



department for
**culture, media
and sport**

Implementing the revised EU Electronic Communications Framework

HMG response to its consultation on proposals and overall approach including its consultation on specific issues

April 2011

improving
the quality
of life for all

Our aim is to improve the quality of life for all through cultural and sporting activities, support the pursuit of excellence, and champion the tourism, creative and leisure industries.

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Foreword



Foreword from the Minister for Culture, Communications and Creative Industries

Last autumn, the Government published its proposals for implementing revisions to the EU Electronic Communications Framework. This document contains our response to the feedback, the ideas and the challenges we received, as well as our final plans on how we intend to proceed with implementing the necessary changes. I am grateful to all who contributed, responding to the questions we published in the consultation document or via our electronic survey facility, participating at one of the many major stakeholder events we ran or attending the issue-specific workshops that have addressed the more complex issues to do with implementation. Most of all I am grateful for the positive response the Government's proposals for this very challenging implementation have received from stakeholders.

As I wrote in the foreword to September's publication of our proposals, electronic communications are vital to our working and daily lives. Our use of digital technologies, mobile and fixed line phone services, e-mail and the internet continues unabated and the revised EU framework sets the regulatory context in which they operate.

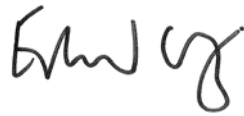
The changes to the EU Electronic Communications Framework bring our regulatory framework up to date and will help to ensure that there is a level playing field in regulation across Europe. We have done our best to ensure that our transposition is proportionate and does not place unnecessary burdens on industry. Many of the revisions already exist or apply in UK legislation and regulation. In many areas too, it is the relevant national regulator, Ofcom or the Information Commissioners' Office, who are or will be empowered to implement the changes for us. Where this is the case, we make this clear in our response.

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

There is further work still to be done on cookies where Government, industry and regulator will jointly need to develop meaningful and effective technical solutions to what is a very challenging provision.

Many of you will know that the Secretary of State for Culture, Olympics, Media and Sport has launched plans to review the existing Communications Act 2003 and an open letter to the communications sector will be published in May. Work will also soon start on the review of the Data Protection Directive (95/46/EC) and Data Retention Directives (2006/24/EC). There will be challenges in ensuring that the work we undertake on implementing the e-Privacy Directive aligns with the outcomes of those reviews.

I am grateful for your views and your help. We have listened to your feedback and taken action where we can. May I encourage you to continue to engage as we move forward in setting the regulatory framework for this dynamic, converging and important sector.



Ed Vaizey

Minister for Culture, Communications and Creative Industries

Introduction

1. In September 2010 the Government published its proposals for implementing the revised EU Electronic Communications Framework.¹
2. In that document we described the main material changes that are needed to implement the revised Framework. We made clear that in the majority of cases those changes are mandatory and the UK has no discretion as to how it implements. In such cases, the changes were described for information only. Where more substantive material changes were required for implementation, we set out those changes and their implications in detail.
3. We also set out the limited number of circumstances in which the UK has some discretion as to how it implements the amendments to the Framework. We asked 15 questions on our proposed approach and how implementation in these areas might best be achieved. Specifically, the issues on which we were seeking views were:
 - Appeals;
 - Facilities sharing;
 - Security and resilience;
 - Dissuasive sanctions;
 - Equivalence for disabled end-users;
 - Personal data breach and enforcement; and
 - Cookies.
4. We also set out and sought views on the changes we considered necessary to make to the Universal Service Order (USO), in order to implement some of the necessary revisions to the Framework.
5. This document contains the Government's response to the representations and contributions we received during the public consultation on our proposals for the implementation of the changes to the EU Electronic Communications Framework.

¹ The Government's original consultation document, "Implementing the Revised EU Electronics Communication framework – Overall approach and consultation on specific issues" can be found at: <http://www.culture.gov.uk/images/consultations/10-1132-implementing-revised-electronic-communications-framework-consultation.pdf>
The full text of the amending Directives is available at:
http://ec.europa.eu/information_society/policy/ecomm/library/legislation/index_en.htm.

6. We also asked for stakeholders' views on the technical and practical issues that Government will need to take into account when implementing the amendments to the Framework. Responses to points raised in relation to this have been integrated into the main body of the text and are not addressed separately.
7. We put a final question to stakeholders on the economic and equality impact assessments which have been produced to support implementation. Responses to this question have been addressed in the revised impact assessments which are published at: <http://www.culture.gov.uk/consultations/7806.aspx>
8. In a limited number of areas, stakeholders made no comments on our proposals. Where we did not receive responses, we have made no reference to the proposed changes in this document. This means, for instance, that we do not refer to the Access Directive or the limited number of amendments to existing UK legislation that the Government will need to make to implement these revisions.

Getting Your Views

In addition to the publication of our formal consultation document in September, we organised four large-scale events for stakeholders, four smaller events on specific policy issues of concern to stakeholders on: cookies, security and resilience, appeals and infrastructure sharing.

We also spoke at seven public events organised by stakeholders, including: the Federation of Communication Service Providers (FCS), Symantec and the Internet Advertising Bureau.

We also met individually with over 82 stakeholders to discuss organisations specific concerns and views on proposals for implementation of the revisions to the Framework.

We also published a questionnaire together with the September consultation document to help build the evidence base. Emails were sent out to over 420 stakeholders to encourage them to complete the online questionnaire. Wherever possible this evidence has been built into the Impact Assessments.

In addition to this we commissioned independent quantitative and qualitative research on cookies and security and resilience to ensure that we were capturing as many views as possible and developing policy on a clear and compelling evidence base. Impact assessments and our research on cookies and security and resilience are published at: www.culture.gov.uk/consultations/7806.aspx

The Framework - Overview

9. The Electronic Communications Framework is the regulatory framework that covers all transmission networks and services (including access) for electronic communications including: telecommunications (fixed and mobile); e-mail; access to the internet; and content related broadcasting. The Framework was originally agreed in 2002 and revised in November 2009.
10. Much of the 2002 Framework was transposed through the Communications Act 2003 and the Wireless Telegraphy Act 2006. Many of the provisions in the e-Privacy Directive were captured in the Privacy in Electronic Communications Regulations 2003 and the Data Protection Act 1998. Our attention in transposing the necessary revisions has consequently been targeted at ensuring that those existing pieces of legislation meet the requirements of the revised Framework.
11. As we set out in our September consultation document, many of these revisions are intended to enhance competition in the communications sector, in part, through further liberalising spectrum markets and to reduce the regulatory burden where possible to help create the conditions for growth and innovation.
12. Further amendments to the Framework strengthen consumer protection through new provisions (mostly in the Universal Service Directive) intended to ensure that consumers are better informed about supply conditions and tariffs and can more easily switch providers, all of which is intended to help promote competition in the electronic communications markets. The revised Framework also provides clarification that national regulators (Ofcom in the UK) are empowered to impose obligations on all operators (not only designated universal service provider(s)) for the provision to disabled users of equivalent access to public electronic communication services, where appropriate.
13. In some instances the revised Framework extends obligations on Member States, National Regulatory Authorities (NRAs) and industry particularly with regard to: consumer protection; e-privacy; and security and resilience of networks and services. Potentially some of these new obligations create additional regulatory burdens.
14. We are certain that our proposals for implementing the changes to the Framework minimise the impacts on business and where at all possible reduce the regulatory burden on businesses in the UK; many of the responses we have received to our consultation

bear this out. We have striven to ensure that the proposed changes are implemented with both business and the consumer in mind and that they create the conditions where businesses and consumers alike can make the most of the opportunities the Framework provides.

15. In line with Government priorities, we have attempted to ensure that our transposition does not gold-plate the Directives. Where possible we have copied out the text of the Directives into UK legislation. Where we have not done this, it is either because the existing legislation does not permit direct copy out or because the European drafting requires some clarification. In these cases we have made the minimum legislative change possible to implement the changes.
16. We set out the impacts of these changes in impact assessments published in September together with our consultation. These have now been revised to reflect the contributions of stakeholders and the independent research commissioned by Government into cookies and security and resilience. These have also been published on the dedicated consultation website: <http://www.culture.gov.uk/consultations/7806.aspx>
17. In some circumstances the revised Framework extends powers granted by Member States to NRAs. To comply with implementation obligations on Member States the Government is amending legislation to provide for these new powers. However, in many instances, though, while the granting of a power is mandatory, the exercise of it is discretionary.
18. Where Ofcom plans to exercise such powers in the future it is legally bound to do so in a proportionate manner. Where the exercise of that power might affect the existing regulatory framework, eg; in relation to the USO, Ofcom is also required to undertake separate consultation. Ofcom has published its consultation on changes to the general conditions of entitlement (GCs). This is available at: www.stakeholders.ofcom.org.uk/consultations/gc-usc/
19. For details on Ofcom's ongoing role in implementing the changes and details of Ofcom's guidance, the timing of Ofcom's consultations and reviews see **Annex 1**.

Implementing the Changes - What Happens Next?

20. The deadline for implementation is imminent. We have until 25th May 2011 to have measures in place to implement the revised

Framework and those measures must come into effect on 26th May 2011.²

21. We have worked closely with Ofcom throughout the process of negotiation, consultation and implementation of the revised regulatory Framework. We have also worked closely with the Information Commissioner's Office (ICO) on matters relating to the E-Privacy Directive. Like Ofcom, the ICO has full operational autonomy and is directly accountable to Parliament.
22. As we explained in our September consultation document, we are using secondary legislation made under section 2(2) of the European Communities Act 1972 to implement most of the required changes, and section 65 of the Communications Act 2003 for amendments to the USO.
23. We will also be using an Order under section 139 of the Communications Act 2003 to increase the maximum penalty for breach of information requests. The Order is subject to the affirmative resolution procedure and so will be debated in Parliament in due course.
24. The statutory instruments which will affect the necessary changes will be laid before Parliament in late April to allow sufficient time for the Parliamentary process to take place.

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

Response in Relation to the “Framework” Directive

Appeals

We asked:

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

25. Following consideration of the responses on proposed changes to the telecoms appeals regime, the Government has decided to consult further on this issue. This we will do shortly. We remain of the view that the interpretation of the current transposition goes beyond what is required by the Directive and should therefore be amended in UK law. We also remain of the view that a standard of review based on Judicial Review is likely to be the most appropriate and effective way to meet the requirements of the Directive, although we intend to use the forthcoming further consultation to seek suggestions of potential alternatives that might meet that objective, as well as to clarify our proposals. The government intends to move forward with reform of the existing system with a view to making any necessary amendments to legislation later this year.

Spectrum

Policy proposals

26. Our September consultation document explained how the principles of technology and service neutrality have been added to Article 9 of the Framework Directive on spectrum. The spectrum provisions have also been augmented by new Article 9b, which covers liberalisation of spectrum usage rights and the promotion of spectrum trading and leasing.
27. New provisions in Article 9(3) and Article 9(4) require Member States to ensure that, except in certain limited circumstances, all types of technology and services may be used in those frequency bands that have been declared available for electronic communications services in the National Frequency Allocation Plan. In addition, any measure which prohibits the provision of any other electronic communications service in a specific band (ie. exclusive use) can only be justified by the need to protect safety of life services or in exceptional circumstances to fulfill a general interest objective.
29. As we set out in our consultation the only necessary change here is for current policy to be reflected in legislation in provisions in the Wireless Telegraphy Act 2006. Ofcom will also be required to regularly review the necessity of any restrictions which they impose which fall within Article 9(3) and Article 9(4) and to make the results of the review public. This is a new requirement but not a significant departure from current policy as set out in our September consultation document.
28. Following a change to Article 6 of the Framework Directive, Ofcom will also be required to consult if it proposes impose any spectrum management restrictions under Article 9(3) and Article 9(4), but only if those restrictions are likely to have a significant impact on the relevant market.
29. Article 9(3) and Article 9(4) will apply to spectrum licences issued after 25th May 2011. Under new Article 9a, from May 2016, Ofcom will be required to take steps to ensure that any restrictions which fall within Article 9(3) and Article 9(4) and which are contained within licences issued before 25th May 2011, comply with the limited grounds of justification set out in those provisions. This is to ensure that Ofcom has a proper process in place under which certain regulatory burdens can be lifted if they are found to be no longer necessary.
30. Further revisions to Article 9 deal with spectrum hoarding. Ofcom already has powers to deal with anti-competitive spectrum

hoarding and will use these powers where appropriate to do so.

31. We also set out changes to Article 9b which seek to strengthen spectrum markets by requiring that spectrum licences in specific spectrum bands nominated by the Commission must be capable of being transferred or leased. This Article also provides discretion to Member States to introduce transfer or leasing in any other bands. The UK already provides for spectrum transfer and Ofcom has consulted on introducing spectrum leasing.
32. In addition to the changes to the Framework Directive, Article 5 of the Authorisation Directive is intended to promote the use of general authorisations, as opposed to the issuing of individual rights of use for spectrum, as far as possible. It also provides for a review of current individual rights of use. Article 5(2) provides that where an undertaking has a licence that has been granted for 10 years or more and where that licence cannot be transferred or leased, Ofcom has to ensure that the conditions which made it appropriate to grant an individual licence, as opposed to a general authorisation, still apply.
33. If the conditions no longer apply, use of the wireless telegraphy station or apparatus will need to be exempted from the requirement to hold a Wireless Telegraphy Act licence. This review will need to be completed by 19th December 2011, although transitional arrangements can apply until 30th September 2012.
34. Finally, Article 5(6) of the Authorisation Directive requires Ofcom to ensure that spectrum is efficiently and effectively used, including in relation to transfers or accumulation of spectrum. Ofcom already has such obligations.

Responses to Proposals for Implementing Provisions on Spectrum

35. A small number of respondents raised concerns over proposals on spectrum leasing. These included concerns that initial discussions with Ofcom had revolved around a maximum limit being imposed on spectrum leases of 24 months. This was viewed as inappropriate to spectrum leasing which is more likely to be an arrangement between commercial undertakings. Agreements to lease might be expected to be for the same time frame as the asset which uses the spectrum, which may be up to 25 years.

Government Response on Issues Raised in Relation to Spectrum

36. As we received no responses that raised issues around how our proposals will work in practice, we intend to proceed with our published proposals for making the necessary changes to the Wireless Telegraphy Act 2006.

37. Ofcom considered possible changes to the regulatory framework for spectrum trading, including leasing, in its *Simplifying Spectrum Trading consultation and statement*³ and, as it announced in the interim statement, intends to proceed to enable spectrum leasing to take place once necessary changes have been made to UK law.
38. The detailed regulation of spectrum leasing will be set out in trading regulations to be made by Ofcom. The specific issue on leasing raised by some respondents may have been based on a misunderstanding. Ofcom did not propose that leases should have to be shorter than 24 months, but that longer leases would need to be notified to them. Ofcom are currently reviewing this point and plan to publish a statement giving detailed conclusions on it and other matters in due course.
39. Once the new provisions above have been implemented, Ofcom intend to make trading regulations that will allow spectrum leasing to take place.

Responses to Proposals for Implementing Provisions on Spectrum (CNI)

40. Some respondents suggested that Ofcom should be able to take greater account of the effects of spectrum policy and administration on critical national infrastructure (CNI), perhaps in consultation with the CPNI (the Centre for the Protection of National Infrastructure).

Government Response on Issues Raised in Relation to Spectrum (CNI)

41. CNI services are expected to secure their spectrum from the market but there is a process should there be a market failure. There is also a role for “sponsor” Government Departments for the CNI industries (e.g. DECC, DEFRA, DfT), who would also be involved in supporting securing spectrum if needed. Discussions are ongoing with these Departments but as yet there have been no requests to secure spectrum. We have also yet to see any evidence of market failure that might necessitate an intervention. In any event, the Framework implementation is not the place to address this.

³ <http://stakeholders.ofcom.org.uk/consultations/simplify/?a=0>

Rights of Way

Policy Proposals

42. Article 11(1) of the Framework Directive includes a new provision requiring certain decisions relating to rights of way to be made within 6 months, except in cases of expropriation. As outlined in the September consultation document, we believe this concerns not only the application of the Electronic Communications Code (Schedule 2 to the Telecommunications Act 1984) to a particular operator by Ofcom, which is the usual process by which rights of way are granted, but also all decisions of competent authorities that result in the grant of a right of way over land, not amounting to compulsory purchase.
43. In order to implement the Directive fully, all decisions that give operators, whether Code operators or otherwise, the right to install apparatus – whether in streets (or roads in Scotland), private land or marine or tidal waters should be made within 6 months.
44. The Government is therefore intending to:
- Amend section 106 of the Communications Act 2003 to require Ofcom to make a decision on Code powers within 6 months;
 - Require that all County Court (or Sheriff's Court in Scotland) decisions regarding access to private land under Paragraphs 2 and 5 of the Code be made within 6 months.
 - Require that decisions made by the Secretary of State under paragraph 11 of the Code regarding the installation of apparatus on tidal waters where there is a Crown interest be made within 6 months.
 - Amend The Marine and Coastal Access Act 2009, and in Scotland the Marine (Scotland) Act 2010 to impose a 6 month time limit on decisions relating to the laying of submarine electronic communications cables.
 - Require decisions for a licence to install apparatus on the street (or road in Scotland), who are not Code operators within 6 months. Those who are not code operators will need to apply in England and Wales to the "street authority" as defined in section 49 of the New Roads and Street Works Act 1991. In Scotland this application must be made to the "road authority" as defined in section 108 of the New Roads and Street Works Act 1991 and in Northern Ireland it must be made to the "street authority" as defined in section 9 of the Street Works (Northern Ireland) Order 1995.
45. We propose that in all cases the time limit to start running from the point at which the decision-maker has received the

information it requires to make a decision based on that information.

Infrastructure Sharing

We asked:

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

Policy Proposals

46. Article 12 of the Framework Directive contains new powers for NRAs and Member States to promote infrastructure sharing as a mechanism for reducing the cost of roll out of broadband and promoting competition.
47. Article 12(1) empowers Ofcom to impose infrastructure sharing even in the absence of Significant Market Power (SMP). The Government intends to implement this by amending section 73(3) of the Communications Act 2003 to allow access conditions to require infrastructure sharing for the purposes of encouraging efficient investment in infrastructure or promoting innovation where such a requirement would be proportionate, rather than only in cases where there is no viable alternative.
48. We recognise that for many stakeholders there is a degree of apprehension regarding when Ofcom may consider it appropriate to make use of this power. If the level of tangible demand for access to non-SMP infrastructure warrants it, Ofcom

will consider developing and publishing guidance on the use of this power in due course .

49. Article 12(2) states that Member States can impose facility sharing or streetworks coordination to protect the environment, public health, public security or to meet town and country planning objectives. As we outlined in the consultation, although we do not preclude the possibility of relying on this provision to justify existing or future measures, we do not intend to take specific action to implement this provision now.
50. Article 12(3) refers to the sharing of in-building wiring. Again, as stated in our consultation, Section 73(3) of the Communications Act 2003 as amended to implement Article 12(1) will allow Ofcom to take this type of action. We do not intend to grant these powers to any other body.
51. Article 12 (4) requires Member States to ensure that competent national authorities are able to require information in order to be able to establish a detailed inventory of the nature, availability and geographical location of facilities held by operators, and to make this available to interested parties.
52. As this Article gives Member States a certain amount of flexibility in the way this can be implemented, we asked a number of questions in the consultation in order to help determine the policy position. In particular, we were interested in respondents' views in three main areas relating to Article 12 (4). These are set out in the text box.

Responses to Proposals on Infrastructure Sharing

56. The vast majority of respondents believed that a detailed, national infrastructure map would be time consuming and costly to produce, as well as maintain, and would not, therefore, be proportionate. There were also significant concerns regarding the security and resilience of existing networks, as a detailed infrastructure map may leave networks vulnerable. Respondents and network operators in particular, were concerned that commercial confidentiality could also be compromised.
57. A detailed map may also date quickly, and would need to be almost constantly updated to remain relevant. This would place disproportionate demands on undertakings, as well as being an onerous task for any body responsible for retaining and managing such a database.
58. Respondents also felt that a map detailing where infrastructure is in itself would be relatively meaningless, as it would not be able to say whether there was spare capacity in the network and in

ducts in particular. This requires a much more resource intensive survey, and often capacity can only be determined when operators come to deploy infrastructure in the network.

59. Whilst it is true that a national infrastructure map may enable some smaller or community operators to make investment decisions, we do not believe that this benefit outweighs the burden on network owners, or the security and commercial concerns.
60. However, we recognise that infrastructure sharing can help to lower the cost of roll-out of broadband, and therefore believe that currently it would be more appropriate for information to be on an ad-hoc basis.
61. The overwhelming majority of respondents believed that Ofcom should be the appropriate body that should be able to request this information, and we agree that there is little benefit in another body being given this power. This is because Ofcom have considerable experience in requesting such information, and limiting the power to one authority will minimise the burden on industry. Ofcom also have the appropriate processes in place.

Government Response on Issues Raised in Relation to Infrastructure Sharing

62. We intend to implement Article 12(4) by amending section 135 of the Communications Act 2003 to include infrastructure sharing as an additional purpose for which information may be requested from communications providers. We are proposing that such a request will be capable of being satisfied by the provision of information less than 6 months old if it has previously been provided in response to such a request.
62. Article 12 (5) states that measures taken by Ofcom in this regard shall be objective, transparent, non-discriminatory and proportionate. We note that section 3(3) of the Communications Act 2003 already captures the need for Ofcom's information requests to be transparent, accountable, proportionate, consistent and targeted, and we believe this satisfies the conditions laid out in Article 12(5) of the Framework Directive.
63. Ofcom may wish to compile any information obtained using these powers into an inventory. We are also introducing a new power to ensure Ofcom can make any information provided (including any inventory produced) available to interested parties.

Security and Integrity of Networks and Services

We asked:

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

Policy Proposals

63. Article 13a and Article 13b of the Framework Directive introduce significant new measures to increase the security and resilience of public communications networks and the security of publicly available electronic communications networks. These measures were described in our September consultation and are designed to enhance levels of network availability, as well as to protect against and prepare for disruptions to availability.

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

65. The proposed approach to Article 13a and Article 13b is to adopt the position suggested in our September consultation document, namely to copy out as far as possible the Directive’s wording into the Communications Act 2003. This approach will also include changes to some of the wording, such as the removal of “guarantee” in 13a(2) for reasons set out below. In addition, Ofcom will be providing high-level guidance on how it anticipates the security and availability provisions will work in practice.

Responses to Proposals on the Implementation of Provisions Relating to Security and Resilience

66. There was general support for overall proposals to copy out the wording of Article 13a and Article 13b. Some concerns were expressed about the danger and uncertainty of directly copying out some of the text given the language difficulties that were identified in the consultation document. These were specifically related to Article 13a(2): “*Member States shall ensure that undertakings providing public communications networks take all*

appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks"; and particular, to the use of "guarantee" and "integrity".

67. There was a general consensus that to "guarantee" network integrity was not possible, even with best efforts. There was also support for the consultation approach that "integrity" is far more closely aligned, in this particular context, with what is generally termed "availability".
68. Strong arguments were made for clear guidance to clarify the legislation as early as possible, though with some companies requesting full consultation on guidance. In addition there was some lobbying to include the detail of requirements in the new legislation on the face of the Communications Act 2003.
69. Opinions on standards and tiered levels of performance were divided. There was both support for and lobbying against the use of standards, including existing management standards. The tiered standard approach only received very limited support, with responses to the consultation favouring the minimal level of implementation to meet legislative requirements.
70. On the reporting of incidents, there was a strong lobby for clarity of what the parameters of this would be. However, Government received little input on what "significant impact" should mean in practice and how incidents would be reported. In addition there was also some lobbying voicing concern regarding the sensitivity of data which would be passed on to ENISA (the European Network and Information Security Agency).
71. Questions were also raised on whether reporting should be in real-time, and whether this may distract from critical activities required at that time, such as incident management. There was general agreement that unless there was an event where Government emergency response mechanisms may be required, reporting should take place in longer time frames.
72. There was general support for our proposed approach not to require the mandating of a specific process for providers to follow in assessing risk and determining mitigations; respondents generally agreed that what is appropriate will vary according to the network and service, and the service level offered to the customer.

Government Response to Points Raised on Proposals on Security and Resilience

73. The proposed approach to copying out the revisions to the Directive will continue, though with two significant changes

related to the problems of transposing Article 13a(2): “*Member States shall ensure that undertakings providing public communications networks take all appropriate steps to guarantee the integrity of their networks, and thus ensure the continuity of supply of services provided over those networks.*”

74. As we set out in our September consultation document, the Government believes it impossible to provide such a guarantee, and does not consider that the Directives meant such a level, as under sufficiently hostile conditions all networks will fail regardless of the steps taken to protect them. To ensure the legislation reflects the practical capability of communications network providers, we will not focus on a “guarantee” but on ensuring that providers should take all appropriate steps to protect the availability – or certainty of supply - of the network.
75. The consultation document also stated that we believe the use of the word “integrity” in this context was not the accepted information security concept of integrity; that is that information is not subject to change while in transit or in store. Instead, the Government set out in the consultation document that “integrity” here appears to mean maintaining a certainty of supply – and, therefore, more in line with the use of the term “availability” in the traditional security concept.
76. High-level guidance is currently under development by Ofcom. It will be published in advance of the implementation date and will set out how Ofcom intends to assess compliance with the legislation. This is following responses to the consultation requesting early guidance in preparation for implementation. Requirements such as incident reporting will be live and operating from 26th May 2011, which means effective thresholds are required for reporting, and structures in place for Ofcom to manage the framework. Government sees the enhancement of security and resilience measures within Article 13a as an iterative process, which will develop with time, and which requires ongoing collaboration with industry.
77. It will also be important to take into account the output of work being led by ENISA, to agree a common approach to implementation across Member States. Government therefore believes the most appropriate approach is, as Ofcom is proposing, with high-level guidance initially, with additional detail and refinement with the benefit of experience, feedback from ongoing industry collaboration, and the outcomes of the ENISA work.
78. As this is an iterative process the initial focus of the guidance, as the Government understands, will be on achieving compliance with Article 13a. As discussed in the consultation, compliance with the NICC ND1643 standard is expected to form a key part

of the Ofcom high-level guidance. As some respondents to the consultation noted, this standards is currently limited to communications providers and sites with particular type of interconnect. Therefore NICC to have been asked to consider extending this scope.

79. In the meantime, the guidance is expected to signal that the basic security concepts contained in ND1643 are still the right ones for communications providers to apply in complying with Article 13a, even if formal certification against the standard is not applicable in a particular case.
80. The process and thresholds for reporting any breach of security or loss of availability to Ofcom will form a central part of the guidance. As noted in the consultation responses, cooperation with CPNI would be beneficial in determining standards. Consequently CPNI has been involved in the development of thresholds. These will vary by network/service type, with the loss of 112/999 access, for example, having lower thresholds than less critical incidents.
81. In accordance with our intention to keep reporting as lightweight as possible, which was generally supported in the responses to the consultation, the real time aspects of incident reporting to Ofcom will be simplified as far as possible. This should also serve to guard against any diversion of effort from dealing with the incident.
82. For those reported incidents - expected to be a small minority – which will have a significant impact on the operation of the network or service, additional information will be sought as required. The relevant information will then be included in the annual summary report to ENISA. Ofcom expects to revise the thresholds over time, not least as experience allows better focus on the incidents likely to be of particular concern.
83. As discussed above, ENISA is coordinating work on developing a coherent pan-European approach to implementation of Article 13. This includes defining thresholds for the annual summary incident report to ENISA and the Commission. This is an ongoing process which will not be completed by May 2011. Both Government and Ofcom are closely involved in this process and are working to ensure the outcome is compatible with the UK's implementation approach.

Dispute Resolution

Policy Proposals

84. In our September consultation document, we set out the changes that are needed to the Communications Act 2003 to implement Articles 20 and Article 21 of the Framework Directive on dispute resolution. In our consultation document, we noted that Article 21 covers covered cross-border disputes and that, as to date Ofcom have not had to handle a cross-border dispute, amendments to that provision will have little impact on the UK.
85. The main change to Article 20(1) seeks to clarify the NRA's duty to resolve disputes between undertakings providing electronic communications networks or services, applies only to existing obligations (under the Framework Directive or the other telecoms directives).
86. The other change to Article 20(1) expands on the category of persons having rights to refer disputes under Article 20. Additionally to disputes between different communications providers, disputes about such existing obligations may also be referred to the regulator if they are disputes between communications providers and other undertakings benefiting from obligations of access and/or interconnection.
87. As we made clear in our September consultation, we are of the view that this change relates to "one step" direct beneficiaries (to which the existing obligation already refers). We do not believe that the purpose of the change is to enable anyone who could be said to benefit from access obligations, no matter how far removed from the undertaking that is subject to the access or interconnection obligation, to refer a dispute to Ofcom. An example of how this would work in practice is provided at page 34.
88. We proposed to implement these changes through amendments to the dispute resolution provisions of the Communications Act 2003 so that they apply only to disputes in relation to conditions set or modified under section 45 of the Communications Act 2003 and obligations under continuation notices falling within paragraph 9(4) of Schedule 18 to the Communications Act 2003. We also proposed to amend the provisions to make clear the intended meaning of regulatory beneficiaries having rights to refer such disputes to Ofcom.
89. Following the changes to Article 5(3) of the Access Directive (previously Article 5(4)), we also set out our intention to further amend the provisions to remove the duty on Ofcom to resolve network access disputes under section 185(1).

90. We also said that we do not think that section 105 of the Communications Act 2003 is a meaningful provision, given that Ofcom is already procedurally required under section 48 of that Act to publish a notification when they impose access-related or SMP conditions. We therefore proposed to repeal section 105 of the Communications Act 2003.
91. Finally, we proposed to grant Ofcom a discretionary power, where appropriate, to recover the costs and expenses it has incurred in relation to resolving a dispute from the disputing parties through lifting the current restriction on Ofcom set out in section 190(7) of the Communications Act 2003.
92. We set out our intention to make this change in order to encourage the use of alternative mechanisms for resolving disputes, where appropriate, which can be both more cost effective and less bureaucratic than the current dispute resolution process.
93. We also made clear that Ofcom would only normally recover such costs from disputing parties, where appropriate, in cases where alternative mechanisms, where available, had not been pursued. This should not impact on the ability of undertakings to seek resolution of disputes through Ofcom.
94. We proposed these changes to enable Ofcom to develop proper policies to provide the right incentives and sufficient encouragement for disputing parties to seek resolution of their disputes, where appropriate, through alternative mechanisms.

Responses to our Proposals for Implementing Provisions Relating to Dispute Resolution

95. Respondents welcomed the Government's clarification of new powers and amendments to provisions relating to dispute resolution, which respondents believe is an important and valuable step within the wider appeals process and provides a strong framework that enables smaller communication providers, in particular, to bring disputes.
96. Respondents also welcomed the explanation of changes that will extend the dispute process to relevant persons whom are to directly benefit from the access and/or interconnection obligations imposed by Ofcom. Respondents were supportive of the Government's proposal to amend section 185 of the Communications Act 2003 to reflect this change.
97. A number of respondents sought further clarity on proposals to introduce a "one step" beneficiary test to clarify which parties can bring disputes under the proposed amendments of section 185 of the dispute provisions of the Communications Act 2003,

noting that there remains some ambiguity as to who will be covered by this new test. Respondents asked, for instance, whether it will extend to cover parties that use transit operators or other wholesale providers to obtain communications services as these will likely be communications providers and fall within the scope of the dispute provisions. Further detail on this process is provided through the example at page 32.

98. Few respondents were supportive of proposals to enable Ofcom to recover the costs of disputes from disputing parties, where appropriate, in cases that could otherwise be resolved without the intervention of Ofcom. Respondents were concerned that changes to the charging regime for the resolution of disputes through Ofcom would deter a large number of parties from bringing genuine disputes.
99. Respondents were keen to point out that referral of a dispute to Ofcom is a measure of last resort and these changes are unnecessary. Furthermore, Ofcom already seeks to refer potential disputes to ADR in appropriate circumstances. Respondents also noted that parties bringing disputes already consider ADR options and only submit a dispute to Ofcom as a last resort when all other commercial avenues have been explored without success.
100. Respondents also pointed out that there are many disputes which are simply not appropriate for referral to ADR, particularly where multiple parties are involved. They also noted that a requirement to add a mandatory ADR stage to the resolution process would lengthen the time taken to resolve disputes unnecessarily and potentially add to regulatory uncertainty.
101. In this context, a number of respondents suggested that a better way of reducing the number of disputes referred to Ofcom is for the regulator to proactively tackle areas of key industry concern rather than focusing on areas where there is limited evidence that reform is required. A number of respondents cite, for example current disputes on 03 and 0870 charges which respondents suggest have risen because Ofcom has failed to tackle the issue of termination rates for non-geographic numbers.
102. Additionally, respondents raised concerns that the proposals might lead to double recovery of administrative costs. Respondents suggested that any contributions towards dispute costs recovered as a consequence of these changes should be fully reflected in a reduction to the administrative charges levied across industry. Respondents also asked that this be reflected transparently in Ofcom guidance on the dispute resolution process.

103. At present, the handling and resolution of Ofcom disputes are funded out of the Ofcom administrative charges. Respondents view this as fair since disputes between a communications providers benefits the whole industry. Respondents noted that there has been a material increase in Ofcom fees of circa 19% part of which is to cover the increases in disputes submitted to Ofcom.
104. Lastly, a number of respondents expressed considerable concern at the Governments proposals to repeal section 185(1) of the Communications Act 2003. Respondents have argued that this will leave a dispute resolution vacuum which private enforcement will be inadequate to fill. Smaller players will be left particularly vulnerable without an effective alternative.

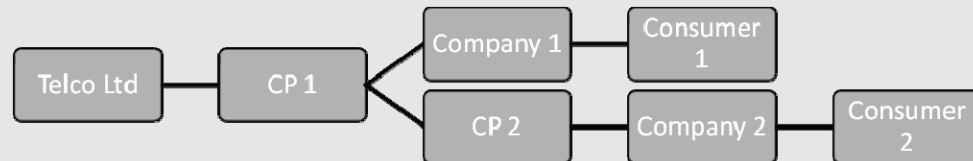
Government Response to Issues Raised in Relation to Proposals on Dispute Resolution

105. The Government is pleased at the positive response to its clarification and explanation of amendments to the dispute resolution process set out in Article 20 of the Framework Directive. However, we do recognise the real concerns expressed by respondents as to the exact meaning of 'one step' beneficiary in Article 20(1). Further explanatory text on this has been provided at page 32.
106. It remains the intention of Government to repeal the duty on Ofcom to resolve network access disputes. However, in response to concerns raised on this point, we have decided to grant Ofcom a power to intervene in network access disputes at its own discretion. If Ofcom decide to exercise its discretion and resolve a network access dispute, their powers will be the same as for any other dispute. However, where Ofcom decide to handle a network access dispute under the new discretionary dispute procedure, in exercising their powers under section 190, they should seek a resolution which appears to Ofcom appropriate for the purpose of securing:
- efficiency;
 - sustainable competition;
 - efficient investment and innovation; and
 - the greatest possible benefit for the end-users of public electronic communications services.
107. The Government recognises respondents concerns at proposals to lift the limitation on Ofcom's ability under section 190(7) of the Communications Act 2003 to recover costs incurred in relation to the resolution of disputes under section 185 of the Communications Act 2003. However, we remain of the view that this change is necessary to provide real incentives in order to encourage disputing parties to meaningfully pursue, in the first

instance, alternative and potentially more cost effective means of resolving disputes, such as ADR if and where appropriate.

108. We recognise that there are a large number of disputes that are not suitable for referral to ADR, including some disputes involving multiple parties. It is our view that though there are many advantages to ADR it should only be pursued in those cases for which it is appropriate.
109. To address concerns raised by respondents about cost recovery, we will look to provide some further clarity on the face of the legislation as to what factors Ofcom should consider when deciding whether to recover their costs. These factors will be:
- the conduct of the party, including before as well as during the dispute proceedings and the efforts made, if any, to try and resolve the dispute;
 - whether a party has succeeded in part of its argument, even if it has not been wholly successful.
- The current position for recovery of Ofcom's costs in respect of spectrum disputes will, however, remain unchanged.
110. The Government also notes concerns that, if Ofcom sought to recover the costs it incurs in resolving a dispute from a party, this would have the potential to result in double recovery of administrative costs by Ofcom. The Government is of the view that this concern is unwarranted. Ofcom is not a profit-making corporation.
111. The statutory regime for administrative charging requires that an over-recovery of costs in any financial year will be returned to stakeholders in the following year (and the year following that in limited circumstances). This will be in the form of a reduction to the annual tariff for the regulatory sector to which the over-recovery of costs pertains. This is set out both in section 38(10) of the Communications Act 2003 and Ofcom's Statement of Charging Principles.

One Step Beneficiary: Example



Ofcom has imposed on a specific company (Telco Ltd) two obligations by means of SMP conditions under section 45 of the Communications Act 2003. Firstly, Telco Ltd is required to provide network access in relation to the relevant market for which Telco Ltd has been determined as having SMP. That obligation is triggered on a reasonable request in writing by another person whom falls within a class of persons identified in the SMP condition with an entitlement to make such a request and CP1 is such a person.

Secondly, Telco Ltd is under a price control obligation in respect of the provision of that access. CP1 therefore benefits from that access obligation, but so does potentially CP2 and Company 1 who purchase products or services from CP1 that rely on the network access provided by Telco Ltd and its customers. Company 1, which purchases relevant products or services from CP1, Company 2 which purchases relevant products or services from CP2, and the end consumers of both Companies 1 and 2 also potentially benefit from the obligation in an indirect way.

In our example, Telco Ltd and CP1 have a dispute about Telco Ltd levying on CP1 a charge that is contrary to Telco Ltd's price control obligation. That dispute could obviously be referred to Ofcom under section 185 as the access and price control conditions would have been set under section 45 of the Act. However, CP1 may choose not to refer the dispute to Ofcom – perhaps it simply passes the amount of the excess levy onto CP2 and/or Company 1. That excess levy may then be passed further down the chain to Company 2 or consumers.

We do not believe that the provision was intended to give a person (CP2, Company 1, Company 2, or end consumers) that purchases downstream services from another party (CP1) which relies on regulated access or interconnection to be provided upstream, the right to refer a dispute to Ofcom about that upstream access.

In the above example, whilst CP1 could refer the dispute to Ofcom, we do not believe that anyone further down the chain (CP2, Companies 1 and 2 or the consumers) should be able to refer the access dispute to Ofcom, even though they may indirectly benefit from the access arrangements between Telco Ltd and CP1.

Response in Relation to the “Authorisation” Directive

Information Gathering Powers

Policy Proposals

112. In our proposals for implementation, we outlined how revisions to the Authorisation Directive would impact Ofcom’s Information gathering powers. Specifically we set out how revisions to Article 10 of the Authorisation Directive and Article 5 of the Framework Directive strengthen the enforcement powers available to the NRA, particularly with regard compliance with the conditions of general authorisations.
113. The most significant of these changes is to Article 10(1) of the Authorisation Directive which requires NRAs to have the power to require “undertakings providing electronic communications networks or services covered by the general authorisation or enjoying rights of use for radio frequencies or telephone numbers to provide all information necessary to verify compliance with the conditions of the general authorisation or of rights of use or with the specific obligations referred to in Article 6(2), in accordance with Article 11.
114. Our September consultation set out the existing powers Ofcom have in this respect, under section 135 (and 191) of the Communications Act 2003 and section 32 of the Wireless Telegraphy Act 2006. However, we also noted that section 135 of the Communications Act 2003 does not extend to matters relating to spectrum, and that section 32 of the Wireless Telegraphy Act 2006 only provides for information gathering for statistical purposes.
115. Therefore, in order to fully implement the changes to Article 10(1) we proposed to introduce a new information gathering power into the Wireless Telegraphy Act 2006 to enable Ofcom to request information for the purpose of fulfilling its spectrum-related functions. We also set out our intention that these new information gathering powers would be enforced in much the same way as sections 135, 136 and 191 of the Communications Act 2003. Therefore, under this new power, Ofcom will be required to notify an undertaking of a contravention of the

information gathering power, as it currently does under section 138 of the Communications Act 2003. Ofcom will also have the power to issue a financial penalty. Lastly, for serious or repeated contraventions of the new information gathering power, Ofcom will be able to revoke the Wireless Telegraphy Act licence.

116. We also set out our proposals for implementing revised provisions in Article 5 of the Framework Directive which require an NRA to have the power to require electronic communications network and service providers to provide information concerning future network or service developments that could have an impact on the wholesale services that they make available to competitors.
117. In addition, we proposed to amend section 135 of the Communications Act 2003 to grant Ofcom the power to require accounting on retail markets that are associated with wholesale markets data from undertakings with SMP in those wholesale markets.
118. In order to give this amendment meaning, we made clear our intention to clarify that information requests made by Ofcom under section 135 of the Communications Act 2003 apply both to information that a company holds and also to information that it can reasonably be required to produce or pull together. We also said that an equivalent provision will be included in the Wireless Telegraphy Act 2006.
119. Lastly, we set out our intention to introduce an obligation on Ofcom to issue a policy statement in respect of information requests made under the new Wireless Telegraphy Act 2006 information gathering powers that would reflect the existing requirement on Ofcom under section 145 of the Communications Act 2003, to publish a statement of their general policy with regard to information requests made under section 135 and 136 of the Communications Act 2003. This statement should also set out the uses to which they are proposing to put information obtained under those sections. This will be achieved through an amendment to section 34 of the Wireless Telegraphy Act 2006, which already requires Ofcom to set out a similar policy statement for the exercise of its powers under section 32 of that Act.

Responses Relating to Proposals on Information Gathering Powers

120. Respondents were clear that it is vital for Ofcom to be able to access the information it needed to effectively fulfil its duties as regulator as set out on the face of the Directives. They also recognised the need for information gathering powers to be extended beyond current obligations to capture spectrum-related

information issues, and for these to be properly reflected in legislation.

121. However, a number of respondents expressed concern at proposals to extend Ofcom's powers in relation to information gathering which they suggested was already onerous. Respondents argued that changes should be limited only to where they are fully justified.
122. Some respondents felt that Ofcom's powers were, for the most part, already sufficiently wide ranging. Others felt that any move to further the powers already available to Ofcom would merely increase the significant burden that already exist on communications providers, particularly if new powers extended to information not just that a company held, but might be reasonably expected to produce or pull together. Respondents asked for clarity on this issue as a matter of urgency.

Types of Information

123. Respondents generally accepted the requirement that companies should provide information where they had firm development plans, but insisted that any requirement that a company should "pull together" information which does not currently exist (as they considered was suggested in our proposals for amendment to section 135 of the Communications Act 2003) would need to be very carefully drawn up. Government would need to be clear that companies would not be asked for a "statement of opinion" rather than information. Respondents were also agreed that communications providers should not be placed at risk of enforcement proceedings for non-compliance with such requests nor should they incur sanction for providing information that later proved to be misleading or incomplete.
124. A number of respondents were concerned that changes to Ofcom powers should not lead to a situation for communications providers with an international base or parent company whereby information that the domestic communication providers might be reasonably able to pull together could be conflated with information that the international owner or parent company might be expected to pull together. As such, the parent company would be subject to a legally-enforceable information request from Ofcom.
125. Respondents also suggested how Government might implement the changes differently, treating the two new information requirements of revised Article 5(1) of the Framework directive separately. The first would relate to the provision of information concerning future network or service developments that could have an impact on the wholesale services that they make

available to competitors. This would be an example of what may be required by an NRA to verify that a communications provider was complying with the obligations imposed on it and as such would fall under existing provisions in section 135 of the Communications Act 2003.

126. The second would relate to provision by an SMP operator in a wholesale market of accounting data on the retail markets that are associated with that wholesale market. This, as an SMP based obligation, would be better implemented through a change to section 87 of the Communications Act 2003 which deals with SMP remedies involving accounting separation.
127. For the most part respondents sought reassurance that what they perceive as a minor change to the information gathering powers under the telecoms framework to cover future network developments in wholesale services, should not be used as a basis for a wider change to the scope of Ofcom's information gathering powers.

Government Response to Issues Raised in Relation to Changes to Ofcom's Information Gathering Powers

128. It is the Government's view that that Ofcom's information gathering powers are critical to Ofcom's ability to fulfil its duties as regulator. We believe that the changes to Ofcom's information gathering powers that we outlined in our September consultation document are absolutely necessary if Ofcom is to comply with its expanded role as set down in the revised Framework. This includes the ability to be able to make informed decisions about future network developments.
129. The Government appreciates the efforts made by communications providers to ensure that they comply with Ofcom's information gathering requests and recognises the concerns raised by stakeholders with regard to the burden that some requests can place on communications providers. We understand that Ofcom is to update its current statement on information requests in light of the amendments to section 135 of the Communications Act 2003 and section 32 of the Wireless Telegraphy Act 2006.
130. Ofcom is the independent regulator, but we believe that it should address the issues raised by respondents in relation to the exercise of its information gathering powers, either in guidance or in its statement on information requests published under section 145 of the Communications Act. We also encourage Ofcom to heed respondents' views on the seriousness with which they regard feedback requests on the information they provide to Ofcom.

131. The Government does not plan to significantly alter its published proposals with regard to Ofcom's information gathering powers. However, we no longer feel that it is necessary to introduce a provision requiring an undertaking to provide information that it can reasonably be expected to pull together. This is because under sections 135 and 191, Ofcom can already require the production of information which, following the definition of information in section 405(1) of the Communications Act 2003 includes accounts, estimates and projections and any document. Ofcom is also able to specify the manner and form in which the information is provided (see section 135(4) and section 405(2) of the Communications Act 2003). We therefore consider that Ofcom's existing powers would enable it to reasonable require an undertaking to pull together information to answer an information request.
132. Although communications providers will not be expected to compile new information, they can be asked in certain circumstances, to pull together information that exists across a number of sources. Government is also clear that the exercise of this power is subject to Ofcom's statutory requirement to action in a proportionate manner and to set out reasons for requiring the information.
133. Respondents asked for clarity as to whether internationally based parent companies might be required to comply with such information requests relating to future planning and development and requests for information that undertakings might be reasonably required to pull together. The Government is clear that this power extends only to matters relating to the UK operation and impacts on UK networks and services wherever the parent company is located.

Enforcement

Policy Proposals

134. The amendments to the electronic Communications Framework include measures to streamline Ofcom's enforcement powers and processes. As we noted in our September consultation document, the revised Framework makes a number of changes to the enforcement powers granted to NRAs to enable them to deal more effectively with cases of breach of regulatory obligations under the Framework.
135. The most important of these changes are:
- Revisions to Article 10(2). This has been amended so that the NRA now just has to allow a reasonable time for the undertaking to state its views rather than needing to notify

an undertaking of an alleged breach and giving it one month either to state its views or to remedy the breach as is currently the case. This means that the requirement to give the undertaking an opportunity to remedy the breach before issuing a penalty has been removed. Under the power, Ofcom will determine what a reasonable time limit is in the circumstances for the undertaking to respond to Ofcom's notification.

- Strengthening of the NRA's enforcement powers in Article 10(3) so that it has the power to require the cessation of the breach either immediately or within a reasonable time limit. To this end, Article 10(3) now expressly allows penalties imposed by Ofcom to be periodic and to have retroactive effect. In practice, this means that Ofcom will be able to issue a financial penalty that dates back to the start of the contravention. Once a breach has been established, Ofcom will also be able to issue periodic penalties going forward, for example a daily penalty for each day for which the contravention continues.

136. Other revisions to Article 10(3) empower Ofcom to require an undertaking to cease or delay provision of a service or bundle of services which if continued would result in significant harm to competition, pending compliance with SMP (wholesale) access obligations. Article 10(3) also requires that NRAs have the power to levy dissuasive financial sanctions. This is dealt with from paragraph 158.

137. As we noted in our September consultation document, Article 10(5) currently applies in respect of serious **and** repeated breaches and the Communications Act 2003 and the Wireless Telegraphy Act 2006 provisions that implement Article 10(5) reflect this drafting. Changes to Article 10(5) now refer to serious **or** repeated breaches. We proposed to implement this and the above changes through amendments to the corresponding provisions in the Communications Act 2003 and the Wireless Telegraphy Act 2006.

138. We also set out our proposals to change the definition of 'repeated contravention' in the Communications Act 2003 and also in the Wireless Telegraphy Act 2006. Currently, Ofcom is required to have given at least two notifications of a contravention during a 12 month period. We proposed to amend this definition in all instances in the Communications Act 2003 and the Wireless Telegraphy Act 2006 so that a "repeated contravention" will be one where there have been in effect two notices of contravention in two years. We explained that this change would be made because of timing issues, which render the present definition of "repeated contravention" ineffective.

139. We also proposed to give effect to amendments to Article 10(5) which make clear that an NRA may issue a sanction or a penalty even after the breach has been remedied. This will enable Ofcom to take effective enforcement action to prevent short-term (often 30-day) scams; e.g. where operators set up premium rate numbers and operate in breach of regulatory obligations/ fraudulently until just before the expiry of the 30-day notification from Ofcom, thereby avoiding any penalty for their actions.
140. Lastly, we explained that changes to Article 10(6) will require amendments to Ofcom's existing power to take interim measure (for example in section 98 of the Communications Act 2003). Article 10(6) currently provides for interim measures, but the changes make it clear that the interim measure is only valid for 3 months unless it is confirmed. In certain circumstances where the enforcement process has not been completed, this three month period may be extended for a further period of up to 3 months.

Responses to the Government's Proposals for Implementing Provisions Relating to Enforcement

141. Although our September consultation document posed no questions in relation to the changes we have proposed to Ofcom's enforcement powers, a number of respondents commented on the proposed amendments. Broadly, respondents welcomed the changes, particularly those that might help prevent short-term scams and better enforce consumer protections through a new power to impose fines immediately, and for past behaviour. Respondents also welcomed the explanation of these changes by Government.
142. However, a number of respondents expressed concern at the proposals. Primarily these concerns relate to amendments which allow Ofcom to provide parties only with a "reasonable time limit" to respond, whereas previously the period was one month. Respondents stressed that it is vital that Ofcom provides parties with a response deadline which is proportionate to the alleged infringement. In most cases a month was thought to be proportionate. Respondents were unambiguous: clarity on what a reasonable time limit would be in practice would need to be included in Ofcom guidance on enforcement. They also called for the powers to fine to be backed up by a requirement on Ofcom to conduct full and thorough investigations in cases where a breach, potentially leading to a fine, is suspected.
143. A number of respondents also expressed concern at proposals to remove the requirement to give parties the opportunity to remedy a breach before the imposition of a penalty.

144. Some respondents noted that one of the key advantages of ex-ante regulation in a fast moving sector like communications is that it enables the NRA to act promptly, rather than waiting to see whether there has been a breach of ex-post obligations. This means that communications provider may take a course of action which it considers to be innovative, reasonable and in the interests of its customers, in the knowledge that if it is seen to be detrimental by either consumers, competitors, or the regulator, it can be adapted as required but without the risk penalty for breach.
145. Respondents argued that it follows that communication providers may become risk averse if they may face substantial fines as a consequence of the launch of new or different services. This may also impact on the willingness of consumers to engage in meaningful negotiations to find pragmatic solutions to issues as they arise.
146. Respondents also expressed concern at a perceived lack of clarity around the implementation of Article 10(3) and the power to require the cessation of the breach within a reasonable time limit. Specifically, respondents wanted to know whether this power runs in conjunction with the reasonable time limit for parties to state their views or whether it comes after that reasonable time period, including also consideration by the regulator of those views and the decision by the regulator of whether a breach has in fact occurred. It was the view of respondents that the two processes are meant to run in sequence and not in conjunction.
147. Respondents were also concerned at new powers for Ofcom to issue a retroactive penalty dating back to the start of the contravention. They argued that this should only be used sparingly, for example, only in those instances where an operator wilfully or deliberately engaged in the breach in the full knowledge of the impact that breach would have on competitors or consumers.
148. Lastly, respondents asked for clear, unambiguous and full guidance to be published by Ofcom on amendments to their enforcement powers ahead of the implementation deadline of the 26th May 2011. A small number of respondents called on Ofcom to consult on this guidance.

Government Response to Issues raised in Relation to Ofcom's Enforcement Powers

149. The Government appreciates the concerns raised by respondents and recognises the importance of the overall Ofcom enforcement regime to stakeholders. In particular we appreciate respondents concerns in relation to the timing of processes as a

consequence of changes to Article 10(3) with the deletion of the need for Ofcom to allow stakeholders the opportunity to remedy any breaches before then seeking to impose any financial penalties, although the Government does note that this requirement was expressly deleted from the Directive wording.

150. The Government agrees with the view expressed by respondents that, subject to urgent action, the requirement for the cessation of the breach comes only after: the expiration of the reasonable time limit for parties to state their views; consideration by the regulator of those views; and, the decision by the regulator of whether a breach has in fact occurred. The Government intends to reflect this in the amendments to be made to the enforcement process in the Communications Act 2003. That said, after having gone through that process, Ofcom will be in a position to require the immediate cessation of the breach.
151. The Government understands that Ofcom intends to consult on guidance as to how it will normally consider applying its new enforcement powers. The Government expects that any such guidance will explain among other things how Ofcom considers that changes to Article 10(3) (which provides that an NRA may require the immediate cessation of the breach or within a reasonable period after representations have been heard) will work in practice.
152. Respondents also asked for additional clarity around Article 10(2). The Government view is that the period for making representations is whatever is reasonable in the circumstances, and could be for a period much shorter than a month. The Government expects that the way in which this will work in practice will be explained further in the draft guidance which Ofcom will issue for consultation in due course.
153. As to the legislative changes to be made, the Government is introducing new versions of the enforcement sections of the Communications Act 2003 and Wireless Telegraphy Act 2006 so far as they relate to the enforcement of matters covered by the European Communications Directives (therefore, for example, they would not apply to the enforcement of PRS conditions or SMP apparatus conditions).
154. The amendments will allow Ofcom to take a preliminary decision where Ofcom will be able to set out not only that it reasonably believes there is a breach of an obligation but also what the stakeholder has to do to remedy both the breach and the consequences of the breach (such as repaying over-recovered monies), and what (if any) proposed financial penalty would be for the breach (including periodic penalties where relevant).

155. Ofcom will then give the stakeholder an opportunity to state their views on this, including on any proposed sanctions, within a reasonable period. Ofcom will then either confirm or withdraw its preliminary decisions (in part or as a whole). This confirmation could include confirmation of any proposed sanctions and penalties. In its confirmation decision, Ofcom can then require the: immediate cessation of the breach, consequences of the breach to be remedied; and, payment of any relevant financial penalties (such penalty level being able to reflect the length of time the stakeholder was/is breaching its obligations). The Government considers that this represents the right balance for Ofcom to act swiftly to address breaches (including being able to take urgent action) as well as allowing stakeholders an opportunity to make representations.
156. Additionally, we will make the amendment needed under Article 10(5), whereby Ofcom may prevent stakeholders from continuing to provide electronic communications networks or services or suspend or withdraw rights of use for serious **or** repeated breaches. Also, a 'repeated contravention' will be one where Ofcom confirms its decision that there has been a contravention within 24 months of a previous decision in relation to the same contravention.
157. Lastly, we will amend Ofcom's existing power to take interim measure (for example in section 98 of the Communications Act 2003) to make it clear that the interim measure is only valid for 3 months unless it is confirmed. In certain circumstances where the enforcement process has not been completed, this three month period may be extended for a further period of up to 3 months.

Dissuasive Sanctions

We asked:

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

Policy Proposals

158. In our September consultation document we asked respondents what they thought a dissuasive level of sanction would be for a failure by a natural person to comply with an information request (see question above).
159. We asked this question because revisions to Article 10(3) of the

Authorisation Directive as well as to Article 21(1) of the Framework Directive require that the sanctions imposed for breach or regulatory obligations flowing from the Framework are appropriate, effective, proportionate and dissuasive.

160. Ofcom already has powers to impose financial sanctions for breaches of the information gathering power in sections 135, 136 and 191 of the Communications Act 2003. The current limit on penalties which Ofcom can impose for non-compliance with information requests under those provisions of the Communications Act 2003 is £50,000. This is set out in section 139 of the Communications Act 2003. Ofcom do not believe that this level of sanction is sufficiently dissuasive to prevent non-compliance with information gathering requests.
161. The European Commission has also made clear its belief that sanction powers more generally need to be strengthened. Consequently, in our consultation document we set out our intention to increase the maximum level of the penalty for non-compliance with information gathering notifications.
162. We also set out our intention to introduce new powers to levy dissuasive fines into the Wireless Telegraphy Act 2006. These would back up the new information gathering power that we will introduce into that Act as a consequence of amendments to Article 10(1) of the Authorisation Directive. This will reflect the financial penalty in section 139 of the Communications Act 2003.
163. We made clear that the UK has no discretion on the implementation of these provisions – we must provide for dissuasive sanctions. The key issue set out in the consultation document related to the level of sanction and what constitutes ‘dissuasive’. We noted that recent changes to the Ofcom enforcement regime in relation to sanctions for silent calls raised the level of sanction Ofcom can levy to £2m.
164. We proposed to make the change to the level of penalty using the Order making power contained in section 139(9) of the Communications Act 2003. This Order is subject to the affirmative resolution procedure so will be subject to debates in both Houses of Parliament.

Responses to Proposals to Increase the Level of Sanction for Failure to Comply with an Information Gathering Requests

165. Respondents were agreed that it is of utmost importance for the effective conduct of Ofcom’s electronic communications regulatory functions under the Framework that it is able to gather all necessary information through the effective and proportionate use of its information gathering powers.

166. However, most respondents disagreed with the need to increase the level of fine that Ofcom levy for breach of its information gathering powers. They argued that the current level of sanctions for failure to comply is already sufficiently dissuasive, and that there is no evidence that communications providers are not complying with information requests.
167. A smaller number of respondents suggested that the Government should focus more on minimising the burden on stakeholders and positive incentives rather than necessarily imposing financial sanctions in order to ensure compliance with information gathering requests.
168. Respondents also noted that the current level of sanction (£50,000) is a considerable sum. Anything above this, and in particular, the proposed sum of £2m, would be equivalent to a substantial commercial penalty. They pointed out that Ofcom's current powers to sanction for a breach of an information request are already higher than some of those available to the regulators of other sectors. Respondents also noted that communications providers are incentivised to comply with information requests by other considerations: for example reputational considerations; relationship with the regulator; and, a legal obligation to comply.
169. Respondents were clear that they thought it would be inappropriate to treat a failure to respond to an information request in the same manner as a breach of specific regulatory obligations where Ofcom already has the ability to impose a dissuasive sanction in the form of fines of up to 10% of relevant turnover. They noted that it is not the level of fine but the enforcement action that provides the deterrent effect.
170. In addition to this, respondents expressed concern that the Government did not provide sufficient evidence to support its assertion that the current level of the sanction for breach of sections 135, 136, and 191 is not sufficiently dissuasive and needs to be increased. They noted that Ofcom has only imposed a penalty in one case since 2003 suggesting that, overall, communications providers pay suitable attention to the requirements imposed on them through information requests from Ofcom.
171. A number of respondents also suggested that the fine for silent calls (set at £2m) should not be regarded as a benchmark for other penalties under the Act. They noted that silent calls have a detrimental impact on consumers particularly those who might be old and vulnerable and therefore the impact of a breach of the silent call regulation can be extremely serious. Consequently, there are legitimate reasons why a penalty for silent calls might be set at a far higher level than sanctions in relation to other issues.

172. Respondents also raised concerns around the difficulty of imposing fines which are at the same time both proportionate and dissuasive. They urged the Government to consider how proportionate dissuasion might work and noted that in UK criminal cases, judges sometimes impose severe penalties which are intended to be a deterrent to others tempted to commit the same offences which are subsequently corrected by the Court of Appeal subsequently.
173. By contrast, a number (but not a majority) of respondents agreed with the Government view that a fine of £50,000 is not dissuasive, particularly to those operating short term scams where the potential gains can exceed the amount of the fine, and were supportive of plans to increase the level of sanction.
174. However, even among this group, respondents cautioned that given the high level of potential fine, its levy should be proportionate to the type of breach of an information sharing obligation, noting that many communications providers can receive several formal requests for information each week.
175. Government was also urged to consider amending the Communications Act 2003 so as to create two “offences”. The first of these would cover deliberate non-compliance with an information gathering request and would be subject to much higher levels of fine. The second would be to reflect the current provisions of the Communications Act 2003, and would cover a situation where the failure to comply was a result of a simple error or omission. In this circumstance the fine would be limited to the current maximum of £50,000.
176. More generally, respondents raised issues with the overall functioning of the information gathering system there is little account taken of the feedback requested of addressees before draft information requests are finalised. This is particularly the case with regard to the timescale for provision of information. Respondents suggested that Ofcom publish the comments it receives and gives its reaction much as it does in the case of formal consultations.

Government Response on Views Raised in Relation to Proposals on Dissuasive Sanctions

177. The Government does not share the view that new text at Article 10(3) of the Authorisation Directive and Article 21(b) of the Framework Directive is a ‘clarification’ of the existing position. The intention of legislators to improve the enforcement powers available to NRA’s through the implementation of the revised Framework is clear and unambiguous.

178. The Government has worked closely with Ofcom to analyse and test the regulators current enforcement powers. We believe that Ofcom's enforcement powers in relation to information gather requests made under sections 135, 136 and 191 of the Communications Act 2003 are not equivalent to other enforcement powers available to Ofcom and are not sufficiently dissuasive.

179. Therefore, we will increase the level of fine Ofcom can levy for failure to comply with an information gathering request up to a maximum of £2m. This will be done for the following reasons:

- i) We are aware that communications providers have refused to comply with an information request or have provided inaccurate information on a number of occurrences during 2009/2010. The issue of evidence to support the Government proposal was raised by a number of respondents but we are unable comment on the detail of the individual cases for legal reasons.

Some respondents claimed that the current level of sanction available to Ofcom is already sufficiently dissuasive. However, evidence seen by Government suggests that the lack of deterrent effect in the current regime means that businesses can (and do) take the risk of not providing accurate information as requested, potentially gaining not only financial but also other business advantage, by delaying, or even avoiding, the full effect of Ofcom's enforcement powers under the Act.

- ii) Non- or delayed, compliance with information requests under sections 135, 136 and 191 of the Communications Act 2003 hinders Ofcom in fulfilling its duty as regulator as set out in the Framework. The failure to supply proper information can prevent Ofcom from making informed decisions relating to market remedy and consumer protection. This in turn can have significant detrimental impacts on both markets and consumer protections. We see the ability to levy an increased level of sanction for failure to comply with an information request as key to ensuring that Ofcom has the necessary information available to it to make effective and correct regulatory decisions.
- iii) Increases in the level of sanction in other areas, for instance silent calls, could provide undertakings with an incentive to refuse to respond to an information request and face a penalty of a maximum of £50,000 rather than answer the request, demonstrate a breach of other regulatory burdens and risk a far higher penalty.

iv) The penalty will only apply to those who do not comply properly with Ofcom's information requests.

180. It should be noted that the increase in penalty sanction that Ofcom can levy will be up to a maximum of £2m. The use of this power by the regulator must be proportionate to the breach of information gathering powers under sections 135, 136 and 191 of the Communications Act 2003. This is consistent with calls made by respondents around the proportionate use of the increases sanction.

Maximum Retail Tariffs

Policy Proposals

181. The Government set out its intention to implement paragraph 1 of Part C of the Annex to the Authorisation Directive. This has been amended to clarify that NRAs 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').

182. We proposed to make minor amendments to the Communications Act 2003 to clarify that Ofcom has this power.

Responses to the Government's Proposals on Maximum Retail Tariffs

183. Although no questions were asked in the consultation document on this issue, a number of respondents have raised concerns about granting the power to impose tariff caps in relation to certain number or number ranges. Specifically, respondents were worried that such a power might lead to charge controls outside the regulatory framework for addressing significant market power.

184. A number of respondents also set out their concerns around the lack of transparency available to consumers in relation to the pricing of particular number and number ranges, leading to consumer detriment.

Government Response to Issues Raised in Relation Maximum Retail Tariffs

185. The Government intends to proceed with the implementation of this provision as set out in our September consultation, to clarify that Ofcom has the power to set tariff principles and maximum prices that can apply in a specific number range for the purpose of ensuring consumer protection. The Government does not believe that the concern raised by respondents in relation to charge controls outside of the regulatory framework for addressing significant market power is valid as this is not the intention of this measure.
186. The Government is of the view that the option to set maximum prices would only be used where there is a clear consumer protection need and where taking such action is demonstrably proportionate, objectively justifiable and non-discriminatory. As has been identified by Ofcom's current review of non-geographic calls (referred to by some of the respondents), there is evidence of several interrelated market failures.
187. Ofcom considered that consumers' awareness of call prices is poor, that coordination problems mean that call prices may not reflect the preferences of the organisations operating non-geographic numbers, and that the pricing of calls to a particular number may not take into account the impact on consumers' perceptions of similar numbers. As a result, Ofcom identified a number of detrimental effects on consumers.
188. The detrimental effects identified by Ofcom included higher non-geographical call prices, bill shock and (in some cases) fraud. In addition, Ofcom's analysis pointed to distributional impacts; lower income groups may be disproportionately affected by the current market failures. Ofcom's consultation contained quantitative and qualitative evidence suggesting that the magnitude of consumer detriment is significant.
189. The Ofcom review is considering the range of options for addressing these issues, in which the setting of maximum prices is one of the potential measures. The review recognises that setting maximum prices has consequences for communications providers and would only endorse such a measure where the weight of evidence of consumer harm justifies such a move and alternative measures are clearly less effective or desirable.
190. Maximum prices would not be used to effect charge controls and they will not be structured with the intent of controlling the revenue or profit of communications companies. Should maximum prices be imposed they would be based on assessment of appropriate price points for consumer protection,

though clearly they would have to be informed by an understanding of costs and consumption patterns.

191. The Government believes that given the scale of consumer concerns, providing Ofcom with the option to impose maximum prices is reasonable and proportionate. Any proposal by Ofcom to exercise this power would be subject to the normal procedural requirements of a consultation and accompanying impact assessment.

Response relating to the “Universal Service” Directive

Universal Service Obligations

Policy Proposals

192. As outlined in the September consultation document, in order to implement the amendments to the Universal Service Directive (USD), the Government proposes to amend the Universal Service Order (USO) as set out in paragraphs 193 - 196 below.
193. In Article 2 of the USO (Interpretation), we propose to delete the definition of “network termination point”, since it will be defined elsewhere and need not be defined in the USO. We propose to amend the definition of “publicly available telephone service” in line with the Directive which no longer describes what the service may contain. Paragraph 1 of the Schedule to the USO will be amended to reflect the fact that it currently uses defined terms which have been deleted from the Directive, and to reflect the amended Directive text.
194. A new provision will be included in Article 3 of the USO to allow the obligation on equivalence for disabled users to be removed from universal service providers, where Ofcom decides it is more appropriate to impose the equivalence obligation by way of a General Condition. Further detail on the reasons for this change can be found in the section on equivalence for disabled users from paragraph 204.
195. Paragraph 4 of the Schedule to the USO will be amended to permit the alternative offering of “other public voice telephony access points” rather than public pay telephones in line with the amendments to Article 6 of the USD.
196. The new requirement in Article 8(3) of the USD provides for designated undertakings (in the UK, the universal service providers) to notify the NRA in advance of any disposal of network assets. We propose to implement this requirement by making a provision in section 67 of the Communications Act 2003 in effect requiring a universal service provider to inform Ofcom when it intends to dispose of a substantial part or all of its local access network assets

Consultation Responses on Universal Service Obligations

197. The majority of consultation responses on the USO related to the new provisions in Article 23a of USD on equivalence for disabled users. They called for the definition of text relay service in the USO to be amended to include video relay services (VRS) and for a universal fund to be established to finance VRS.
198. One respondent welcomed the introduction of the requirement for universal service providers to notify Ofcom in advance of the disposal of any network assets, as it mirrored existing requirements for network providers in the energy and water industries.
199. One respondent expressed disappointment that DCMS had not reviewed the provisions on uniform pricing in the USO as part of the transposition process. They considered that existing arrangements prevented that respondent from competing on a level playing field and had the potential to distort competition.

Government Response to Issues Raised in Relation to Universal Service Obligations

200. The Government is grateful for the responses it received in relation to its proposals on Universal Service Obligations. We are glad that respondents found our explanation of the changes useful.
201. The Government response to the issues raised on the equivalence obligation for disabled users can be found at paragraph 208.
202. With regard to the review of uniform pricing, Government notes that the provisions in Article 9.4 of the USD relating to common tariffs, allow Member States discretion in implementation, and remain unchanged since 2002. As such, Government does not believe that it would be appropriate to review those provisions as part of the Framework implementation. In the UK, OFCOM could decide to permit differential pricing if there is a justification for it, but this is a matter for OFCOM, and does not require a change to the USO.

Minimum Quality of Service

Policy Proposals

203. Article 22 of the revised Universal Services Directive enables NRAs to require undertakings to publish comparable, adequate and up-to-date information for end-users on the quality of their services and on measures taken to ensure equivalence in access for disabled end-users.
204. A new provision, Article 22(3), enables, but does not require, Ofcom to impose minimum quality of service obligations on electronic communications network and service providers. Grounds for doing this include preventing the degradation of service and hindering the slowing down of traffic over networks. This new provision reflects Commission concerns around traffic management and net neutrality.
205. We proposed to implement the changes to Article 22(3) through a minor amendment to the Communications Act 2003. On 24 June 2010, Ofcom published a discussion document on traffic management, where it states that its likely initial view would be to explore existing competition tools and consumer transparency options before considering using these powers. Ofcom's consultation closed on 9th September 2010.

Consultation Responses on Minimum Quality of Service:

206. On **net neutrality** specifically, respondents were keen to see the detail of the "minor amendment" referred to in the September consultation document that would implement Article 22(3). In the summer Ofcom will provide updated guidance on quality of service issues, and Ofcom will also take in to account the ongoing work on Quality of Service by BEREK.
207. Good arguments were marshalled for leaving market forces (aligned with transparency of information and easy switching) as the consumer safeguard. There was also an argument put forward for business providers of private IP networks ("managed services") to corporate customers being exempted from the provisions because the customers themselves dictated and paid for a high degree of traffic management distinctions
208. Business raised concerns about the potential disproportionate nature of any regulation to prevent degradation of services, on the basis that there was no evidence of any need, any measure would be unavoidably complex and disproportionate and some respondents even went so far as to suggest that regulation may

have unintended consequences, including a detrimental effect on innovation and service development.

209. A single respondent pointed to ongoing industry work to agree a best practice co-regulatory approach to transparency on traffic management. They anticipated that this would minimise the need for Ofcom to use formal regulatory powers either to mandate a minimum quality of service standard or mandate publication of specific information.

Government Response Minimum Quality of Service (Net Neutrality)

210. The Amendment to section 51 of the Communications Act 2003 referred to in our original proposals, will ensure that Ofcom sends the detail of any proposals made in this regard to the Commission for comment before they make any such condition. It is the view of Government that Ofcom already has sufficient power under Article 51 to impose minimum quality of service obligations on communication providers.
211. The Government is keen to encourage the development of an industry led, industry wide agreement or set of principles which can be used to guide self regulation with regards to traffic management and net neutrality. The Government notes the launch on 14th March 2011 of the Broadband Stakeholder Group's Code of Practice on traffic management transparency, including their Key Facts Indicator (KFI). This is a good example of industry coming together on a voluntary basis to self regulate.
212. The Minister for Culture, Communications and the Creative Industries is committed to advancing the discussion on industry self-regulation and has hosted a roundtable discussion with industry on the Open Internet at which minimum quality of service, traffic management and the idea of an industry agreement were discussed at length.
213. The Internet has enjoyed a huge level of success in part because of the lack of regulatory restraint that has been placed on it. The Government believes regulation should be used only as a last resort and industry should be given the chance to self regulate. However should the market develop in an anti-competitive manner or in a way which impedes innovation and impacts detrimentally on consumers and citizens, Ofcom will have the appropriate powers to intervene.

Responses in Relation to Minimum Quality of Services (Provision of Information)

214. On revisions to Article 22, which provide for publication of comparable, adequate and up-to-date information there was a general consensus that any future obligation on the publication

of comparable data must cover the whole of the industry to make it meaningful. Respondents also felt that such information should be sourced by Ofcom, directly from the experiences of customers, to ensure that it properly serves customers needs and is not subject to any subjective interpretation by communication provider supplier companies.

215. Some respondents welcomed the intent behind requiring publication of comparable performance data but also posted a cautionary note with reference to the TopComm project which had not delivered its intended impacts and was wound up in July 2009.

Equivalence for Disabled Users

Policy Proposals

216. There is a range of new provisions in the Framework (mostly in the Universal Services Directive but also in the Framework Directive) which strengthen the requirements for equivalent access and choice for people with disabilities. The most significant of the amendments is a new article in the Universal Service Directive, Article 23a. This requires the Government to enable Ofcom, where appropriate, to require undertakings to provide equivalent public communication services to disabled users.
217. Ofcom presently only has the explicit power to impose such obligation on Universal Service Operators. In order to remove any ambiguity, we propose to amend section 51 of the Communications Act 2003 to clarify Ofcom's power to impose a General Condition (on all operators) in relation to equivalence.
218. If Ofcom chooses to impose the equivalence obligation by way of General Condition, it will need to consider at the same time whether those measures achieve equivalent effect to an obligation on universal service providers and, where this is the case, it may be appropriate to remove the obligation on universal service providers.

Consultation Responses on Equivalence Referencing Video Relay Services

219. A number of respondents claimed that changes to Article 23 mandate the provision of video relay services (VRS), although this was not a specific proposal in our publication. Respondents also supported the establishment of a designated telecommunications relay fund (TRF) for financing VRS. Respondents put forward various arguments either partially, or in

some instances singularly, in support of mandating VRS British Sign Language (BSL) users. These included:

- VRS is the only real time, dynamic and meaningful (both in terms of words per minute and expressive capability) comparison to talk-to-talk communication;
- VRS would BSL users to make a fuller contribution to society and the economy;
- failure to mandate VRS would mean failure to provide access to emergency services; (as SMS access to emergency services did not meet the access requirement universally);
- referencing recital¹² of the amending directive which defines equivalence as “functionally equivalent, such that disabled end-users benefit from the same usability as other end-users, but by different means”.

Responding to the Points Raised on the Consultation Proposals (VRS)

220. The revised USD does not mandate video relay services but allows Member States to decide what is appropriate. New Article 23a(1) obliges the Government to enable Ofcom, where appropriate, to require undertakings to provide equivalent public communication services to disabled users.

221. Under the Communications Act 2003 Ofcom is already required to have regard to the needs of older and disabled users of electronic communications. In addition, Ofcom is obliged to ensure that the universal service operators ensure equivalence of access and service to disabled end users. As mentioned above section 51 of the Communications Act 2003 will be amended to clarify Ofcom’s power to impose a General Condition (on all operators) in relation to equivalence.

222. Equivalence is a broad concept and not tied to any particular service. It is therefore for the regulator to assess what obligations might be placed on communications providers to make communications more accessible to those with hearing and speech difficulties.

223. Ofcom is currently undertaking a review of relay service provision for hearing- and speech-impaired users of electronic communications. It is planning to publish a consultation document shortly, which will look at the existing text relay service and additional relay services, including video relay and captioned telephony.

224. This publication will include Ofcom’s analysis of the costs and benefits associated with video relay services and an impact assessment. The consultation process will be followed by a statement shortly afterwards. Depending on the nature of

responses to their initial consultation, there may be a further period of consultation on existing and future provision in the UK.

225. The objective for this initial review is to assess whether the current arrangements for the provision of relay services are adequate in delivering equivalence to voice telephony for hearing- and speech-impaired end-users and, if they are not, to consider proportionate solutions. Consequently the review is not exclusively looking at video relay; but will consider its viability. Market research, which helps set the context for the review, was published on 4th February 2011.
226. The requirements for Ofcom to have regard to the needs of older and disabled users of electronic communications under the Communications Act 2003 are subject to the confines of the Universal Service Order (USO) 2003 set by Government and which currently mandates the requirement of a text relay service be provided by the universal service providers. We do not believe that Article 23a requires a change to the USO to make video relay service mandatory. We consider that to attempt to “future proof” and potentially allow Ofcom to mandate Video relay services at a later date, at this stage would be gold-plating. Any such change would need to be subject to a separate consultation under the statutory duty contained in section 65(4) of the Communications Act 2003.
227. The only USO amendment relevant to this Article envisaged in the FWR consultation is to allow for the removal of the equivalence obligation from universal service providers if Ofcom decides it is more appropriate to impose that obligation by way of a General Condition. We will consider whether it would be appropriate to amend the USO to cover other relay services and technologies, following the outcome of Ofcom’s review of relay services.
228. Further to the above, the Government has no plans to introduce a designated TRF to provide for financing VRS or, as suggested by some respondents, the provision of terminal equipment. In relation to terminal equipment, Recital 12 of the original USD (and which remains unchanged) provides that “any funding mechanism should ensure that market participants only contribute to the financing of USO obligations and not to other activities which are not directly linked to the provision of USO obligations”.

Consultation Responses on Equivalence (other issues)

229. In addition to responses relating to the provision of Video Relay Services, respondents raised a number of other issues in with regard the Government’s plans for implementing provisions on equivalence.

230. Respondents were broadly supportive of the Government's proposed plans for implementation, seeing the proposals as an important step in efforts to provide improved services to disabled end users, although there was some challenge as to the extent to which we would meet implementation obligations.
231. Some respondents expressed reservations at any attempt to implement revised requirements through the extension of USO obligations. This response was based on the contributors' analysis of the success of previous disability measures addressed through USO specifications. In response to this point, and as stated above, the Government will not be altering the USO beyond the changes outlined in our original proposals document which will allow for the removal of the equivalence obligation from universal service providers, if Ofcom decides it is more appropriate to impose the equivalence obligation by way of a General Condition.
232. Some respondents pointed to revisions to Article 7 of the USD which, they argue, place an "absolute obligation" on Government to take specific measures to ensure equivalence. As set out in our September consultation document, the Government has interpreted amendments to Article 7 as dealing with measures to be taken by the universal service providers to provide equivalent access to services to end users with disabilities.
233. By contrast, Article 23a deals with equivalence for all service providers, rather than just the universal service operators. Article 7 now provides that where measures have been imposed on all service providers under Article 23a, ensuring disabled end-users have access to equivalent services and benefit from the choice of undertakings and services available to the majority of end-users, additional equivalence obligations do not need to be imposed on the universal service providers.
234. Several respondents argued that the terminology of Article 23a (2) required action that was stronger than merely *promoting* the availability of terminal equipment, maintaining that that action on terminal equipment is long overdue. One respondent challenged manufacturers' and suppliers' adherence to ITU and ETSI standards, urging a greater commitment to "design for all" principles in ensuring true interoperability in assistive devices and technologies.
235. As we explained in our consultation document, the statutory basis for implementing this Article already exists under section 10 of the Communications Act. We expect the e-Accessibility Forum, established in spring 2010, to deliver specific examples of success in this area. The new forum, which brings together experts from Government, industry and the voluntary sector, will

be work to promote and address inclusive design in technology products, reducing cost barriers to assistive technology, and improving training in assistive technologies.

236. Some respondents challenged whether text relay services provided the necessary access to emergency services mandated by USD. The Government is aware that the highly successful pilot scheme providing access to emergency services through SMS messaging is being declared permanent at the end of April 2011 when the current single point of failure (the server providing translation between SMS and emergency handling call centres) is appropriately backed up. Ofcom has now opened a consultation on whether to make provision of this service mandatory in order to safeguard it for the users.

237. In the implementation arrangements described above and in our September consultation, we believe we have struck the right balance between paving the way for improved provision for disabled end-users of electronic communications services and ensuring that our transposition does not gold-plate the Directives

Provisions Relating to Directory Enquiry Services

Policy Proposals

238. We said in our September consultation that Government considers that *ex ante* regulation in the UK is already consistent with the amendments to Article 25 of the Universal Service Directive which places new obligations on undertakings to provide subscriber information (at subscribers' request) to the provider of directory enquiry services.

239. We also said that Ofcom intend to give further consideration to whether any revised Community obligations under other Articles of the Universal Service Directive that relate to directories and directory enquiry services require any changes to, in particular, the General Conditions.

Responses Relating to Provisions on Directory Enquiry Services

240. A number of respondents raised concerns in relation to the implementation of provisions in the Framework relating to Directory Enquiry services. Respondents suggested that the UK might not fully implement changes to Article 5(1) of the Access Directive relating to access conditions, and changes to Article 25(3) of the Universal Service Directive on access to subscriber databases for directory enquiry service providers.

241. Access-related Conditions: Respondents suggested that in order to properly implement the revisions to Article 5(1) of the Access Directive, the Government would need to make specific provision in section 73 CA2003 to refer to Directory Enquiry services. Such change would give Ofcom an explicit power to make access related conditions in relation to Directory Enquiry services.
242. Subscriber databases: Respondents also argued that in order to fully implement Article 25(2) (which has not been amended) the UK would need to make reference to elements of the text of recital 38 (to the amending Directive) which would require the UK to empower the regulator to pull together a central Directory Enquiry database which could then be accessed by providers at the cost. Respondents have suggested that the UK will not have implemented properly unless such power is given to Ofcom.
243. Directory Enquiry Service Costs: More generally, respondents were also concerned at the high level of connection charges for access to DQ services, particularly from mobile phones. Respondents noted that the high level and onward connection to services of social need of upwards of £2 a minute with considerable additional costs for onward connection to certain services of social value like the NHS and the Samaritans.

Government Response in Relation to Issues Raised Around Directory Enquiry Services

244. The Government welcomes the views of respondents but believes that the implementation will address the concerns raised.
245. We are making amendments to the Communications Act 2003 which implement changes to the definitions and Article 5(1) of the Access Directive. These changes include Directory Enquiry services, as well as other Information Society Services, in the definition of “access”. They also include access obligations on people who control end access to make services interoperable. This will fully implement the amendments to Article 25(3).
246. The Government is confident that once the proposed amendments are made, Ofcom will be able to impose such access conditions in relation to Directory Enquiry services. Therefore, specific mention of Directory Enquiry services is not required on the face of UK legislation.
247. We do not consider that our previous implementation of article 25(2) is defective. We do not propose to transpose recital 38 in the amending Directive into the UK implementing legislation. It is the view of the UK Government that recitals cannot impose obligations on Member States, and there is no substantive

change to the Directive which would require NRAs to make, or compel another to make and keep a central database of numbers or which requires Member States to give their NRA such a power. To implement this recital in this way would be to gold-plate and against the spirit of the UK implementation.

248. Lastly, the Government shares the concern of respondents with regard to the often high level charges for access to Directory Enquiry services. Therefore, the Government welcomes the Ofcom review into non-geographic numbers and is pleased that Directory Enquiry charges will be in the scope of this review.

Access to Emergency Services

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

250. As we noted in our September consultation Article 26(4) places an obligation on Member States to ensure that disabled consumers have access to emergency services equivalent to that enjoyed by other end-users. We made clear our intention to reflect this obligation through an amendment to section 51 of the Communications Act 2003 (as part of the equivalence changes set out above) and any necessary changes to General Condition 15 required as a consequence of this Article will be made subject to consultation by Ofcom.

251. Ofcom has already opened a consultation on proposed amendments to General Condition 15, which mandates services for disabled people, that would make provision of emergency SMS obligatory. (This would be in addition to the text relay access that is already mandated for both fixed line and mobile providers.) This proposed change would have no resource implications for the UK over and above what has already been committed to by the mobile network operators as they have already agreed to fund it on a voluntary basis.

Facilitating Change of Provider

Policy Proposals

252. The consultation did not ask any specific questions on facilitating a change of provider. However, in our publication we set out revisions to Article 30 of the USD which require that “porting of numbers and their subsequent activation shall be carried out within the shortest possible time”. It further sets a maximum time limit for activation of the number of “within one working day” from when an agreement to port has been concluded. The provision makes no distinction between types of services or end-users.
253. As stated in our consultation, the Government is of the view that the one working day requirement in relation to non-bulk (ie up to 25 ports) mobile number porting (MNP) has already been met as a consequence of Ofcom’s proposed changes to General Condition 18 (GC 18). These were published in July 2010⁴ as part of their final statement for their consultation on MNP.
254. In relation to bulk porting (the porting of 25 numbers or more at once), the Government supports Ofcom’s proposed position that the same processes will apply as for non-bulk mobile porting.
255. The Government notes that consumers porting 25 numbers or more simultaneously may want to arrange a date to port that offers them enough time to plan ahead for smooth implementation (e.g. to arrange for employees to collect new handsets or SIMs). Customers wishing to bulk port could request an alternative port date that is later than one working day. Indeed, it is probable that many business customers who are porting in bulk will require this flexibility. MNOs may decline a request to bulk port within one working day and risk losing the business, if they feel they are unable to meet this requirement.
256. Fixed number porting (FNP) in the UK is currently subject to a verification/authentication stage and, occasionally, lead-in times to enable the local access arrangements to enable switching to be in place before porting can be activated. Government believes that the new obligation does not prevent this stage and/or lead-in times to continue under the one working day requirement. However, once the porting process has been initiated, it should not take more than the one working day

⁴ <http://www.stakeholders.ofcom.org.uk/consultations/mnp/statement>

specified to activate the number unless otherwise agreed by the parties. The approach to bulk porting of fixed numbers should be similar to that of mobile.

257. Article 30(4) also includes a provision stating that “Member States shall ensure the appropriate sanctions on undertakings are provided for, including an obligation to compensate subscribers in case of delay in porting or abuse of porting by them or on their behalf”. We proposed to make a new provision in the Communications Act 2003, to ensure that companies are obliged to compensate subscribers in the event of delay of porting or abuse of the porting process.

Proposed changes to General Condition 18

258. Ofcom’s recent consultation⁵ on proposed revisions to the general conditions stated; “for **fixed** numbers, we propose that port activation should take place within one working day from when a subscriber’s ‘new’ provider requests *activation* from the subscriber’s existing provider. This is in effect when porting can actually take place, in that the necessary consumer protection measures and any physical line provisioning have been completed.”

259. With regards to bulk mobile porting Ofcom stated; “We already set out a one working day requirement on the porting of non-bulk **mobile** numbers in a statement last year. This change will come into effect on 11 April 2011. We now propose that the same requirement apply to *bulk* mobile ports. This will mean the ‘one working day’ timetable for bulk mobile ports will start when a subscriber gives their PAC to their new provider.”

260. Ofcom also proposed that “communications providers must have compensation schemes in place by 25th May which provide reasonable compensation to subscribers following any porting delay or abuse.”

Responses to Proposals in Relation to Facilitating Change of Provider

261. A small number of respondents expressed concern at the “Inconsistent approach as regards fixed porting” noting that “if it were indeed the case that the ‘one working day’ requirement is triggered the moment a customer concludes an agreement to port with their new provider, as suggested in relation to mobile porting, then precisely the same analysis would also have to apply to fixed porting”.

⁵ http://stakeholders.ofcom.org.uk/consultations/gc-usc/?utm_source=update&utm_medium=email&utm_campaign=gc-usc

262. A small number of respondents disagreed that the changes to Article 30 of the USD will require substantive changes to the Communications Act and General Condition 18. They believe that this would amount to gold plating and believe that no substantive change to current porting arrangements is required in order to implement the one day porting provisions in Article 30.
263. A small number of respondents did not believe that lead in times for fixed numbers could continue under the new one working day requirement. They believe this negates the European legislators' "instruction to comprehensively solve number portability once and for all".
264. A small number of respondents stated that a "gaining provider led" system would be best for consumers but noted that there was no requirement and in some cases no incentive for companies to work towards a "mechanism for central coordination of switching and/or porting."
265. A small number of respondents disagreed with the Government's statement in the September consultation document that Ofcom's proposed changes to the current donor led process in relation to MNP within working day will meet the new requirements. They believe that these changes would fail to meet the requirement of porting "within the shortest possible time".
266. A small number of respondents expressed a belief that while a losing provider led process was not ideal it did work adequately for single ports between large suppliers. However they expressed concern at the experience reported by their members of porting between Wholesale Line Rental (WLR) and VoIP.
267. A recent survey conducted by a respondent revealed that the average porting time between WLR and VoIP was 21 days with the longest stretching to 12 months. They also note that 60% of respondents to this survey had experience of customers abandoning the process due to frustration. The respondents believe that Ofcom needs to address this problem urgently to comply with the new regulations.
268. A small number of respondents felt that Government should place further emphasis on co-regulatory measures while implementing (and encouraging Ofcom to use) the revised Article 21 of the Universal Service Directive, which states, "If deemed appropriate, NRAs may promote self- or co-regulatory measures prior to imposing any obligation."
269. There is general support from respondents that the analysis set out in the consultation document with regard to bulk porting is correct.

Government Response to Points Raised on Proposals on Facilitating Change of Provider

270. The Government notes that the processes for FNP and MNP are different as the fixed line process involves a customer verification period and local access provisioning must occur before a fixed port can be activated. Therefore, the approach to applying the one working day porting requirement is necessarily different for fixed and mobile, in order to take this process into account.
271. While we acknowledge that there are some small differences in the two approaches we do not agree that they are inconsistent as some respondents have suggested.
272. Changes to GC18 are required to implement a one day requirement for FNP and mobile bulk porting, although in practice this may mean limited changes to actual porting processes. Changes to the Communications Act 2003 are required to ensure that Ofcom can compel providers to pay compensation in cases of abuse or delay in porting.
273. The Government understands that many of the porting delays arise as a result of a lack of porting agreements between smaller suppliers. The issue of establishing technical and commercial arrangements between providers in order to facilitate porting is outside the scope of the changes to Article 30 of the USD.
274. The Government believes that Ofcom's proposals to implement a one working day requirement for porting meets the new requirements of the revised Article 30. Government is not of the view that the revisions require Member States to mandate switching to a gaining or losing provider led system in order to meet the requirements. Further, Ofcom's Strategic review of consumer switching is considering the different switching models and also the related customer verification processes which impact on overall switching times. This review will look, firstly at fixed and broadband switching, and second at mobile and cable television switching (from 2012).
275. Finally, the Government plans that Article 30 of the USD should be implemented in full but notes that it will be for Ofcom to decide if it is appropriate to promote self- or co-regulatory measures.

Response to Proposals in Relation to the e-Privacy Directive

Personal Data Breach

We asked:

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

Article 4 (as amended) Personal Data Breach

276. Substantive revisions to Article 4 of the e-Privacy Directive introduce a specific reference to “personal data breach” (defined in Article 2(h) of the amended Directive). Article 4 also now includes a duty on providers of electronic communications services to notify such breaches to the competent national authority. In certain circumstances, providers are also required to inform the data subject of a personal data breach.

277. Other amendments state that the competent national authority may issue guidance on notification of data breaches. In addition, competent national authority must be able to audit whether providers are complying with their obligations.

278. We set out our approach to the implementation of amendments on personal data breach in our September consultation document. In line with our commitment not to gold plate the implementation of the Framework, we proposed to copy out the provisions of these Articles, in line with our approach to the implementation of the Framework package as a whole.

279. We also made clear that for the purpose of these amendments, as for much of the e-Privacy Directive, the competent national authority is the Information Commissioner’s Office (the ICO).

280. It would be for the ICO to consult on the content of that guidance with stakeholders ahead of the new regulations coming into force.

281. We also set out our intention to consider whether the Information Commissioner's Office has appropriate powers to enable it to audit compliance with both Article 4 and other Articles in the revised e-Privacy Directive.

Article 15a (Enforcement)

282. Also considered in this part of the Government response are the changes to Article 15a of the Directive which require that there must be effective, proportionate and dissuasive sanctions on providers which do not comply with the requirements in the Directive.

283. We said that we would make provision in the implementing regulations to ensure that the ICO has access to effective investigatory powers and sanctions and so it is properly able to enforce the rights of individuals under the e-Privacy Directive.

Responses to Proposals for the Implementation of Article 4 of the e-Privacy Directive and Other Provisions Relating to Personal Data Breach

284. Respondents were broadly supportive of the government's proposals, recognising first that data protection regulations could work more effectively when they are tailored specifically to the electronic communications industry; and second the value of copying out the relevant text of the e-Privacy Directive into the Privacy and Electronic Communications Regulations (PECR) as a means of bringing clarity to the regulations. Respondents also welcomed proposals to ensure that the regulations make provision for the ICO to issue guidance in relation to the notification mechanism for personal data breaches.

285. Respondents cautioned Government against widening the remit of breach powers to include all data controllers. Respondents also cautioned against the drafting of guidance in such away that data controllers generally, rather than Communication service providers, were subject to a stricter regime than they are currently without full and proper consultation.

286. Many respondents conceded that the powers of the ICO under PECR needed to be strengthened if the requirements for 'effective, proportionate and dissuasive' penalties for any infringement of the provisions introduced in the revised Directive are to be met. In this context, respondents broadly agreed with the Government's proposal to:

- Making the enforcement notice more effective
- Introducing civil monetary penalty for certain breaches
- Making provisions in the implementing regulations to give the ICO an audit power
- Retaining criminal penalties for only the most serious breaches.

287. In particular, new audit powers to reflect those already existing in the DPA as well as the ability to levy penalty in line with the Civil Monetary Penalty Powers introduced into the DPA in April 2010 were regarded as much needed additions to the ICO's existing enforcement powers. However, in this context a small number of respondents warned that the granting of new powers to the ICO could lead to the creation of two enforcement regimes; one for electronic communications providers and one for other parties under the DPA.
288. However, respondents were clear that any new powers under PECR should not go beyond those the Information Commissioner has access to under the DPA, as these have proven effective and efficient in promoting and achieving compliance with the DPA.
289. Respondents were also keen to point out that in addition to monetary penalties, organisations subject to a penalty may also incur other substantial costs relating to the investigation of the breach, taking remedial action and consulting with legal counsel, in addition to suffering reputational damage.
290. Respondents were almost universally agreed that there should be no requirement to notify all breaches to the ICO, that there should be a sensible threshold for when notification is required, and similarly for the data subjects involved. Respondents were clear that they supported the existing ICO position that minor breaches that have only minimal impact on data subjects should not need to be notified; this also means that thresholds will need to be defined so that all parties have certainty over the requirements.
291. Many respondents felt that the decision to notify data subjects should be based on a harm-based trigger; the overriding consideration in the decision to notify should be what harm to the data subject could arise as a result of this breach.
292. Indeed, some respondents suggested that unless there are overriding personal data issues or there is important information to convey to customers about steps that could be taken to avoid any harm arising from a security breach, that notifications to customers about security should be restricted to the most serious systemic incidents. This, respondents argued would imply a higher threshold than the current ICO guidance for personal data breaches (i.e. where more than 1,000 customers affected). One of the key reasons given for the need for a high threshold were that customers, if overloaded with information that is not obviously relevant or properly contextualised, may ignore information that might require follow-up action.

293. A number of respondents questioned whether the proposed level of sanction (up to a maximum of £500,000) would be unduly punitive for many small to medium sized enterprises that act as data controllers and for whom such a fine would have a noticeable impact on profit. However, the same respondents also questioned whether a fine of £500,000 may act as a sufficient deterrent for large firms for whom the cost of compliance with data protection requirements may exceed the potential value of a fine. A very small number of respondents suggested that new provisions should be made for the prosecution of directors and disqualification of directors in repeated and intentional breach of the PECR.
294. Respondents were also clear that the introduction of civil monetary penalties into the e-privacy enforcement regime should also follow the criteria laid down in section 55A of the DPA; that is, it should involve a deliberate or negligent contravention of a kind likely to cause substantial damage or substantial distress.
295. In our consultation document we set out the possible introduction of criminal penalties for “serious breaches”. Most respondents recognised that enforcement powers and appropriate sanctions play an important role in ensuring the effective enforcement of legal and regulatory frameworks and that these could include criminal sanctions for the most serious data breaches. Respondents were also clear that the serious breaches should be understood in terms of the harm done to an individual.
296. A number of respondents have argued that it is too early to extend the powers to levy monetary penalties for serious breaches of the Data Protection Act 1998 to the PEC Regulations, arguing that less than a year has passed since the new powers were introduced; it is therefore too early to conclude that new powers are needed or indeed that it is appropriate to extend the remit of monetary penalties to the PEC Regulations and that early extension of these powers would put the UK business at a competitive disadvantage. A smaller number of respondents argued that the powers already available to the ICO are sufficient to properly enforce the DPA and the revised e-privacy Directive.
297. Respondents also warned against early or over implementation of the revised articles as a general data breach notification regime applying to all data controllers will be introduced in the near future as a result of the currently ongoing review of the EU Data Protection Directive due to start in summer 2011. Instead, the matter should be considered in the round when data protection legislation will be updated for the whole economy as this would be the best way of ensuring that regulation is proportionate and consistent for all data controllers. Respondents were concerned that enhanced ICO’s powers to

investigate data security breaches and impose sanctions, would impose a harsher sanctions regime for electronic communications service providers than other categories of data controllers.

298. With regard each of the proposed new powers for the ICO, respondents were agreed that particularly before any enforcement action is decided on, there must be clear guidance from the ICO, particularly in relation to those provisions of the Directive where the interpretation is uncertain. Respondents were also clear that the guidance would only be effective if business has the opportunity to comment on the proposed guidance as part of a wider consultation process covering all parts of the enforcement framework for the data breach provisions.

Government Response to Issues Raised in Relation to Personal Data Breach and Associated Provisions in the e-Privacy Directive

299. The Government is pleased at the level of support its proposed approach to the implementation of new provisions in the e-Privacy Directive. As such we are not minded to change our proposals.
300. In particular we do not hold the view that it is possible to wait for the completion of the review of the Data Protection Directive before implementing the e-revised e-Privacy Directive. The UK would not be compliant with the revisions which require the UK to have a system for data breach notification. As non-compliant, we could be infracted.
301. In relation to the Civil Monetary Penalties, we would also not be compliant with the requirement to have 'effective, proportionate and dissuasive' penalties to be introduced for any infringement of the provisions of the revised Directive. We consider that CMPs have shown to be useful regulatory tools across a number of regulatory areas. We do not agree that UK business will be at a competitive disadvantage because of CMPs.
302. As a consequence of work done with the ICO to review the effectiveness of the current enforcement regime, we remain of the view that there are elements of the current regime which could work more effectively if they were more tailored to the electronic communications industry. We will therefore make three key changes:

Civil Monetary Penalties

- New powers will extend the provisions of section ss55A to 55E (with appropriate modifications) to PECR by a revision

of Regulation 31. The modifications will make it relevant to the implementation of the revised e-privacy Directive.

- ICO will be required to issue (or amend) guidance to include PECR violations within the regime.

Audit powers

- We propose to introduce new provisions in relation to audit in PECR. We will ensure that the new provision in PECR does not create a regime which conflicts with the regime under the DPA.

Information from third parties

- We will make provision in PECR for obtaining information from third parties. The Government envisages that there are two classes of persons which might be subject to these third party information notices:
 - telephone providers (withheld CLI)
 - ISPs.
- This power will enable the ICO to take find the guilty companies in cases of cold calling where the number is withheld and spamming in breach of the revised e-Privacy Directive.

303. As set out in our September consultation document, Article 15a calls for criminal penalties where appropriate as part of the sanctions regime. We remain of the view that these should be retained only for the most serious breaches and this should be understood in terms of significant harm done to individuals.

304. Reflecting the views of respondents we will ensure that the ICO to consult and produce guidance on these new enforcement powers under PECR.

Cookies

We asked:

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

Policy Proposals

305. The revised e-Privacy Directive introduces a change in the requirement for storing information on a subscriber's or user's equipment from a 'right to refuse' to obtaining consent. This refers to any attempt to store information or gain access to stored information in a user's terminal equipment. This can refer to both legitimate and illegitimate practices which include the use of spyware and viruses. However, these are already addressed in other legislation.
306. The main legitimate practice covered by the amended article is the use of cookies. These are small text files made up of letters and numbers which are stored on the user's terminal equipment. Cookies have a wide range of uses on the Internet and, as we recognised in our September consultation, the internet as it is today would be unusable or severely restricted without their use.
307. We are aware that stakeholders have serious concerns around the implementation of the amended provision and that any legislative changes around the use of cookies could have serious impacts on the use of the internet.
308. In our preferred approach to the implementation of the European Framework on electronic Communications we set out our plans for the implementation of Article 5(3) of the e-Privacy Directive. We have proposed to copy out the wording of the provision into the Privacy in Electronic Communications Regulations and make reference to elements of the wording of recital 66 which consider that browser settings may give consumers a way to indicate their consent to cookies. However, we will not rule out other ways of getting the required consent from customers.
309. It is important to note that the Directive does not require that consumers be given a "right to refuse" (now a requirement that consumers give consent) if the cookie is strictly necessary for the provision of a service specifically requested by the user. Although Government has declined to attempt to list what cookies are "strictly necessary", we consider that it will, for

instance, cover the use of cookies that underpin the use of shopping baskets on websites.

310. In our September publication, we also made clear that we did not think that it was the place of Government to specify a technical solution to the technical problems posed by the requirement by servers of cookies to obtain consent from the user. Rather it is industry and the users of cookies who are best placed develop technical solutions that meet the requirements of the Directive. This is also the approach that has been adopted by the European Commission in its guidance on the implementation of Article 5 (3) of the e-Privacy Directive.

Responses to the Proposals for the Implementation of Article 5(3)

311. Respondents were largely positive about the Government's preferred approach to implementation and were pleased that our preferred approach recognised the importance of cookies to the smooth running of the internet. This includes the use of third party cookies used in behavioural advertising as these play a key role in ensuring provision of free internet services for all users as well as underpinning a growth industry (online behavioural advertising) that many users regard as valuable:

- The Office of Fair Trading estimated that behavioural advertising amounts to an annual value of £64m to £95m in the UK.
- The Network Advertising Initiative behavioural targeting is more than twice as effective at converting users who click on ads into buyers (6.8% conversion rate compared to 2.8% for run-of-network ads).

312. Respondents were also supportive of proposals to ensure that elements of the text detailed in recital 66 are placed into the wording of the regulations. These relate in part to browser settings and will also provide clarity on the use of cookies to publishers of websites which provide services specifically requested by the user.

313. Many respondents argued that using an end user's browser settings has worked well to date with no evidence of consumer harm. They said that this model, which is to provide "cookie" information within privacy policies and then rely on the users browser settings as a means of consent, should continue to apply going forward.

314. Some respondents argued browser settings as they stand are not flexible enough to allow consumer' 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 the choice of receiving some third party cookies that they may wish to give consent to. Respondents also raised the concern

that this or similar methods of harvesting consent cannot meet the requirement for informed consent as it relies on a degree of technical awareness on the part of the consumer. Respondents were concerned that most users would be unable to change their browser settings to reflect their intended choices. In effect their consent would not be informed nor freely given.

315. Some respondents were of the view that the prior consent requirement of the directive means that privacy would need to be maintained through a default setting which would require the user to opt in if they choose to accept cookies. Other respondents were also concerned that if Government adopted a more intrusive method of obtaining consent, for instance, asking an affirmative question, this would severely disrupt current websites and current models. Respondents raised the significant impacts in terms of costs and time that such a method of harvesting consent would cause.
316. Nearly all respondents raised the concern that whilst the current proposal provides legal certainty for implementation, it does not provide adequate certainty to industry and those who may be looking to develop appropriate technical solutions, or to consumers and the ICO. Many worried that considerable resource might be invested in potential solutions that then did not meet the requirements of privacy enforcement agencies. Respondents called for Government to be proactive in setting out a framework for the development of appropriate technical solutions.
317. Finally, respondents were concerned that there would not be time to develop adequate technical solutions and that enforcement action might be taken before such solutions had been developed.

Government Response to Issues Raised in Relation to Cookies

318. The Government is pleased that stakeholders were largely positive about our plans for implementing of Article 5 (3) of the e-Privacy Directive. Given the level of support for our proposals we are not minded to change our approach. We propose to copy out the wording of the revised article 5(3) of the e-privacy Directive into the Privacy in Electronic Communications Regulations making due reference to elements of the wording in recital 66.
319. We remain of the view that there is no rationale for Government mandating a technical solution and believe that industry itself is much better placed to develop appropriate technical solutions.
320. Whilst we believe that although it is not for Government to specify a technical solution, we have heeded the concerns raised by respondents about the need for greater certainty for

businesses developing solutions and the role that Government might play in the sponsorship and development of those solutions.

321. Many respondents were clear that browser settings (though not in their current form) might be the most cost effective and efficient means of harvesting the consent of the user. However, it is the opinion of the Government that given the substantive changes to the wording of the Directive, the current use of browser setting as a form of consent is not consistent with the revised wording. A large number of respondents supported this view. They argued that the current practice does not accord with the wording of the revised e-Privacy Directive. The European Commission is also of this view.
322. Therefore the Government proposes to work with browser manufacturer to see if these can be enhanced to meet the requirements of the revised Directive - users will be provided with more information as to the use of cookies and will be presented with easily understandable choices with regard to the import of cookies on to their machine. In terms of taking this work forward, Government has formed a working group made up of representatives from the browser manufacturers to look at the issue in more detail.
323. The Government is also supporting the cross-industry work on third party cookies in behavioural advertising. This industry lead approach will marry the provision of more information on the use of cookies accessed through an easily recognisable internet icon, a privacy policy notice, a single consumer control page, with a self-regulatory compliance and enforcement mechanism. Through clicking on the icon the consumer will be informed about: each specific internet advert; the advertiser; the server; who the advert has customised by; and an option to refuse those and other cookies (including an option to refuse all cookies from that server). Consumers will also be provided with a link to further information on privacy and behavioural advertising.
324. The Government is pleased to support the industry-lead work on the use of third party cookies in behavioural advertising and is satisfied that this meets the requirements of the revised Article 5(3). The European commission has also endorsed this work. The Government believes that this work fully addresses one of the uses of cookies of most concern to users and is, therefore, a major component in the Government's plans for meeting the requirement of the revised provisions.
325. However, it is clear from the responses that a one size fits all solution is not appropriate to the UK. There will, of course, be uses of cookies that cannot be dealt with through any of the three measures outlined above. Indeed, flexibility will be

important to help ensure that new business models and innovations not currently envisioned are not constrained nor presumed to have to behave in the same way or implement privacy controls in exactly the same form as existing business models. The UK approach is therefore not to be prescriptive about potential measures intended meet the requirements of the Directive but rather to enable a more flexible and responsive UK ecology of solutions built around the three measures elaborated here.

326. To this end, the Government will set up a second working group to explore other options with industry to complement the guidance that will be issued by the ICO. Some organisations may also want to develop their own bespoke approaches for business reasons.

Timing for the Development of Technical Solution for Article 5(3) of the Universal Service Directive

The Government does not expect the work it will lead on enhanced browser settings, the cross industry work on third party cookies used in behavioural advertising or the development of other options to have been completed before the implementation deadline. We fully recognise that it will take time these and for other meaningful solutions to be developed, evaluated and rolled out.

Therefore, the Government is proposing that implementation of the technical solutions will be phased and tied to the development and availability of appropriate technical solutions. Precedent for such phased implementation is provided for by the original implementation of the e-privacy directive in 2003 which set out a transition schedule to enable business and users time to respond to the revisions to the regulations.

We recognise that this has the potential to cause some uncertainty for the regulator, business and consumers alike. Therefore during this time we do not expect that ICO will take enforcement action against businesses and organisations that are working to address their use of cookies or are engaged in development work on browsers and/ or other solutions. However, what is clear is that the UK will implement the technical requirements of the revisions to Article 5(3).

In the meantime it is important that businesses and organisations abide by the spirit of revised Directive and develop best practice ahead of full implementation. The UK Government therefore encourages servers of cookies to look at their own use of cookies and take steps to ensure that these meet with the requirements of the Directive ahead of the roll out of appropriate technical solutions.

If individual organisations are uncertain as to the requirements of the Directive, we encourage them to seek advice from the Information Commissioners Office. The ICO will be providing advice on compliance with Article 5(3) ahead of the formal deadline for implementation of the Framework on 25th May 2011. Formal guidance will be produced in a manner which reflects the phased approach to implementation.

Summary of Consultation Questions

Appeals

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

Facilities Sharing

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

Security and Resilience of Networks and Services

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

Dissuasive Sanctions

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

Universal Service Obligations

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

Equivalence of Access for Disabled Users

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

Breach of Personal Data and Penalties

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

Cookies

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

Impact Assessments and Equality Impact Assessment

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

General comment

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

Annex 1: Ofcom's Role in Implementing the Framework

1. Ofcom's role in implementation can be divided into three broad areas:
 - activities to be undertaken prior to the 25 May 2011 transposition deadline;
 - activities to update its processes where it has received revised or new duties once the revised Framework has been transposed into UK law; and
 - possible consultation if and when Ofcom decides it is appropriate to exercise new discretionary powers conferred on it by the revised Framework.
2. This annex summarises those activities and more detail will be provided in a short statement to be published by Ofcom shortly.

Activities to be undertaken prior to the 25 May 2011 transposition deadline

3. Ofcom is working to revise a number of General Conditions and Universal Service Conditions as soon as possible ahead of the transposition deadline in order to bring them into line with the revised Framework. Ofcom published a consultation document on 24 February 2011⁶ and will publish a statement ahead of the 25 May 2011 deadline.
4. Ofcom will also publish documents in a number of other areas:
 - As a result of revisions to the Framework Directive, the Communications Act is being revised to place new obligations on providers of public networks and services and give Ofcom new duties in relation to network security and resilience. Ofcom will shortly publish high-level guidelines on these new provisions.
 - As a result of revisions to the Authorisation Directive, the Communications Act and the Wireless Telegraphy Act will be revised to extend Ofcom's information-gathering powers. Ofcom will shortly publish a consultation on revisions to its Information Gathering Guidelines to take account of these changes.

⁶ <http://stakeholders.ofcom.org.uk/consultations/gc-usc/>

- To take account of changes to its duties and powers in relation to dispute resolution, Ofcom will publish a consultation by 25 May 2011 on necessary revisions to its Dispute Resolution Guidelines.
- To take account of changes to its duties and powers in relation to enforcement, Ofcom will publish a consultation by 25 May 2011 on necessary revisions to its Enforcement Guidelines.

Activities to be undertaken following transposition of the revised Framework into UK law

5. There are other revisions to the Framework which may require Ofcom to change its processes where it receives revised or new duties once the revised Framework has been transposed into UK law. In these areas, Ofcom is not planning, at the present, to publish any further guidelines or consultations.

Infrastructure sharing

As a result of revisions to the Framework Directive, the Government will revise the Communications Act to empower Ofcom to require facility sharing, in cases where there is an absence of significant market power. Ofcom has no firm proposals to develop specific guidelines on infrastructure sharing.

In most cases, Ofcom expects to perform a facilitating role between the owner of the infrastructure and the provider that is seeking access and believes that it is preferable that both parties are able to reach a commercial agreement. In circumstances where no commercial agreement can be reached, Ofcom will consider carefully the case for exercising its revised infrastructure sharing powers in a way that does not constrain investment in network infrastructure.

Market Reviews

As a result of the revised Framework Directive, there will be various amendments to Ofcom's market review processes in the Communications Act. In general, these changes include a requirement for market reviews in certain markets to be conducted every three years and that the European Commission and BEREC are notified of any draft measures to set, modify or revoke significant market power and access-related conditions ahead of national consultation.

Ofcom will consider how these changes may affect its internal processes and consider the processes necessary to comply with the notification requirements.

Spectrum

As a result of revisions to the Authorisation and Framework Directives, and accordingly the Wireless Telegraphy Act, Ofcom will conduct a review of spectrum licenses by December 2011 to ensure they are technology and service neutral.

Changes in the Framework in relation to spectrum trading will allow Ofcom to begin implementation of its approach as set out in its statement on spectrum leasing published on 15 April 2010.

Ofcom will acquire a duty to review all licenses by 2015 focusing specifically on the case for making them more tradable or introducing a general authorisation regime. Details of this review will be announced closer to the 2015 deadline.

New discretionary powers conferred on Ofcom by the revised Framework

6. As a result of revisions to the Universal Service Directive and Framework Directive, the Communications Act will be revised to confer on Ofcom new permissive powers in relation to equivalence and minimum quality of service. Where Ofcom believes it is appropriate to exercise such new powers it will consult stakeholders on proposals to do so.

Annex 2: List of Individuals/ Organisations consulted

The following organisations/individuals submitted formal responses to our consultation on proposals for implementation.

Respondents

Advertising Association	Greater Manchester Chamber of Commerce	Signhealth
AFME & BBA	Hearing Concern Link	Significan't (UK)
Amazon	Internet Advertising Bureau	Skype
Associated Newspapers	Information Commissioner's Office	Sorensons
Association of On-Line Advertisers	Interactive Media in Retail Group	South West Internet CIC
Bileta	Intellect	SSE
Bird & Bird	ITV	Symantec
BSkyB	Janet UK	TAG
BT	Joint Radio Company	TalkTalk
Cable and Wireless	MAAWG	The Number (118118)
Competition Appeals Tribunal	Mobile Broadband Group	Three
Confederation of British Industry	moneysupermarket.com	TowerHouse Consulting

Computer and Communications Industry Association	Market Research Society	Telephony Services Ltd
Citizen's Advice	National Deaf Children's Society	UK Council on Deafness
COLT	Net Coalition	UK Competitive Telecommunications Association
Consumer Focus	Newspaper Society	University of Edinburgh
Deaf Access to Alternative Relay in Telecommunications	Olswang	Verizon
Direct Marketing Association	PhoneAbility	Viacom
Everything, Everywhere (Orange & T-Mobile)	Payments Council	Virgin Media
Expedia	PPA	Webtrends.com
Experian	RNID	Which?
Federation on Communication Services	Sense	

The following individuals/organisations have also contributed to the implementation of the revised Framework at some stage during the negotiation, consultation or implementation stages.

Business

Acer UK Ltd	Five	Philips
Apple	FIPRA	Phorm
Ashurst	Freeview	Pioneer
Associated News	Global Crossing	Pixsan
AT&T	Google	Portset
BT Retail	Harvard plc	Post Office
Buffalo Technology	Hewlett-Packard Limited	RIM (Blackberry)
Cabot	Hitachi	Samsung
Canon Consumer Imaging	Humax Digital	Sanyo

Carphone Warehouse	IBM	Seagate Technology
Channel 4	Intel	Sharp
Cicero Strategy	JVC	Slater Electronics
CISCO	Lenovo Technology	Sony UK Ltd
Connexion	Lexmark	Thomson
Cullen International	LG Electronics	Tiscali
Dell	Microsoft	Toshiba
DigiTV	MSI Computer UK Ltd	Tvonics
Dixons store group	News International	Virgin Media
Easynet	Nortel	Vodafone
eBay	Panasonic	Yahoo!
Epson		

Interest Groups

Alliance for Inclusive Education	European Publishers Council	National Council for Voluntary Organisations
Association for Interactive Media and Entertainment (AIME)	Federation of Communication Services	Phone Pay Plus
British Screen Advisory Council	Future Inclusion	Public Utilities Access Forum
Broadcasting & Creative Industries Disability Network	Information Society Alliance	Publishers Association
Communications Consumer Panel	Internet Telephony Service Providers Association (ITSPA)	Publishers Licensing Society
Digital Inclusion Technology Group	Media Trust	Radio Regulatory Associates (RRA)
Digital Inclusion Team	Museums, Libraries and Archives Council	Telecoms Industry Forum on Disability & Ageing
Equalities National Council	National Consumer Federation	UK Digital Champion

Third Sector

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

Other

Field Fisher Waterhouse	Luther	Pinsent Masons LLP
Kemp Little LLP	Onslow Partnership LLP	Taylor Wessing



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