere rather than with the licensee.

6 Universal Service Obligations

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

We have seen the evolution of the General Authorisation regime in the UK and believe that it is comprehensive enough to incorporate the USO changes.

FCS assists its members to develop and work to codes of practice for compliance with the rules of GC14 and these can be adapted to maintain adherence to changes in the General Conditions.

6.1 Contracts:

The new provision obliges contract providers to offer consumers a fixed-term contract of 12 months in addition to any other fixed term contracts they might offer (i.e.18 months) to a maximum length of two years

This new provision applies to individual consumers as defined in the Directive. However we would like to stress that implementation in the UK should refer only to contracts with natural persons, i.e. individuals, and not the broader definition in the Communications Act 2003 of a consumer as including very small businesses with up to 10 employees. Suppliers to small businesses offer a variety of packages and services within their contracts depending on their customer's requirements and to reduce this flexibility would be a retrograde step for competition. For example when selling a small PBX to an SME and upgrading them to ISDN at the same time, typically service providers and resellers would offer contract or lease payments of up to five years to spread the cost for a small business.

The new obligation for suppliers of fixed term contracts to consumers to offer at least one contract version that has a minimum period up to 12 months will require suppliers of broadband to produce a

new tariff offering. This has yet to be consulted upon by Ofcom but our reading of this new obligation suggests that suppliers will have to spend time and resource to add this to their portfolio. We would be grateful of this clarification before the outcome of Ofcom's consultation in the spring. This will take time to implement for the companies concerned and a transition period would appear appropriate

6.2 Number portability:

The consultation does not analyse how the new obligation to port a telephone number in 1 day is to be implemented but defers to Ofcom's consultation next year.

General Condition 18 covers porting of geographic, non geographic and mobile numbers.

In the UK mobile numbers are treated separately and the mobile number porting process is conducted via the MNP Operators Steering Group; 1 day porting, although losing provider led which we do not believe is the ideal, is already in place.

The geographic and non geographic porting processes appear to work adequately for single line number ports between large national suppliers, but FCS members who service small business with WLR or VoIP multiline services report that the current porting process is becoming slower and more resource intensive to implement. In a recent FCS survey of fixed number portability CP members reported that the average time to port is 21 working days between WLR providers or between WLR and VoIP providers with the longest time to port from 3-12 months. 60% respondents had experience of customers abandoning the transfer of their business due to frustration with the problems associated with porting their phone number. It is clear that Ofcom needs to address this problem urgently for the UK to comply with this new porting regulation and we encourage Ofcom to do this in advance of the consultation on changes to GC18 in 2011.

6.3 Customer switching:

Switching customers is a central feature of a competitive market and ease of switching demonstrates a well functioning market. We are concerned that developments within the new fibre services delivering broadband and voice may limit the ability of a customer to switch supplier. We have engaged with Ofcom in its review of switching- the [FCS submission](#) is on the FCS website and includes a report on fixed number portability.

In our view there is an urgency to address consumer switching processes in the UK. This would be best achieved by co-ordination between all Communications Providers delivering services over all the technologies- copper, fibre, wireless and satellite- to ensure that the industry is able to resolve the operational issues that arise. Customers using bundled services would expect a single process for changing their supplier either to obtain new unbundled products or to another supplier providing a similar bundle. The direction that industry has to move to has been set out by Ofcom but industry should get together in a co-regulatory Telecoms Forum to develop the detailed requirements.

6.4 Directories:

Article 25 places obligations on undertakings to provide subscriber information (at subscribers' request) to the provider of directory enquiry services.

We are unclear as to whether this will apply only to number range holders, i.e. CUPID registered addresses, or all CPs on the Ofcom RID list. We would welcome clarification.

7 Equivalence of Access for Disabled Users

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?

We agree with the Government's approach

We would like to know how the text relay services are to be funded. BT provides these services at the moment but there is little cost transparency.

In its consultation on changes to GC 15 we would welcome clarification as to which organisation Ofcom will consult on services for the disabled since the Government has said that it is minded to abolish the Communications Consumer Panel, which is specifically named in GC15.

Q11 Breach of personal data and penalties

No comment

Q12 Cookies

No comment

Q 13 Revised Framework impact assessments and equality impact assessments

No comment

Other comments

8 Spectrum

Article 9 of the Framework Directive applies to the management of radio frequencies. This permits Member States to require an electronic communication service to be provided in a specific band under certain limited circumstances including measures to fulfil general interest objectives set out by Member States

8.1 CNI

FCS believes that consideration needs to be given by the UK Government as to how the future radio spectrum requirements of the Critical National Infrastructure (CNI) will be provided. The CNI organisations, which include the energy utilities, transport, water and emergency services, use radio spectrum as an input to support their primary national functions. They cannot function without self provided spectrum services as commercial services do not wholly satisfy their requirements. [A report](#) explaining the requirements of the UK business radio industry and users including the CNI sector, the Strategic Review of Business Radio, was published by FCS in June 2010

8.2 Hoarding

Article 9 also allows for Member States to lay down rules to prevent spectrum hoarding. We do not yet know how Ofcom will implement this new power. In developing a consultation on this subject we would urge care to set out what is meant by hoarding. A commercial spectrum organisation such as a mobile telephony operator will maximise their usage, but other users with spectrum as a secondary input for safety may use the frequencies infrequently for the time when an emergency occurs. This is not hoarding. We are concerned that the time is running out for an in-depth consultation prior to May 2011 of all the types of licence currently in use but clear guidelines will need to be developed to inform licensees of Ofcom's intentions.

8.3 Licence restrictions

Article 9a allows WT Act licensees to request to the NRA for a reassessment of the restrictions of their rights. We would be interested to know which licences might be considered; for example licences issued before 25 May 2006 include licences issued as a result of auctions or by command and control mechanisms. It would be helpful if Ofcom could set out what changes would be permitted and to which licences so that all relevant licensees can consider whether to take advantage of this new facility.

8.4 Leasing and trading

Article 9b refers to the transfer or lease of individual rights to use radio frequencies.

Spectrum trading was introduced 6 years ago in December 2004 but has not been the success that Ofcom envisaged with a very low percentage of licences changing hands by trading. Trading was introduced for Business Radio licences in December 2008 but again has had little impact on the market; FCS has explained that business radio licensees have a need for their spectrum, as it is an essential input to the end user's primary activity, and so are unlikely to want to sell or trade it unless their business plans alter. Trading is more suited to commercial players in the spectrum market such as broadcasters and mobile telephony providers.

The introduction of spectrum leasing is intended to make trading easier.

However there may be unintended consequences for current and well established business methods that are providing valued service to customers. On behalf of its business radio members delivering Short Term Hire, Public Access Mobile Radio (PAMR), Common Base Station (CBS) and Spectrum Management Organisation (SMO) services. FCS has held discussions with Ofcom. We urge that by introducing spectrum leasing into the UK there is minimum intrusion to current business practices. This may take the form of a change in the licence conditions to refer to keeping records of customers.

In our discussions with Ofcom we have been concerned to learn that Ofcom wishes to place a 24 month limit on spectrum leases. This might be a suitable timeframe for a company hiring out equipment tuned to a radio frequency for short term hire. But this time limit is a new restriction on companies who have long standing customers using the services of a PAMR, CBS or SMO company. New restrictions appear to go against the objectives of removing barriers for licensees.

We endorse the view of FCS member Joint Radio Company that *"The view has been expressed by Ofcom that arrangements over this period of time ought to be governed by trades rather than leases, but the leasing arrangement retains the spectrum manager's flexibility to make other use of the spectrum not envisaged at the time of the original agreement. For example, the spectrum manager might find a use of the same spectrum overnight or at week-ends if the primary user does not require its use at that time. The spectrum manager would be geared up to make use of such opportunities, whereas the business of the primary user might cause them not to wish to engage in such third party arrangements. Thus, we would not want what is intended to be a liberalising measure to be unnecessarily constrained"*

9 Maximum Retail Tariffs

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.

There are many disadvantages for consumers associated with the current high level of charges for calls to 08/09 numbers including “Freephone” particularly from mobile phones with no added value from the callers perspective. The rationale for prolonging the temporary arrangement established for 0800 calls 25 years ago because of increased call delivery costs no longer holds and the premiums added to other NGN calls are unjustified.

Ofcom expects to consult on non geographic calls services shortly and the new powers for Ofcom to set retail tariff caps might be helpful in addressing this concern.

10 Definitions

The definition of **Electronic Communications Network-** is being changed to include “*network elements which are not active*”. We seek more clarification as to what these elements might be as there is a separate definition for associated facilities.