



**Consumer  
Focus**  
Campaigning for a fair deal

# **Consumer Focus response to the Department for Business, Innovation and Skills consultation on implementing the revised EU Electronic Communications framework**

**December 2010**

# About us

Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland. We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

Consumer Focus tackles the issues that matter to consumers, and aims to give people a stronger voice. We don't just draw attention to problems – we work with consumers and with a range of organisations to champion creative solutions that make a difference to consumers' lives.

Acronyms used in this response			
ADR	Alternative Dispute Resolution	MTR	Mobile termination rates
BIS	Department for Business, Innovation and Skills	NoT	Notice of transfer
GPL	Gaining provider-led	PAC	Porting Authorisation Code
IAB	Internet Advertising Bureau	PAYG	Pay as you go
ISP	Internet Service Provider	P2P	Peer to peer
LPL	Losing provider-led	QoS	Quality of service
MAC	Migrations authorisation code	SMP	Significant market power
MNO	Mobile network operator	USD	Universal Service Directive
MNP	Mobile number porting	VOIP	Voice over internet protocol

# Introduction

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We welcome the opportunity to comment on the Department for Business, Innovation and Skills (BIS) consultation on implementing the revised EU Electronic Communications framework.

We are also grateful to BIS for facilitating stakeholders' meetings on the implementation of the regulations that served as useful platforms to exchange feedbacks about views of various market players.

Overall we welcome the new regulations which we believe will strengthen consumer protection and encourage more open and fair electronic communication markets. However in order to ensure that the new legal framework provides a better consumer protection regime we recommend that BIS ensures that:

- Ofcom addresses the issue of improving transparency of information to consumers in the areas of tariffs, price comparison services, information on customer services, information on network coverage and not spots, and broadband speed and overall traffic management
- the new regulations on number portability will lead to an introduction of the recipient-led system that would benefit consumers most
- the new regulations will facilitate the process of making publicly available data on telecommunication providers' complaint record and customer service standards
- Ofcom engages in work with consumer organisations and industry stakeholders to foster work on setting minimum quality of service indicators
- the new regulations will lead to a genuine choice of contracts for consumers

In addition we recommend that:

- BIS reproduces the wording of the revised ePrivacy directive, Article 5(3), in relation to cookies as stated in the impact assessment text.<sup>1</sup> In addition we recommend that BIS reconsiders its proposed options (Option 1 and 2) for the implementation of cookie provisions under ePrivacy directive to take account of consumers concerns and interests, as well as the opinion of the Article 29 Working Party
- BIS considers the examples of national regulatory authorities from other countries and adopt self-regulation or co-regulation on net neutrality and traffic management to prevent anti-competitive behaviour and safeguards consumers and citizens access and choice to internet services, to include access to public services and digital inclusion

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<sup>1</sup> <http://bit.ly/hlaAT7>, para 228, p. 57.

# Universal Service Obligations

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

### Consumer information

Complexity and consumer information has emerged as a key theme of Consumer Focus' work to date in the mobile sector. The market is highly competitive, leading to innovation and downward pressure on prices. However, too often consumers pay too much and get too little value because they do not have access to the information and tools to allow them to make informed choices when buying products and services. As stated by BIS the aim of the revised Framework for Electronic Communication is to improve the existing information asymmetry on the market by providing consumers with better quality of information on telecommunication services such as information on prices, tariffs, and terms and conditions.

BIS points to the fact the provisions about information are already in place in the UK, but in many cases the consumer information provisions are not bringing any benefits for consumers. Our research in the mobile sector<sup>2</sup> for example, found that consumers are struggling to deal with the perceived complexity of the mobile phone market. For example only one in five mobile users found it easy to navigate through the range of tariffs available, with close to 70 per cent feeling that there are too many mobile tariffs available.

Consumer Focus research also illustrates consumer confusion about the lack of clear information about call charges<sup>3</sup>:

- Less than half of respondents (45 per cent) were aware they are charged for 0800 calls from mobiles, while almost one in five (19 per cent) thought these calls were free
- Awareness of charges for 0845 and 0870 numbers was higher among respondents (57 per cent and 51 per cent respectively) but large numbers of consumers didn't know whether they were charged or not (33 per cent and 42 per cent respectively)
- Awareness of charges for 0300 numbers was particularly low; less than a third (31 per cent) knew that they would be charged for these numbers and 60 per cent didn't know whether they would be charged or not
- When asked how much they would be charged for calling 0800 numbers, respondents who made an estimate were generally accurate (up to 25p), but the overwhelming majority (83 per cent) did not know how much the charges were

In addition, the rising popularity of bundles, while offering consumers a wide range of services often at a discounted price, also presents further complications to switching processes.

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<sup>2</sup> Online survey conducted by Harris Interactive in March 2009 amongst 2,013 adults aged 18+,

<sup>3</sup> Telephone omnibus survey commissioned by ICM research, on behalf of Consumer Focus in March 2010. Sample size 1000

Ofcom states that in some cases consumers who wish to switch a bundled deal from one provider to another may have to navigate the Notification of Transfer, MAC and Cease and re-provide methods, which clearly present disincentives for consumers.

Worryingly, Ofcom's research found that consumers felt that switching a bundle would be easier than switching individual services when in fact it can be considerably more complicated<sup>4</sup>.

We are concerned about Ofcom research which demonstrates that 'not knowing what process to use to switch'<sup>5</sup> was a factor in some consumers deciding not to switch providers<sup>6</sup>. Consumers should have access to independent information on how to switch mobile provider as well as how to get the best mobile deal and information about provider's customer service standards and price. Consumer Focus research indicates that although information about cost is important in considering switching, other factors such as previous experience with a company, information about coverage and provider reputation are also important<sup>7</sup>.

Schemes such as Ofcom's price accreditation offer consumers assurance that the price calculator is accessible, accurate, up- to date, transparent and comprehensive. However when we asked respondents to our survey if they are aware of Ofcom's scheme, 82 per cent were unaware of it. Ofcom accreditation has now been awarded to three broadband providers but only one mobile phone provider. The low awareness among consumers of the accreditation scheme and low take up from companies undermines the potential benefits of this kind of independent information, and demonstrates the need for Ofcom to take a more active roll in raising the profile of the accreditation scheme.

Consumers perceived complexity of the market, their lack of awareness of switching processes and the low take up of the Ofcom price accreditation service all illustrate the need not only for an increase in independently accredited price comparison sites, but also for information on customer service standards and coverage. To this end we urge Ofcom to take a more holistic approach to switching, linking it closely with related reviews of consumer information and the Ofcom review of consumer complaints.

Another issue to consider in connection to switching is the transfer of personal data stored on digital devices and equipment. We would like to note that it is important for Ofcom to consider both questions around the procedural switching of services (ie who provides mobile, landline, broadband and TV services) and the porting of 'personal elements' of services, including mobile and landline numbers, email accounts and stored data such as photos. Personal information on the personal elements of services may not be at the forefront of consumers' minds when they switch, but consumers need to be aware of how to delete, transfer and access the personal information connected to the service they are switching.

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<sup>4</sup> Ofcom, Strategic review of consumer switching, pg 46.

<sup>5</sup> Ofcom, Strategic review of consumer switching, pg 83.

<sup>6</sup> Ofcom, Strategic review of consumer switching, pg 46.

<sup>7</sup> Consumer Focus commissioned ICM to conduct a Telephone Omnibus Survey of 1,000 adults, nationally representative adults aged 18+. It was conducted between 24 and 31 March 2010. When we asked our survey respondents what factors influenced their decision the last time they looked for a phone deal 67 per cent cited cost as the primary motivation. 48 per cent cited previous experience with a company, 43 per cent cite Network coverage, and 41 per cent cite the provider's reputation.

The revised Framework Directive also introduces the requirement of transparency of information on traffic management practices. In our view the new provisions to safeguard the transparency requirement on traffic management should serve as the starting point for improving the quality of consumer information so that it is meaningful and empowers switching. We provided in depth comments on the issue further in our response under the section 'net neutrality'.

### Our recommendations

As part of the implementation of the new regulations we see a greater role for Ofcom in driving improvements in transparency of information.

For example we were encouraged by Ofcom's proposals to improve transparency of information on traffic management set up in the discussion paper on net neutrality and traffic management (June 2010). However we strongly recommend that the issue of transparency and quality of information on traffic management should be investigated in the context of general information provision to consumers, and by exploring the most appropriate and effective models to help decrease information asymmetry in the telecommunication sector. Failure to do so will result in the increase rather than decrease in information asymmetry and will add to consumers' confusion.

Therefore we recommend BIS ensures that the provisions on transparency of information to consumers about telecommunication services, are not only enshrined in UK law, but also duly enforced by Ofcom. In particular we recommend BIS ensures that Ofcom addresses the issue of improving transparency of information to consumers in the following areas:

- Tariffs
- Price comparison services
- Information on customer services
- Information on network coverage and not spots, and broadband speed

We also recommend BIS requires Ofcom to publish comparative data on telecom services as part of fulfilling the new Universal Service Directive obligations to enhance transparency of information. For example we have advocated with Ofcom the need to publish comparative data on mobile services.

### Mobile number porting (MNP)

Under the new regulations, consumers will have the right to change fixed or mobile operator, while keeping their old number, in the shortest possible period that is in no less than one working day.

We welcome the new provisions on number portability, and expect they will be enforced smoothly by Ofcom which we regret in so far has not been the case. We would like to point to the fact that the decision about MNP has been looked at by Ofcom in numerous consultations over the last five years. In the April 2010 Statement, Ofcom justified its decision not to take forward any further assessment of gaining provider-led (GPL) MNP processes on the basis that Ofcom is 'undertaking a separate project on consumer switching, which [will] be looking at the current approach towards switching processes and, among other things the strengths and weaknesses of different switching processes in different sectors, including mobile.'<sup>8</sup>

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<sup>8</sup> Paragraph 1.9, Ofcom's Statement and Consultation: Changes to the Mobile Number Porting Process, published 1 April 2010, available at: <http://bit.ly/ez7fcC>.

Ofcom went onto state: ‘we decided to suspend consideration of moving to a GPL MNP porting process pending the outcome of [its] consumer switching work, which we plan to consult on in summer this year. We have therefore not taken forward analysis of the two [GPL] options set out in the August consultation (Options A and C) while the consumer switching work is in progress.’<sup>9</sup>

Clearly, Ofcom made its interim decision in the April 2010 statement on the basis that MNP GPL options would be fully considered as part of the consumer switching review.

It is internally inconsistent and illogical for Ofcom to now exclude mobile from this review, in order to wait for the interim decision take effect.

Waiting to see how these changes ‘bed-down’ is not a valid reason for delaying industry debate regarding a move to a GPL porting process. From previous experience we know that it will take considerable time for any changes actually to take effect, due to the further rounds of consultations and regulatory statements.

Ofcom’s ‘interim’ decision in the April 2010 Statement is extremely unsatisfactory and does not address either the systematic flaws in the losing provider-led (LPL) porting process or the consumer and competition detriments it causes, which Ofcom itself has identified, including:

- **Donor operators have little incentive to make the porting process work:** The LPL system is heavily reliant on regulation to force losing operators to do the right thing by consumers. As Ofcom has now recognised, a LPL system requires operators to work against their commercial best interests
- **Policing burden:** Ofcom’s interim decision does nothing to reduce the strong Ofcom policing effort required to make it work. In fact, arguably the interim decision increases Ofcom’s enforcement burden by increasing obligations on operators. An approach which regulates itself is much more consistent with Ofcom’s legal duties
- **Delays:** Ofcom’s interim decision maintains the existing two-step process for consumers to affect their port. Any system which requires consumers to actively obtain a PAC rather than empowering their new operator to activate the switch on their behalf will always be prone to delays
- **The ‘hassle factor’:** In the consultation, Ofcom has carried out extensive research looking at the way in which hassle factors create a barrier to switching. The interim decision does little to address these factors, because the consumer still has to manage the LPL process, and ask their current network for permission for what is effectively theirs by right. Ofcom’s previous research shows that the majority of customers understandably want to avoid this<sup>10</sup>
- **Sub-optimal competitive effects:** The interim decision does not propose any way of ending the save activity that consumers are exposed to under the LPL system. Even with Ofcom’s changes, operators can still target their best deals at the small number of customers who are considering switching, or are savvy enough to play the system, rather than offer better all round deals to the whole market. Competition will continue to operate at a sub-optimal level rather than benefit all consumers
- **Unwanted save activity:** The opportunity for losing providers to engage in unwanted save activity still exists following the interim decision. Simply shortening the timeframes for providing a PAC does not, in itself, realign losing operators’ incentives or actively limit potential misinformation or unwanted save activity

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<sup>9</sup> Paragraph 1.10, *ibid*.

<sup>10</sup> TNS GB Omnibus Survey, December 2008 commissioned by Ofcom.

We are concerned that the decision about mobile porting has been pushed back further. We believe that consumers are not well served by the current MNP system. In an omnibus survey of 1,000 participants conducted in March 2010 we discovered that 57 per cent of respondents to our survey had never switched mobile provider<sup>11</sup>.

This is worrying given billmonitor research which suggests that eight of 10 people are on the wrong contract paying £200 more than they should<sup>12</sup>.

With approximately 80 million mobile phone subscribers in the UK<sup>13</sup> this suggests that a significant number of UK citizens are over paying for their mobile service. Given the potential consumer over spend and the low levels of switching in the market, we feel that any measures which would make mobile switching easier deserve close consideration.

In both our response to the August 2009 consultation on mobile number portability, and the more recent consultation in May 2010<sup>14</sup> we took the view that porting should be recipient-led and take place within two hours, as this would deliver the greatest benefit to consumers. We referenced research carried out for Consumer Focus by Harris Interactive in March 2009 in order to gain the views and experiences of consumers around mobile number portability. In this research 79 per cent of consumers stated that they would like the switching process to be handled by their mobile network operator (MNO) on their behalf, rather than arranging the process with their new and old network providers themselves. This is because recipient-led MNP is simpler for consumers, involving fewer consumer-prompted interactions with MNOs, and avoiding the retention activity, which can be unpleasant for consumers.

We recognise that Ofcom has already taken some positive steps by requiring providers to supply PACs by phone or SMS within two hours and by asserting that porting will be reduced down to one business day. However, our view remains that consumers would benefit from recipient-led porting and that Ofcom should take steps to introduce this system, aligning the UK with the large majority of EU member states. We also question whether Ofcom's changes to the MNP process meet the criteria set out in the EU's Telecoms Package. The Revised Universal Service Directive (USD) is quite clear that EU Member States must offer porting within the shortest possible time, and in any event, within one working day. The interim decision neither achieves one day porting nor does it allow for porting within the shortest possible time, both of which are required by this provision. Also Three previously highlighted this as being incompatible with the approach taken to date by Ofcom, which has chosen to pursue one-day donor-led porting<sup>15</sup>. In fact, of the four options which Ofcom previously identified as "possible" and likely to produce a positive economic case over time, Ofcom chose to adopt the slowest option. It would be helpful for this tension to be avoided in the translation to UK law, to avoid further tension and confusion in future.

## Our recommendations

We advocate the new regulations on number portability will lead to an introduction of the recipient-led system that would benefit consumers most and would comply with the revised universal directive provisions on porting the number 'within the shortest possible time'.

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<sup>11</sup> Telephone omnibus survey commissioned by ICM research, on behalf of Consumer Focus, in March 2010. Sample size 1,000.

<sup>12</sup> <http://bit.ly/eYZXCp>.

<sup>13</sup> Ofcom, Communications Market report, pg 321.

<sup>14</sup> Consumer Focus response to Ofcom consultation: mobile number portability, October 2009 and Consumer Focus response to Ofcom's consultation on Changes to the Mobile Number Porting Process May 2010.

<sup>15</sup> Ofcom's most recent MNP consultation included four options, for donor and recipient led porting, in two hours and one day in each case. Ofcom's preferred option, for one day donor led porting, was the least desirable option from Consumer Focus' point of view.

## Complaints & redress

The new regulations aim to ensure that consumers should be provided not just with information on prices, tariffs and terms and conditions, but also the quality parameters of the service, and the types of customer and after-sales service available. This in our interpretation should include making publicly available data on providers' complaint record and customer services standards.

Ofcom recently carried out a review of complaints procedures that shows poor consumer experience of pursuing complaints:

- 30 per cent of complaints (around 3 million per year) are still unresolved after 12 weeks
- the majority of consumers who cannot resolve their complaint promptly have considerable difficulty getting their provider to recognise they are trying to make a complaint and in finding out information about the complaints process
- those consumers who are unable to resolve their complaint within 12 weeks are much more likely to suffer financially or through stress
- only 8 per cent of consumers are aware that they can take unresolved complaints to Alternative Dispute Resolution (ADR), which is considerably lower than in a number of other sectors with similar schemes

Ofcom has put forward the following proposals, due to come into force on 22 January 2011<sup>16</sup>:

1. Establishing minimum standards for complaints handling procedures, which will apply to all communications providers ('the Ofcom Code'). The Ofcom Code establishes a regulatory requirement for providers to resolve complaints in a 'fair and timely manner' and also outlines minimum expectations about the accessibility, transparency and effectiveness of providers' complaints handling procedures. This will replace the current requirement for providers to seek Ofcom approval of their individual Codes of Practice
2. Requiring communications providers to provide additional information to consumers about their right to take unresolved complaints to ADR, which has been shown to help resolve long-running complaints. Providers will now need to include relevant information about ADR on consumers' bills and to write to consumers whose complaints have not been resolved within eight weeks to inform them of their right to go to ADR

We have consistently called for Ofcom to publish provider specific data on complaints and customer service standards. Ofcom has indicated that it intends to start publishing this data, based on complaints recorded by the Ofcom Advisory Team. Ofcom has stated that: *'the evidence suggests that providers' incentives to compete on the basis of customer service are not proving sufficient to ensure that individuals will receive satisfactory treatment from their provider when they try to pursue a complaint.'* (Statement on complaints review, July 2010). This supports the view that greater incentives are needed to encourage companies to compete on the basis of customer service, such as published comparative data.

## Our recommendations

We recommend that BIS ensures that the new regulations will lead to making publicly available data on telecommunication providers' complaint record and customer service standards.

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<sup>16</sup> Ofcom, Review of Consumer complaints procedures, March 2010.

## Quality of service

Article 14 of the Universal Service Directive includes provisions on quality of service (QoS). New article 22 states 'National regulatory authorities may specify, among other things, the quality of service parameters to be measured and the content, form and manner of the information to be published'. QoS, which can be defined by Ofcom under this provision, typically refers to network performance, speed, reliability etc. We believe that QoS should also include quality of customer service, ie companies' customer service and complaint handling standards.

The reasons we believe that customer service and complaint handling should be included in the definition of QoS are below:

- A lack of publicly available comparable data on providers' customer service standards
- An appetite for this information among consumers. For example in our Omnibus survey, 95 per cent of consumers agreed that information on customer service performance should be readily available to consumers
- Ofcom's analysis, mentioned above, that *'providers' incentives to compete on the basis of customer service are not proving sufficient to ensure that individuals will receive satisfactory treatment from their provider when they pursue a complaint'*
- The information being useful for two reasons: firstly, to allow consumers to make more informed choices between mobile providers, and secondly, to use published league tables to drive competition in service standards

## Recommendations

We recommend that BIS requires Ofcom to engage in work with consumer organisations and industry stakeholders to foster work on setting minimum quality of service indicators.

## Contract length

Under the new rules the maximum initial duration of a contract signed by a consumer with an operator will be no longer than 24 months. Operators must also offer consumers the possibility of shorter contracts with a maximum duration of 12 months.

According to Ofcom Communications Market Report 2010, two year contracts have become standard, having grown steadily more common over the past two and a half years. For example having accounted for just 2 per cent of contracts in Q1 2008, they now make up 63 per cent of all new mobile contracts. A corresponding fall has taken place in 18 month contracts over the same period, from 72 per cent to 12 per cent. Numbers of 12 month contracts and one month SIM-only contracts have remained relatively static throughout this period

This trend towards longer contracts is not beneficial to consumers:

- Longer contracts typically offer customers cheaper up-front charges and lower monthly tariffs, but can be significantly more expensive over the life of the contract. For example consumers pay between £90 and £190 more if they sign up to a 24 month contract rather than an 18 month contract
- Longer contracts limit consumers' ability to switch, putting a brake on competition in the market
- The dominance of two year contracts limits consumers' options for financing their mobile package in the way that suits them best. For example, consumers are very restricted in their choice of 12 month contracts involving higher up-front costs, though this is an option that may suit some people

While we welcome this new legislation to limit the length of contracts to 24 months, we believe consumers will not be served by two year contracts becoming ‘the norm’ and want to see providers offering a range of contract lengths to suit consumers’ needs.

### Recommendations

We recommend that BIS ensures that the new regulations will lead to a genuine choice of contracts for consumers. Companies should offer consumers a genuine range of contracts. The choice of 12 month contracts, and to a lesser extent 18 month contracts, is currently severely limited in the market. This has a range of detrimental effects on consumers, as noted above.

In addition Ofcom should increase consumer information to consumers to make them aware that by taking out longer contracts, they can often end up paying significantly more than for shorter contracts. For example while the benefits of longer contracts are clear at the point of sale, in terms of lower up-front charges and lower monthly tariffs, the higher cost over the life of the contract is not made clear to consumers.

# ePrivacy and Electronic Communication Directive

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**Q12 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.**

## **Cookies**

Cookies are pieces of data which can be stored permanently and invisibly on terminals by web servers without the knowledge of internet users. Cookies may contain identifiers which can be used to track the clickstream of a computer user and enable collecting information about the internet users' online behaviour such as surfing preferences, choices internet user has made on visited sites and other information that can be considered private by internet user. Hence the use of cookie technology without seeking prior consent from the internet users raises privacy concerns. Cookies' ability to map users surfing habits and preferences is made use in online behavioral advertising which attempt to tailor adverts to particular demographic groups.

There are different types of cookies such as functional, session and persistent cookies installed by first or third parties. We are especially concerned over installation of third party cookies which are particularly privacy invasive due to the fact that they are sent behind the shoulders of the user to invisible third parties that the user does not have the knowledge of.

We would like to stress that the existing practice of collecting data without user's consent is not acceptable from consumer perspective, and violates consumers' right to privacy. Therefore we welcome the new provision under the revised ePrivacy Directive granting consumers the right to prior consent to installation of cookies (recital 66 of the ePrivacy Directive).

However we are concerned about BIS's proposal to implement the directive through Option 2, ie putting the onus on consumers to change the browser setting for more privacy friendly. In our opinion such interpretation would not comply with the prior consent requirement of the directive. As noted above, currently most browsers are set to accept third party cookies by default. We find that consumers tend to accept the default position on the browser setting, not because they give consent, but, because it is the path of least resistance and they do not have necessary the knowledge or time to appreciate or utilise the choice. Our omnibus study conducted in February this year found that overall 47 per cent of respondents were unsure/did not know/never heard of cookies. The percentage was larger among women, over 55+ and people falling into skilled manual or unskilled and unemployed (majority did not know).

In addition even when internet user has the knowledge to set the browser to reject third party cookies, his/her decision can be revoked by so called flash cookies increasingly used by the online industry.

Our view is inline with a position expressed by Europe's privacy watchdogs the Article 29 Working Party that earlier this year published its interpretation of the new law.<sup>17</sup> In the Article 29 Working Party interpretation:<sup>18</sup>

*'Consent must be obtained before the cookie is placed and/or information stored in the user's terminal equipment is collected, which is usually referred to as prior consent... "Informed consent can only be obtained if prior information about the sending and purposes of the cookie has been given to the user.'*

*'Average data subjects are not aware of the tracking of their online behaviour, the purposes of the tracking, etc. They are not always aware of how to use browser settings to reject cookies, even if this is included in privacy policies... It is a fallacy to deem that on a general basis data subject inaction (he/she has not set the browser to refuse cookies) provides a clear and unambiguous indication of his/her wishes.'*

*'[...] for browsers settings to be able to deliver informed consent, it should not be possible to "bypass" the choice made by the user in setting the browser. However, in practice deleted cookies may be easily "respawned" by so-called flash cookies, enabling the ad network provider to continue monitoring the user. The availability and increasing use of such technology challenges the ability of browser settings to deliver informed, valid and effective consent.'*

*'Finally, consent by browser setting to receive cookies in bulk implies that users will accept future processing, possibly without any knowledge of the purposes or uses of the cookie. Consent in bulk for any future processing without knowing the circumstances surrounding the processing cannot be valid consent.'*

In addition, browser settings are not flexible enough to allow consumers' choice in accepting some third party cookies while rejecting others. For example by setting the browser to reject third party cookies consumers are deprived of choice of receiving some third party cookies that they may wish to give consent to.

Therefore if Option 2 through browser setting is to be considered it would require redesigning of the browser in the way that it would address the issue of the prior consent requirement of the directive, privacy by default setting, low consumer's awareness of cookies, and consumer's choice ie consumer's ability to decide which third party cookies they wish to reject. In order to achieve this we recommend BIS to study the proposal of the US Federal Trade Commission that suggests implementation of a "Do Not Track" setting on consumers' browsers so that consumers can choose whether to allow the collection of data regarding their online searching and browsing activities.<sup>19</sup>

As for Option 1 ('opt -in') that requires consent from the internet user to install cookie on user's computer we broadly see some concerns about installation of multiple pop up icons to facilitate this option, that could impact on internet user's experience. However in order to alleviate potential problems we recommend considering the recommendations of the Article 29 Working Party that suggests that consent can be given to advertising networks covering thousands of websites and need not be given to every individual site.<sup>20</sup>

We would like to point out that some businesses already implement 'opt in' policies eg Fetchback to ensure a more targeted approach to advertising that meets consumers' preferences and needs while mitigating privacy concerns. Also 'opt in' option is offered to consumers by some online businesses in exchange for discount vouchers for services and products (eg restaurants, clothes).

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<sup>17</sup> <http://bit.ly/hWvEdH>.

<sup>18</sup> <http://bit.ly/eMnOmm>.

<sup>19</sup> <http://bit.ly/hAaGRy>.

<sup>20</sup> <http://bit.ly/eMnOmm>.

Others such as Criteo or Yahoo Icon project aim to be more transparent to users about their advertising practices by placing high visibility icons on websites, around advertising, with links to additional information.

We recommend such practices be adopted across the industry, including members of the Internet Advertising Bureau (IAB). The current model of increasing transparency of information to consumers is not transparent enough and does not seek consumers' consent to collection of personal data. For example the IAB Code of Conduct on Online Behavioural Advertising<sup>21</sup> based on 'opt out' option requires a certain degree of knowledge of cookies and awareness of online advertising models from consumers. We are also concerned about a low take up of the Code of Conduct on Online Behavioural Advertising among IAB members. For example out of some 540 members currently only eight comply with the Code and were independently audited, and further 11 are either comply or are committed to comply.<sup>22</sup> The Code also raises our concerns around issues such as: safeguards to protect vulnerable consumers including children, a conciliation process and independent arbitration of complaints, and developing clear timelines criteria for resolution of complaints.

We would like to point out that despite the existence of the IAB Code the recent study of OFT on online advertising concluded that although industry self-regulation addresses some concerns about behavioral advertising, more should be done to provide consumers with better information about how personal information is collected and used.<sup>23</sup>

In conclusion we do not agree that this code could be served as a sufficient self-regulatory substitute of the prior consent requirement of the directive.

Such view was also expressed by the Article 29 Working Party that stated in its opinion:<sup>24</sup>

*'Ad network providers increasingly offer "opt-out" mechanisms enabling users to opt-out from receiving targeted advertising. [...]However, this mechanism is not an adequate mechanism to obtain average users informed consent. The reasons are similar to those indicated above in the context of browser setting, namely:*

*'First, in general users lack the basic understanding of the collection of any data, its uses, how the technology works and more importantly how and where to opt-out. As a result, in practice very few people exercise the opt-out option, not because they have made an informed decision to accept behavioural advertising, but rather because they do not realise that by not using the opt out, they are in fact accepting.*

*'Second, consent means active participation of the data subject prior to the collection and processing of data. The opt-out mechanism often refers to a 'non' reaction of the data subject after such processing has already started. Furthermore, under opt-out mechanism there is no active participation; simply the will of the data subject is assumed or implied. This does not meet the requirements for legally effective consent.'*

Also when considering implementing Option 1 'opt in' BIS should take account of placing additional safeguards to ensure that the consent is given for a limited period of time and that consumer has the right to revoke given consent as recommended by the Article 29 Working Party.<sup>25</sup>

*'First, to limit the scope of the consent in terms of time. Consent to be monitored should not be 'for ever' but it should be valid for a limited period of time, for example, to one year.*

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<sup>21</sup> <http://bit.ly/goWim1>.

<sup>22</sup> *ibid.*

<sup>23</sup> <http://bit.ly/eHK6ZG>; Online Targeting of Advertising and Prices. A market Study, OFT, May 2010; <http://bit.ly/eXw3QA>.

<sup>24</sup> <http://bit.ly/eMnOmm>.

<sup>25</sup> *ibid.*

*After this period, ad network providers would need to obtain a new consent. This could be achieved if cookies had a limited lifespan after they have been placed in the user's terminal equipment (and the expiry date should not be prolonged).*

*'Second, the risks outlined above would be further mitigated with additional information practices [...]*

*'Third, freely given consent can always be revoked. Data subjects should be offered the possibility to easily revoke their consent to being monitored for the purposes of serving behavioural advertising. In this regard, the need to provide clear information about this possibility and how to exercise it is essential.'*

## Recommendations

While we overall support BIS proposal to reproduce the wording of Article 5(3) as stated in the impact assessment text.<sup>26</sup> We recommend that BIS reconsiders its proposed options for the implementation of cookie provisions under the revised ePrivacy directive to take account of consumers concerns and interests, as well as the opinion of the Article 29 Working Party.

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<sup>26</sup> <http://bit.ly/hlaAT7>, para 228, p. 57.

# Additional comments

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

## Net neutrality and traffic management

Consumer Focus regards net neutrality as a key principle of the internet. It safeguards an enhanced participation by citizens in society, secures access to knowledge and diversity, and promotes innovation, economic growth and democratic participation.<sup>27</sup>

Consumer Focus recommends that any traffic management policy is based on the key principles of net neutrality that entitle consumers to an internet connection:<sup>28</sup>

- of the speed and reliability advertised
- that enables them to:
  - send and receive content of their choice
  - use services and run applications of their choice
  - connect hardware and use software of their choice that does not harm the network
- that is free from discrimination with regard to type of application, services, or content or based on sender or receiver address

There should also be:

- competition among network, application, service and content providers
- transparency over network management practices deployed by providers

We recognise that reasonable traffic management practices must be permitted under net neutrality to allow the proper functioning of the network. However these need to be distinguished from discriminatory practices arising from anti-competitive behaviour and access restrictions to the public internet. Currently some of the traffic management practices applied by network providers raise concerns over their discriminatory character. These include traffic blocking or throttling (eg blocking Skype by mobile networks or downgrading P2P traffic), preferential treatment of one application provider over others (present in mobile telephony). The potential for unfair discrimination is increasing due to deployment of managed services with priority access, as well as the convergence of network providers with providers of television, radio and telephony services. Providers of integrated communications and multi-media platforms are likely to have financial incentives to prioritise transmission of affiliated content and services at the expense of competing products. For example, an internet provider that provides video distribution services has incentives to allocate greater bandwidth to its own services at the potential expense of competing internet applications. Similarly, an internet provider that also supplies telephony might degrade or block a VoIP provider.

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<sup>27</sup> <http://consumerfocus.org.uk/g/4mz>; <http://consumerfocus.org.uk/g/4n0>

<sup>28</sup> Transatlantic Consumer Dialogue (TACD) Resolution on net neutrality, April 2010, <http://bit.ly/b38quK>

Such practices may lead to market foreclosure of new entries for content and for service providers who do not secure integration or exclusive agreement with network operators; and in turn this will have a direct detriment for consumers in terms of limiting choice and the potential for price maintenance.

We are particularly concerned about the impact of such practices on consumers living in rural and underdeveloped urban areas with limited competition for network providers, whose choice of content or services may be restricted to those offered by a network operator which holds a dominant position in the area.

We are also concerned that discrimination may impact on the growth of the internet infrastructure as it will be against the financial interests of network providers to invest in expansion of the infrastructure's capacity to support content and services of competing players.

In the current regulatory framework it is difficult for consumers to assess impact of traffic management practices on their internet access. However, we also doubt whether the new revised EU Framework Directive, based on two pillars competition and transparency will be sufficient to deal with issues around net neutrality from the position of an individual consumer.

As far as competition is concerned, competition rules can only be applied after the event (ex-post) and can take a long time to resolve, and can be circumvented, depending on whether services are blocked or just slowed down.

Competition law takes effect only in cases where a company is proven to have abused its significant market power (SMP) and relies on a narrow definition and interpretation of the relevant market in which such power arises. However, as pointed out by Ofcom in its discussion paper on net neutrality and traffic management, in the complex and changing ICT market it is difficult to define the appropriate market.<sup>29</sup> Therefore we are concerned that competition law may be ill-equipped to deal with cases of anti-competitive behaviour of an ISP that does not hold SMP in the overall market, but has a dominant position in a particular geographical location where consumers have limited choice of providers.<sup>30</sup>

Secondly, competition law can only deal with some aspects of traffic management such as blocking internet access as a whole, or intentionally degrading competing content and services of unaffiliated providers.<sup>31</sup> It is not adequate to address issues of network operators (1) degrading all the non-prioritised traffic in order to launch and promote prioritisation services, (2) setting up unreasonable restrictions for end-users running some applications and (3) refusing unaffiliated internet content providers access to prioritisation services.<sup>32</sup>

Thirdly, the competition rules can only apply ex-post once the anti-competitive behaviour takes place; they are costly and can take a long time to resolve. In the meantime consumers may be tied into a low value deal that may be difficult to switch from due to barriers such as contract early termination charges, or software and equipment costs in the case of bundled services.

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<sup>29</sup> Ofcom's discussion paper on Net Neutrality and Traffic Management, 24 June 2010, p.26

<sup>30</sup> Christopher Marsden, Net Neutrality and Consumer Access to Content, Scripted, volume 4, issue 4, September 2007.

<sup>31</sup> Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications, Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta.

<sup>32</sup> Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications, Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta.

As far as transparency of information is concerned, although we recognise it is an important step towards ensuring consumers are informed about traffic management practices, on its own it is insufficient to prevent discriminatory practices. Informing consumers about practices will work as long as consumers have the knowledge and understanding of traffic management practices. Ofcom's research on broadband speeds found that only a minority of consumers were at ease with making practical use of the information, by comparing connection speeds or reliability of connection.<sup>33</sup> Consumers may also find it difficult to assess what part of a service's chain is at fault. For example, Synnovate research indicates that consumers who experienced problems with Internet connection attributed them to different causes, such as ISPs, Internet connection speed, computer hardware, computer memory, websites, download limits of their internet plan and others.<sup>34</sup>

We point out that consumer decisions to switch providers are complex, and depend on many factors, including tariffs, bundles of products, network coverage, licensing and contract lock-ins. Yet information on these is not always presented to the consumer in a transparent and clear way. For example our research, mentioned earlier, on consumer experiences of the mobile market suggests that only one in five consumers found it easy to navigate through the available information, with close to 70 per cent feeling that there are too many mobile tariffs available.<sup>35</sup> Similarly, our cross-country research on consumers' experiences with buying goods and services with the use of a mobile handset found insufficient information disclosure on products, on subscriptions, costs and customer services.<sup>36</sup>

In addition we also recommend taking account of other factors that are likely to ease anticompetitive behaviour such as addressing the issue of switching barriers, mobile termination rates (MTR), complaint and redress mechanisms, infrastructure investments, jointly with an obligation placed on operators to justify every traffic intervention on their networks. The latter approach has been adopted in other countries.<sup>37</sup>

We are concerned that adopting the new EU legislation without clear guidelines on traffic management will mandate traffic management practices as long as consumers are informed about such practices leaving consumers with little choice to reject such practices and network providers. In addition we fear that lack of guidelines on traffic management will facilitate development of premium managed services, at the expense of maintaining 'best effort' public internet. We are concerned that this in turn will have long term implications for both consumers and citizens in accessing not only commercial but also public services online (eg NHS, DirectGov, Inland Revenue). It may also have an adverse effect on the Government's plan for Digital Inclusion.

## Recommendations

We recommend that in implementing the new legislation BIS considers examples of national regulatory authorities from other countries and adopts net neutrality and traffic management co-regulations or self-regulations to prevent anti-competitive behaviour and safeguards consumers and citizens access and choice to internet services.

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<sup>33</sup> Ofcom's discussion paper, p.37.

<sup>34</sup> Consumer Expectations of the Internet, Synnovate 2009.

<sup>35</sup> <http://consumerfocus.org.uk/g/4m2>

<sup>36</sup> <http://consumerfocus.org.uk/g/4m0>

<sup>37</sup> <http://bit.ly/ajJjmd>; Network neutrality. Guidelines for Internet neutrality, Post-og teletilsynet, 24 February 2009; Ofcom's discussion paper on Net Neutrality and Traffic Management, 24 June 2010, pp.20-21, footnote 18; the French regulatory authority recommendations [http://www.arcep.fr/uploads/tx\\_gspublication/net-neutralite-orientations-sept2010-eng.pdf](http://www.arcep.fr/uploads/tx_gspublication/net-neutralite-orientations-sept2010-eng.pdf) .

In addition, we recommend that BIS supports Ofcom in setting up a minimum quality of service if developments in the market threaten maintaining 'best effort' public internet and compromise important citizens' goals eg access to public services.

We also recommend that the implementation of the new legislation should be followed up by a clear Government policy on the open internet that takes into account long term implications of traffic management for consumers' and citizens' interest, including access to public services and digital inclusion.



## **Consumer Focus response to the Department for Business, Innovation and Skills consultation on implementing the revised EU Electronic Communications framework**

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