



**Consumer  
Focus**  
Campaigning for a fair deal

# Consumer Focus response to a **communications review** for the digital age

July 2011

# About Consumer Focus

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Consumer Focus is the statutory consumer champion for England, Wales, Scotland and (for postal consumers) Northern Ireland.

We operate across the whole of the economy, persuading businesses, public services and policy makers to put consumers at the heart of what they do.

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

# Executive summary

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The ambition to establish the UK communications and media markets as among the most dynamic and successful in the world is one that we share. Consumer Focus believes that a successful market is one that balances the needs of the demand side as much as the supply side. For these markets in particular, that means they must work for all consumers, including those who live in rural and remote locations and who are not well served by communications infrastructure.

## Growth innovation and deregulation

1. The interests of consumers in complex and fast moving digital markets will change as technology, platforms, content and consumer behaviour changes. Government prefers an agenda which emphasises deregulation and growth. We argue that regulation is still necessary where competition does not protect the interests of consumers. But even in a deregulatory context, consumer interests need to be properly represented. That is best achieved through consumer bodies who understand complex market issues, have the capability to advocate on behalf of consumers and who can provide the collective supply side perspective to balance the views of market participants.

### Consumer Focus recommends:

- **that the Review of Communications in the Digital Age directly considers the most effective and sustainable means of ensuring active and expert consumer representation for those complex market and regulatory issues which have direct and indirect consequences for consumers.**
2. The new online environment poses new challenges to consumer protection. The existing regulatory framework developed in the pre-ICT era is ill adapted to the needs of a rapidly evolving digital environment with increasing demand for digital content or downloads, subscriptions and streaming. The currently applied legal instruments to safeguard basic consumer rights to safety, information, choice, dispute resolution and redress are either weak or not applicable to the digital market place. For example gaps in the legal framework in relation to digital products have been widely acknowledged in the report 'Consumer rights in the digital products' commissioned by the Department for Business, Innovation and Skills (BIS).

### Consumer Focus recommends that the new Communication Bill:

- **guarantees a strong consumer protection framework adequate for the digital era**
- **safeguards the role for a strong regulator capable of dealing effectively with consumer problems, including complex cross-cutting issues**

## A communications infrastructure that provides the foundations for growth

3. Having access to fast, reliable and high quality telecommunications services is rapidly becoming essential for consumers, particularly those who are living in rural and remote areas. People increasingly rely upon the internet to engage with public and private services in a wide range of different markets. The internet underpins many of the activities that consumers might undertake when dealing with businesses and especially public services.

For example, consumers need the internet in order to find the best deal for a particular service or product; to access vital public services; to pay suppliers for using a service; to find out new information about a particular product; or to provide feedback or make a complaint about a service that they have used.

Consumer Focus believes that if the market does not deliver universal access to a fast, effective broadband service then public policy intervention is essential. In addition plans should be co-ordinated across all the nations of GB with a focus of resources on rural and remote areas.

### Consumer Focus recommends that the new Communication Bill ensures:

- **a universal service in broadband service of at least 2Mbps should be guaranteed to 100 per cent of households in the UK. This level should be reviewed annually to ensure it keeps pace with needs**
- **that any exceptions to this level of provision must be treated as delivery exception and follow clear criteria**
- **that a universal service obligation in communication is considered, covering all sectors of communications, including postal services and telecoms (both fixed line and mobile)**

### Creating the right environment for the content industry to thrive

4. The Independent Review of IP and Growth, published in May by Professor Hargreaves sets out changes to copyright law and licensing necessary to support social and commercial innovation, and generate economic growth. UK copyright law needs to be updated urgently to make it fit for the digital age.

The Communications Review should resist any calls by copyright owners for additional copyright enforcement measures in the Communications Bill. The focus of policy makers must now be on modernising copyright licensing to lay the foundation for future economic growth and thriving content industries which meet consumer demand through legal services.

### Consumer Focus recommends that the Communications Bill should **not**:

- **revisit the recommendations of the Hargreaves Review, and responsibility for implementation of the Review should rest with the Intellectual Property Office**
- **be used to implement additional copyright enforcement measures, instead the focus should be on reforming copyright licensing to ensure consumer demand for digital content is met through innovative legal services**

5. The internet is an essential utility, necessary for consumers to fully engage in economic and social life. In its report *Internet Access 2010* the Office of National Statistics found that 73 per cent of households in the UK now have internet access and that 30.1 million adults used the internet every day or nearly every day in the 12 months under review. In 2010 some 17.4 million adults had used the internet to watch television or listen to the radio; 31 million people bought or ordered goods or services online. Some 90 per cent of individuals with internet access had used it to send/receive email; 54 per cent had used the internet for online banking; 39 per cent used it to seek health-related information; 35 per cent used it the purpose of learning; and 26 per cent used the internet to look for a job, or send a job application.<sup>1</sup> Consumer Focus considers disconnection from the internet a disproportionate punishment for civil copyright infringement by consumers.

**Consumer Focus recommends that the Communications Bill should:**

- **repeal the technical stage of sections 3 to 16 of the Digital Economy Act (sections 124A to 124N of the Communications Act 2003), which would see internet subscribers disconnected for alleged civil copyright infringement**
6. Consumer Focus believes that maintaining the ‘mere conduit principle’ in relation to internet intermediaries who provide internet access is vital to maintain an environment where consumers and the content industry can flourish. ISPs are mere conduits of information, not publishers. They operate akin to a postal service, rather than a broadcaster. ISPs do not have editorial control over content that is sent, received and bought by consumers and businesses

**Consumer Focus recommends that the Communications Bill should:**

- **maintain and strengthen the ‘mere conduit’ principle in relation to internet service providers**
7. As an essential utility of modern life, with the potential to turn consumers into active and empowered participants, access to the internet – and to the increasing number of public services hosted on it – must be protected. The success and power of the internet has been based on the principle of open and equal access. We want to maintain this equilibrium by enshrining the principle of net neutrality into the new Communication Bill.

We are concerned that there is an enormous risk that the benefits of this new ‘utility’ will be restricted if the net neutrality principle is compromised. In our view net neutrality is a pre-requisite to safeguard participation by citizens in society, secures access to knowledge and diversity, and promotes innovation, economic growth and democratic participation. Net neutrality is essential to ensure that consumers have access to the internet connection of their choice that is free of discrimination with regard to type of application, service or content or based on sender or receiver address.

In addition, freedom of expression should be considered the guiding principle when regulating content online. Both principles are central to creating the right environment for consumers and the content industry to thrive in the online world.

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<sup>1</sup> [Internet Access 2010: Households and Individuals](#), Office of National Statistics, pg.1 & 13

Consumer Focus recommends that the Communication Bill guarantees consumers internet connection that:

- **is of the speed and reliability advertised**
- **is transparent over network management practices**
- **enables them to send and receive content of their choice, use services and run applications of their choice and connect hardware and use software of their choice that does not harm the network**
- **is free from anti-competitive discrimination against applications, services, or content based on sender or receiver address**
- **promotes competition among network, application, service and content providers**

Consumer Focus also recommends that the Communications Bill should:

- **embed freedom of expression as the guiding principle when regulating or suppressing content online**
- **provide in law for any suppression of content online, such as through website blocking, and this should be necessary and proportionate to protect the rights of others**
- **ensure that the regulation or suppression of content online should not deny UK consumers access to legal content and services, or degraded internet service**

# A communications review for the digital age

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Consumer Focus welcomes the Communications Review for the Digital Age and we are pleased to provide views on how the interests of consumers can be placed at the heart of that review.

The ambition to establish the UK communications and media markets as among the most dynamic and successful in the world is one that we share. Consumer Focus believes that a successful market is one that balances the needs of the demand side as much as the supply side. For these markets in particular, that means they must work for all consumers, including those who live in rural and remote locations and who are not well served by communications infrastructure.

Our response covers those issues which have been the primary focus on Consumer Focus advocacy in these markets.

## Growth innovation and deregulation

### Consumer representation in the digital age

The interests of consumers in complex and fast moving digital markets will change as technology, platforms, content and consumer behaviour changes. Government prefers an agenda which emphasises deregulation and growth. We argue that regulation is still necessary where competition does not protect the interests of consumers, but that even in a deregulatory context, consumer interests need to be properly represented. That is best achieved through consumer bodies who understand complex market issues, have the capability to advocate on behalf of consumers and who can provide the collective demand side perspective to balance the views of market participants.

Depending on the results of an open consultation and the passage of the Public Bodies Bill, Government has announced that it is minded to abolish Consumer Focus and to transfer many of our functions to other bodies. The future of the Ofcom Communications Consumer Panel is also uncertain. We believe that the Government must consider, as part of its Communications Review for the Digital Age, how it expects informed and expert consumer advocacy to support its ambition of world leading digital and media markets.

We attach a think piece from Consumer Focus [\*\*Consumer Representation for the 21<sup>st</sup> Century\*\*](#) on how the interests of consumers in complex, regulated markets might be served by a consumer advocacy function that would be able to bring the consumer perspective to bear on sector specific and cross sectoral issues.

Consumer Focus recommends that the Review of Communications in the Digital Age:

- **directly considers the most effective and sustainable means of ensuring active and expert consumer representation for those complex market and regulatory issues which have direct and indirect consequences for consumers**

## Consumer protection in the digital age

‘Effective competition in a market depends on the active engagement and participation of consumers. That means consumers knowing what services, providers and technologies are available; consumers comparing services in terms of price and quality; and consumers actively seeking out new services and technologies.’<sup>2</sup>

Over recent years the unprecedented growth of information and communication technology (ICT) has transformed the UK marketplace and impacted on consumption patterns, and cultural and social behaviour. Emerging new forms of virtual trading such as e-commerce, mobile commerce, online auctions, social networking, social shopping, online banking and health services facilitated by internet providers and intermediaries offer tangible benefits to consumers.

However the new online environment also poses challenges to consumer protection. The existing regulatory framework developed in the pre-ICT era is ill adapted to the needs of a rapidly evolving digital environment with increasing demand for digital content or downloads, subscriptions and streaming. The currently applied legal instruments to safeguard basic consumer’s rights to safety, information, choice, dispute resolution and redress are either weak or not applicable to the digital market place. For example gaps in the legal framework in relation to digital products have been widely acknowledged in the report ‘Consumer rights in the digital products’ commissioned by BIS.<sup>3</sup>

Ofcom research indicates that 29 per cent of consumers of internet services believe it is difficult to make cost comparisons.<sup>4</sup> In order to properly exercise choice the consumer needs to be able to compare services and products, know what they are contracting for, and who they are contracting with. Often digital services are bundled (phone and broadband, television and film downloads) and prices quoted are for different services (different broadband speeds, times of access, length of contract etc), making comparison difficult.

More standardised terms and de-bundling offers would empower consumers to make good comparisons and informed choices. Long term contracts, restrictions on switching and interoperability of software all impede choice, work against effective competition and skew the operation of the market. Consideration needs to be given to making switching easier after certain minimum contract periods and to promoting open source standards to overcome these problems. In relation to commercial transactions, it is imperative that the consumer knows who they are dealing with and, in particular, that they are aware of the end supplier. Redirection from a vendor’s website to other websites without the consumer being warned causes confusion and potential security problems. Clear statements about who is the vendor and who is therefore responsible for the supply of a service or product are basic contractual principles that should be applied in the digital world.

There are also cross-cutting consumer issues such as advertising, the protection of privacy, issues of trust, cancellation rights, lack of clarity over end users licence agreements, dispute resolution and redress, and lack of effective enforcement at a distance that require a joined up approach of appropriate regulators.

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<sup>2</sup> ‘The Consumer Experience, Policy Evaluation 08, Ofcom

<sup>3</sup> Consumer rights in digital products. A research report prepared for the UK Department for Business, Innovation and Skills, by Professor Robert Bradgate, September 2010

<http://bit.ly/aTYIqnv>

<sup>4</sup> ‘The Consumer Experience 2008, Research Report, November 2008, Table 6.5, p.104

## Consumer Focus recommends that the new Communication Bill:

- **guarantees a strong consumer protection framework adequate for the digital era**
- **safeguards the role for a strong regulator capable of dealing effectively with consumer problems, including complex cross-cutting issues**

## A communications infrastructure that provides the foundations for growth

### Universal broadband access for all

Having access to fast, reliable and high quality telecommunications services is rapidly becoming essential for consumers, particularly those who are living in rural and remote areas. People increasingly rely upon the internet to engage with public and private services in a wide range of different markets. The internet underpins many of the activities that consumers might undertake when dealing with businesses and especially public services. For example, consumers need the internet in order to find the best deal for a particular service or product; to access vital public services; to pay suppliers for using a service; to find out new information about a particular product; or to provide feedback or make a complaint about a service that they have used.

Currently 10 million people, often the most vulnerable living in remote and rural areas, do not use or have access to home internet. The Government has announced as part of the Comprehensive Spending Review funding that £530 million (from BBC licence fees and under-spend from digital switchover funds) will be provided to facilitate the roll-out of superfast broadband to cover the areas known as 'not spots' where it is not commercially viable for service providers to install the carbon fibre needed for superfast broadband.

Consumer Focus believes that if the market does not deliver universal access to a fast, effective broadband service then public policy intervention is essential. We welcome the extra funding announced by the Government. However, we want assurances that bids are encouraged from communities without superfast broadband connections. These are likely to include households who would suffer detriment by being left out of the digital race. We also encourage cross-departmental working for the Government to be plugged into groundbreaking projects as part of Race Online 2012's drive to encourage everyone to get online. In addition plans should be co-ordinated across all the nations of GB with a focus of resources on rural and remote areas.

We support the UK Government's commitment to delivering a universal broadband service to all consumers in the UK by 2015, although we would urge the Government to strive to achieve this target before that date if possible. We believe that this universal service should deliver a broadband service of at least 2Mbps to 100 per cent of households in the UK. Any exceptions to this level of provision must be determined by clear criteria, similar to those, for example, used by Royal Mail for delivery exceptions to their universal service obligation.

In order to deliver a universal service of 2Mbps we believe that the UK Government must take a proactive role in ensuring that the parts of the UK's telephone network which cannot deliver a 2Mbps service at present are identified. An accurate, comprehensive and up to date mapping of the telecoms infrastructure is essential. The spread of basic broadband and mobile phone technology to date has clearly highlighted the areas in the UK that are unlikely to be served by a market-driven approach to the provision of telecommunications services. We would urge the Government to consider a universal service obligation which brings all sectors of communications, including postal, fixed and mobile broadband together.

The speed of broadband service that consumers need now may be very different from what they need in one, five or 10 years time. As technology develops it is likely that more services and products will be accessible online and the potential benefits to consumers – particularly those in rural areas – from having access to the most up to date technology will only increase. Therefore it is vital the broadband infrastructure is developed with a ‘future proof’ mindset, using next generation technologies wherever possible. The launch of *Youview* in 2011 will revolutionise how broadband content will be accessible via TV screens. It is unclear at present what range of speeds this will need. We therefore believe that the Government’s commitment of delivering a minimum speed of at least 2Mbps needs to be reviewed annually and matched against actual needs.

Consumer Focus recommends that the new Communication Bill ensures:

- **a universal service in broadband service of at least 2Mbps should be guaranteed to 100 per cent of households in the UK. This level should be reviewed annually to ensure it keeps pace with needs**
- **that any exceptions to this level of provision must be treated as delivery exception and follow clear criteria**
- **that a universal service obligation in communication is considered, covering all sectors of communications, including postal services and telecoms (both fixed line and mobile)**

## Creating the right environment for the content industry to thrive

### Implementing the Independent Review of IP and Growth

The Independent Review of IP and Growth, published in May by Professor Hargreaves sets out changes to copyright law and licensing necessary to support social and commercial innovation, and generate economic growth. UK copyright law needs to be updated urgently to make it fit for the digital age. According to the call for ideas the Government response to the Hargreaves Review will set out overall copyright policy and form the foundation for any reference to copyright issues by the Communications Review.<sup>5</sup> Consumer Focus welcomed the Hargreaves Review, and we believe it is vital that its recommendations are swiftly implemented. The Communications Review should in our view not be used to ‘review the review’, which was based on a wide call for evidence and detailed economic analysis.

Parliamentary timetabling may result in Hargreaves’ recommendation for changes to copyright law being implemented through the Communications Bill. If this is the case, we believe that all changes to copyright law should be implemented into the existing Copyright, Designs and Patents Act 1988, not the forthcoming Communications Act. There is obviously some overlap between the reform of copyright law and communication law. Though the implementation of Hargreaves’ recommendations should continue to be led by the Intellectual Property Office (IPO), which has the necessary resources to establish evidence based policy.

In particular, the Communications Review should resist any calls by copyright owners for additional copyright enforcement measures in the Communications Bill. Hargreaves has recommended for the existing copyright enforcement regime to be made more cost effective through the introduction of a small claims track for lower value copyright infringement disputes.

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<sup>5</sup> [Open letter: A Communications Review for the Digital Age](#), Department for Culture, Media and Sport, 16 May 2011, pg.4

Furthermore Hargreaves' recommendations focus on modernising copyright licensing, so that copyright owners can effectively meet consumer demand through the innovative and timely use of digital communications technologies. UK law already provides for a wide range of copyright enforcement measures, civil and criminal, many of which are not consistently used by copyright owners to enforce their rights in the online world. The content industry should be encouraged to make effective use of the rights they have already.

The focus of policy makers must now be on modernising copyright licensing to lay the foundation for future economic growth and thriving content industries which meet consumer demand through legal services.

**Consumer Focus recommends that the Communications Bill should not:**

- **review the Hargreaves Review, and responsibility for implementation of the Hargreaves Review should rest with the Intellectual Property Office**
- **be used to implement additional copyright enforcement measures, instead the focus should be on reforming copyright licensing to ensure consumer demand for digital content is met through innovative legal services**

### **Online copyright infringement and suspension of end-user internet access**

Sections 3 to 16 of the Digital Economy Act were amended into the Communications Act 2003 as sections 124A to 124N. They provide for a notification stage, where internet subscribers are notified of suspected copyright infringement on their connection and placed on a 'copyright infringement list'. In the notification stage such listed subscribers may be taken to court for civil copyright infringement. In the 'technical stage' listed subscribers may be subject to 'technical measures', including:

- limits to the speed or other capacity of the service provided
- being prevented from using the service to gain access to particular material, or limits such use
- suspension of the service provided
- limits to the service provided in another way<sup>6</sup>

We believe that the Government should take the opportunity of the forthcoming Communications Bill to repeal that technical stage. The Digital Economy Act 'online infringement of copyright' provisions were rushed into law in the last days of the previous Government, without proper economic impact assessment and without full parliamentary scrutiny. The Digital Economy Act is also at odds with the recommendations of Professor Hargreaves in his Independent Review of IP and Growth. Hargreaves recommends for evidenced based policy making, to ensure copyright law and enforcement does not hinder innovation and economic growth. He has singled the Act out as prime example of 'lobbysmics' and recommended balanced enforcement, focusing on modernising copyright law, education, enforcement and a 'big push to expand the legitimate market for digital content, through services which attract consumers of all ages and backgrounds.'<sup>7</sup>

The internet is an essential service, necessary for consumers to fully engage in economic and social life. In its report Internet Access 2010 the Office of National Statistics found that 73 per cent of households in the UK now have internet access and that 30.1 million adults used the internet every day or nearly every day in the 12 months under review. In 2010 some 17.4 million adults had used the internet to watch television or listen to the radio; 31 million people bought or ordered goods or services online.

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<sup>6</sup> See [Digital Economy Act 2010, section 9 / Communications Act 2003 section 124G](#)

<sup>7</sup> Hargreaves review pg.81 and 91

Some 90 per cent of individuals with internet access had used it to send/receive email; 54 per cent had used the internet for online banking; 39 per cent used it to seek health-related information; 35 per cent used it the purpose of learning; and 26 per cent used the internet to look for a job, or send a job application.<sup>8</sup> Consumer Focus considers disconnection from the internet a disproportionate punishment for civil copyright infringement by consumers.

In his report on the internet and freedom of expression the UN Special Rapporteur on Freedom of Expression expressed deep concern about measures to cut off access to the internet entirely. The UN Special Rapporteur has signalled out legislation based on the concept of 'graduated response', which imposes a series of penalties on copyright infringers that could lead to suspension of internet service, such as the so-called Hadopi law in France and the Digital Economy Act 2010 of the UK. In his view the Digital Economy Act is disproportionate and a violation of the International Covenant on Civil and Political Rights, and as such should be repealed.<sup>9</sup> Disconnecting consumers from the internet limits their right to freedom of expression, and must therefore be necessary and proportionate to protect the rights of others. We would like to highlight in the case of criminal offences under the Sexual Offences Act 2003, where courts may impose restrictions on internet use through Sexual Offences Prevention Orders (SOPOs), courts have overturned total bans on internet access on the basis that it is not necessary or proportionate to protect the rights of others. Instead SOPOs are issued which prohibit the downloading of specific material, or the use of the internet save 'for purposes of lawful employment, study, leisure or social interactions with persons over the age of 18.'<sup>10</sup>

Because the Digital Economy Act imposes vicarious liability on internet subscribers to prove that no copyright infringement has occurred on their connection, the technical measures carry a significant risk of reducing internet access for all UK consumers. Entire households face disconnection from the internet because one individual may have infringed copyright. Businesses, libraries, universities and WiFi providers face liability under the Act as subscribers, therefore there is a strong risk that the threat of technical measures has a chilling effect on internet access provision by private and public intermediaries.

Disconnecting end-users from internet access for civil offences does not create the right environment for the content industry to thrive and is fundamentally at odds with a world where public services are 'digital by default'.

**Consumer Focus recommends that the Communications Bill should:**

- **repeal the technical stage of sections 3 to 16 of the Digital Economy Act (sections 124A to 124N of the Communications Act 2003), which would see internet subscribers disconnected for alleged civil copyright infringement**

### **Internet service provider liability for content**

Consumer Focus believes that maintaining the 'mere conduit principle' in relation to internet intermediaries who provide internet access is vital to maintain an environment where consumers and the content industry can flourish.

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<sup>8</sup> **Internet Access 2010: Households and Individuals**, Office of National Statistics, pg.1 & 13

<sup>9</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, **Freedom of Expression through the Internet**, UN Human Rights Council, 17<sup>th</sup> session, 16 May 2011 pg.14 & 21

<sup>10</sup> Ian Walden & Martin Wasik, The Internet: Access Denied Controlled! Criminal Law Review, April 2011, see *TO* [2010] EWCA Crim 2511; *Paul Smith* [2009] EWCA Crim 1795; *Edmund Smith* [2008] EWCA Crim 3083; *Hammond* [2008] EWCA Crim 1358; *Halloren* [2004] EWCA Crim 233; [2004] 2 Cr. App. R. (S.) 57; and *Collard* [2004] EWCA Crim 1664

Recently content industry representatives have called for Internet Service Providers (ISPs) to be made legally liable for content transmitted through their pipes. All EU and North American countries have adopted principles of limited liability in relation to internet service providers. This gives ISPs the necessary legal certainty when providing internet access to millions of consumers and businesses. A change in internet intermediary liability requires careful consideration and would fundamentally change the business models which underline the provision of internet access. It risks making the provision of internet access unviable due to the cost associated with legal liability for any information transmitted.

Therefore we believe the Communications Bill should maintain and strengthen the mere conduit principle for internet service providers.

ISPs are mere conduits of information, not publishers. They operate akin to a postal service, rather than a broadcaster. ISPs do not have editorial control over content that is sent, received and bought by consumers and businesses. As such Consumer Focus believes that ISPs should not be held responsible for content they carry unknowingly. Furthermore we do not believe that ISPs should be made responsible for proactively regulating or monitoring content they carry. It is wholly inappropriate, and neither is it desirable, to make ISPs judge and jury over the legality, suitability or appropriateness of the content they carry or temporarily store on their servers.

The UN Special Rapporteur on Freedom of Expression has highlighted that internet intermediaries, such as ISPs, play a fundamental role in enabling internet users to enjoy their right to freedom of expression and access to information. He emphasises that intermediaries should not be held liable for refusing to take action that infringes individuals' human rights. Any requests submitted to intermediaries to prevent access to certain content, or to disclose private information for strictly limited purposes such as administration of criminal justice, should be done through an order issued by a court or a competent body which is independent of any political, commercial or other unwarranted influences.<sup>11</sup>

Therefore Consumer Focus believes that the mere conduit principle, as enshrined in Article 12 of the E-Commerce Directive (**Directive 2000/31/EC**), is still appropriate and should be maintained in the Communications Bill. The principle currently has effect under UK law, and makes specific provisions for internet service provider liability. It states that:

'Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

- (a) does not initiate the transmission;
- (b) does not select the receiver of the transmission; and
- (c) does not select or modify the information contained in the transmission.'<sup>12</sup>

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<sup>11</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, [Freedom of Expression through the Internet](#), UN Human Rights Council, 17<sup>th</sup> session, 16 May 2011 pg.20

<sup>12</sup> [E-commerce directive](#), Article 12(1)(a)-(c)

The acts of transmission and of provision of access include the automatic, intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network, and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.<sup>13</sup> Article 15 of the E-Commerce Directive furthermore provides that ‘Member States shall not impose a general obligation on providers, when providing the services..., to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’<sup>14</sup>

**Consumer Focus recommends that the Communications Bill should:**

- **maintain and strengthen the ‘mere conduit’ principle in relation to internet service providers**

### **Net neutrality and interoperability**

We want the Communication Bill to reform the current outdated regulatory framework to ensure that standards of net neutrality and interoperability are in place to facilitate competition in the digital market to the benefit of consumers.

The internet is an essential utility of modern life and, as such, access to it – and to the increasing number of public services hosted on it – must be protected. The success and power of the internet has been based on the principle of open and equal access. We want to maintain this equilibrium by enshrining the principle of net neutrality into the new Communication Bill.

We are concerned that there is an enormous risk that the benefits of this new ‘utility’ will be restricted if the net neutrality principle is compromised. In our view net neutrality is a pre-requisite to safeguard participation by citizens in society, secures access to knowledge and diversity, and promotes innovation, economic growth and democratic participation. Net neutrality is essential to ensure that consumers have access to the internet connection of their choice that is free from discrimination with regard to type of application, service; or content or based on sender or receiver address. Net neutrality ensures that the quality of the content is not affected by the ISP’s agreements, preferences, financial interests or other concerns.

We recognise that reasonable traffic management practices must be permitted under net neutrality principles to allow the proper functioning of the network. However these need to be distinguished from discriminatory practices arising from commercial rivalry and access restrictions to the public internet. Currently some of the traffic management practices applied by network and ISPs raise concerns over their discriminatory character. These include traffic blocking or throttling, such as mobile networks blocking Skype; ISPs downgrading peer-to-peer filesharing traffic; and preferential treatment of one application provider over others, applied for example in mobile telephony.

The potential for unfair discrimination is increasing due to deployment of managed services with priority access, and the convergence of network providers with providers of television, radio and telephony services. Providers of integrated communications and multi-media platforms are likely to have financial incentives to prioritise transmission of affiliated content and services at the expense of competing products. An internet service provider that provides video distribution services will have an interest in allocating greater bandwidth to its own services at the potential expense of competing internet applications. Similarly, an ISP that also supplies telephony might degrade or block a voice over IP (VoIP) provider.

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<sup>13</sup> [E-commerce directive](#), Article 12(2)

<sup>14</sup> [E-commerce directive](#), Article 15(1)

Such practices can lead to market foreclosure of new entry content and service providers who do not secure integration or exclusive agreement with network operators. This could lead to price maintenance and limit consumer choice.

Consumer Focus is particularly concerned about the impact of such practices on consumers living in rural, remote and disadvantaged urban areas with limited competition for network providers. Some UK consumers are still restricted in their content and service choice to the products and services offered by a single network operator which holds a dominant position in the area. Residents of Hull for example are limited in their choice of telecommunications provider to K-Com and its subsidiaries, which are the only retail and wholesale ISPs in the area.<sup>15</sup>

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

Competition rules may alleviate problems, but are not sufficient alone to guarantee adequate protection for consumers. For example in our view existing competition law is ill-equipped to deal with cases of anti-competitive behaviour by ISPs that do not hold Significant Market Power (SMP) in the overall market, but have a dominant position in a particular geographical location where consumers have limited choice of providers.<sup>16</sup> Ofcom has noted that it is difficult to define the appropriate market in the complex and changing information and communications technology market.<sup>17</sup>

Overall competition law can only deal with some aspects of traffic management such as blocking internet access as a whole, or intentionally degrading competing content and services of unaffiliated providers.<sup>18</sup> Competition law can not address situations where ISPs degrade all non-prioritised traffic in order to launch and promote prioritisation services. Neither is competition law able to address instances where ISPs place unreasonable restrictions on end-users running certain applications. Competition law would also not apply where ISPs refuse unaffiliated internet content providers access to prioritisation services.<sup>19</sup>

Consumer decisions to switch providers are complex, and depend on many factors, including tariffs, bundles of products, network coverage, licensing and contract lock-ins. Yet information on these is not always presented to the consumer in a transparent and clear way. Our research on consumer experiences of the mobile market suggests that only one in five consumers found it easy to navigate through the available information, with close to 70 per cent feeling that there are too many mobile tariffs available.<sup>20</sup> Even where information about traffic management is provided to consumers it is difficult for them to assess the impact on their internet access.

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<sup>15</sup> [Ofcom review of the wholesale broadband access markets, Final explanatory statement and notification](#), Ofcom, May 2008, pg.47

<sup>16</sup> Christopher Marsden, [Net Neutrality and Consumer Access to Content](#), Scripted, volume 4, issue 4, September 2007.

<sup>17</sup> Ofcom's discussion paper on Net Neutrality and Traffic Management, 24 June 2010, p.26

<sup>18</sup> Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta, [Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications](#), August 2008

<sup>19</sup> Peggy Valcke, Liyang Hou, David Stevens, Eleni Kosta, [Legal analysis of network neutrality under EU competition rules and the Regulatory Framework for Electronic Communications](#), August 2008

<sup>20</sup> [For](#) further details see the Consumer Focus position paper [Priorities in the mobile phone sector](#), November 2009

According to Ofcom's research on broadband speeds only a minority of consumers were at ease with making practical use of information provided, for example to compare connection speeds or reliability of connection.<sup>21</sup> Consumers may also find it difficult to assess what part of a service's chain is at fault. Synnovate research indicates that consumers who experienced problems with internet connection attributed them to different causes, such as ISPs, internet connection speed, computer hardware, computer memory, websites, download limits of their internet plan and others.<sup>22</sup>

So while we welcome the Government lead on increasing transparency of information to consumers, and are encouraged by the Broadband Stakeholder Group voluntary code of practice on information on traffic management, we urge the Government to not over rely on the role of transparency as a tool to facilitate consumer access and choice.

We fear that lack of clear assurance of the principle of net neutrality will facilitate development of premium managed services, at the expense of maintaining 'best effort' public internet. We are concerned that this in turn will have long term implications for both consumers and citizens in accessing not only commercial but also public services online (eg NHS, DirectGov, Inland Revenue).

It may also have an adverse effect on the Government's plan for digital inclusion.

We also call upon the Government to ensure that the new Communication Bill guarantees net neutrality in terms of inter-compatibility and inter-operability of digital technologies particularly important in the light of growing convergence of internet, telephone, mobile, radio and TV. Without interoperability, equipment and devices purchased consumers may become redundant and create significant cost burdens, as well as limiting competition and innovation. It is unacceptable that consumers already face the situation where digital technologies and applications are not compatible beyond what may be termed expected technical difficulties, or are locked in to a particular product because they cannot move their own content data. Lack of compatibility in digital technologies may be deliberately employed for anti-competitive ends and thus constrain the open and free digital market.

**Consumer Focus recommends that the Communication Bill guarantees consumers internet connection that:**

- **is of the speed and reliability advertised**
- **is transparent over network management practices**
- **enables them to send and receive content of their choice, use services and run applications of their choice, connect hardware and use software of their choice that does not harm the network**
- **is free from anti-competitive discrimination against applications, services, or content based on sender or receiver address**
- **promotes competition among network, application, service and content providers**

### **Guiding principles for regulating and suppression of content online**

The call for ideas for the Communications Review talks of the public policy challenge of applying a coherent set of principles of content provision online to achieve the right balance between appropriate protection for the public while enabling rapid innovation, better services and sustaining freedom of expression. In the UK the right to freedom of expression has been the guiding principle for the regulation of content in the offline world for centuries.

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<sup>21</sup> [Ofcom's discussion paper on Net Neutrality and Traffic Management](#), 24 June 2010, p.37

<sup>22</sup> [Consumer Expectations of the Internet](#), Synnovate 2009.

The right to freedom of expression includes the right to express and disseminate information and ideas, as well as the right to seek and receive information and ideas. We believe that the principles that have evolved to ensure that freedom of expression is effectively balanced against the rights of others are as relevant online, as they are offline.

At Deauville the UK along with other G8 nations issued a declaration stating that:

'The Internet has become the public arena for our time, a lever of economic development and an instrument for political liberty and emancipation. Freedom of opinion, expression, information, assembly and association must be safeguarded on the Internet as elsewhere. Arbitrary or indiscriminate censorship or restrictions on access to the Internet are inconsistent with States' international obligations and are clearly unacceptable. Furthermore, they impede economic and social growth.'<sup>23</sup>

In the past two decades the internet has become the most important medium to exercise freedom of expression for the media and individuals alike; it allows individuals to communicate, as well as to publish and access information and ideas. Unlike traditional media, the internet allows ordinary citizens and consumers to publish ideas and information without the approval of gatekeepers. As such the internet has had an historically unprecedented empowering and democratising effect, which should continue to be encouraged. The internet is different from any other media in that anybody can download (receive) information, as well as upload (disseminate) information. Unlike TV or radio broadcast, citizens do not need a licence to upload information and ideas on the internet.

The internet, like no other medium, has the potential to turn consumers into active and empowered participants. The Communications Bill should seek to preserve this essential quality of the internet by protecting the principles of net neutrality. In turn, freedom of expression should be considered the guiding principle when regulating content online. Both principles are central to creating the right environment for consumers and the content industry to thrive in the online world.

Content that infringes copyright, libel, indecent images of children and hate speech, are regulated online and offline through relevant laws, such as the Copyright, Designs and Patents Act 1988, the Protection of Children Act 1978, the Defamation Act 1996, the Racial and Religious Hatred Act 2006 and the Terrorism Act 2006. The right to freedom of expression must be balanced against the rights of others, and the law recognises that freedom of expression may be legitimately limited in case of child pornography (to protect the rights of children), hate speech (to protect the rights of affected communities), defamation (to protect the rights and reputation of others against unwarranted attacks), direct and public incitement to commit genocide (to protect the rights of others), and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (to protect the rights of others, such as the right to life).

The United Nations Special Rapporteur on Freedom of Expression has recently reiterated that any limitation to the right to freedom of expression, whether offline or online, must pass the following three-part, cumulative test. It must:

- be provided by law, which is clear and accessible to everyone (principles of predictability and transparency)

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<sup>23</sup> [G8 Declaration: Renewed Commitment for Freedom and Democracy](#), G8 Summit of Deauville, May 26-27 2011

- pursue one of the purposes set out in article 19, paragraph 3, of the Covenant on Civil and Political Rights, namely to protect the rights or reputations of others, or to protect national security or of public order, or of public health or morals (principle of legitimacy)
- be proven as necessary and the least restrictive means required to achieve the purported aim (principles of necessity and proportionality)

The UN Special Rapporteur has also emphasised that ‘any legislation restricting the right to freedom of expression must be applied by a body which is independent of any political, commercial, or other unwarranted influences in a manner that is neither arbitrary nor discriminatory, and with adequate safeguards against abuse, including the possibility of challenge and remedy against its abusive application.’ As such the UN Special Rapporteur warns against the control, manipulation and censoring of content online ‘without any legal basis, or on the basis of broad and ambiguous laws, without justifying the purpose of such actions; and/or in a manner that is clearly unnecessary and/or disproportionate to achieving the intended aim.’<sup>24</sup>

Website blocking at network level by ISPs is a relatively crude and untested technology which may result in the blocking of websites beyond the intended target, negative effects on online services and impact on network performance, particularly speed. There is a significant risk of negative impacts on all internet users – either by denying them access to content that is legal and they have a right to access, or degradation of service for all UK users. In regard to the latter, subscribers should enjoy an internet connection of the speed and reliability advertised to them, that enables them to send and receive content of their choice, and use services of their choice. We have made a detailed submission to Ofcom’s technical feasibility assessment of the website blocking provisions of Sections 17 and 18 of the Digital Economy Act 2010<sup>25</sup>. This technical feasibility assessment is to be published shortly, and we believe it should inform the Communications Review when considering the regulation and suppression of online content.

Consumer Focus is concerned that, in recent months, website blocking has been advanced as a silver bullet solution without consideration for the principles of necessity and proportionality. It has thus far been the role of the courts to ensure an appropriate balance between the right to freedom of expression and the rights of others. Consumer Focus was particularly concerned about recent calls for ‘voluntary’ website blocking in cases of unlawful content, (content which is illegal under existing UK law). The Home Office’s Prevent Strategy, for example, proposes website blocking of ‘harmful content’ in schools and libraries on a voluntary basis to prevent radicalisation. The Terrorism Act 2006 provides for ‘glorification offences’, but according to the Prevent Strategy ‘prosecuting people under some of this legislation has not been simple. Since the Act was passed, only three people have been convicted for these offences’.<sup>26</sup> If the Act, or any other law, is inadequate for the protection of others online, it should be updated. There are currently several provisions in UK law which allow courts to order ISPs to block access to website at the network level in order to protect the rights of others. Voluntary industry led schemes cannot be a substitute for the updating of existing laws so that courts can effectively protect the right of others in the online environment. They also run the inherent risk of violating the three-part test for the legitimate limitation of information online.

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<sup>24</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, [Freedom of Expression through the Internet](#), UN Human Rights Council, 17<sup>th</sup> session, 16 May 2011 pg.8

<sup>25</sup> See [Consumer Focus submission to Ofcom web blocking technical feasibility assessment](#), Consumer Focus, April 2011

<sup>26</sup> [Prevent Strategy](#), HM Government, June , 2011, pg.26

Current reforms of libel law include efforts to update it for the online environment. In libel law, as well as many other laws, public policy issues arise not only from the legislation, but also the way they are enforced in practice.

The current libel law reform will allow parliament to properly consider the implications of website blocking in the wider context of libel law reform, ensuring necessary safeguards against abuse and the appropriate balance between competing rights. We believe this is the right approach, and that the Communications Bill should not be used to implement website blocking provisions where the relevant laws to protect the rights of others are really in need of an update.

**Consumer Focus recommends that the Communications Bill should:**

- **Embed Freedom of expression as the guiding principle when regulating or suppressing content online:**
  - **Suppression of content online, such as through website blocking, should be provided for in law, and should be necessary and proportionate to protect the rights of others**
  - **Where necessary existing laws to protect the rights of others should be updated for the online environment**
  - **Ensure that the regulation or suppression of content online does not deny UK consumers access to legal content and services, or degraded internet service**



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