

*Representing the Communication Services Industry*



## **A Communications Review for the Digital Age**

FCS response to the Department for Culture, Media and Sport  
June 2011

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## A. Summary

FCS welcomes this timely review of communications regulation, which impacts the growth and support that the communications services sector can provide to the country as a whole. We offer suggestions for streamlining the legislation itself, including consolidating all radio spectrum legislation into a single Wireless Telegraphy Act and removing historic clauses. FCS proposes reform of the multi-supplier communications market to adapt to the digital age. Communications infrastructure and platforms are best regulated as a utility with a separate approach to the competitive access market. In order to demonstrate that it is a well functioning market and delivers the services that customers use, the industry itself needs to operate within a transparent self/co- regulatory framework for services delivery set up by the new Act. We also propose reform of radio spectrum management to ensure that it is flexible enough to accommodate all the current and future national spectrum requirements. FCS provides a new model for an appeals mechanism against Ofcom decisions that embraces the needs of all players in the industry

## B. Introduction

The Federation of Communication Services is the representative body for the UK communications services industry with 320 members and 50 Associates delivering products and services over wireless, copper and fibre to customers. A list of our members may be found on our website- [www.fcs.org.uk](http://www.fcs.org.uk)

We are pleased to have the opportunity to respond to this important consultation, as the majority of our members are regulated by some part of the Communications Act. We seek to set out some view of the future and to identify where today's issues might be addressed to encourage growth in the wider economy.

## C. What will communications look like in 2015-2025?

1. Technology and usage trends are already emerging that can offer a glimpse into the future decade and a half. The European Commission has already set out a Digital Agenda to 2020<sup>1</sup> with complementary proposals for the UK published by the Coalition Government; almost universal adoption of broadband by 2013 with superfast broadband widely in use by 2020. The drivers for these policy positions are, in Europe, to compete effectively with other international markets and in the UK to encourage the UK to be in the lead in Europe. Economic policy is also driving all sectors to be more efficient and to reduce costs. Digital communications has the crucial role to play as the basis for the future economy by facilitating e- payments to replace paper and post (phasing out of cheques is an example), for smart energy metering, telemedicine in the home or workplace, appointment booking, business processes and file sharing. The UK and Europe will be driven to match, if not surpass, the capabilities of the Far East and the Americas.

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<sup>1</sup> Digital Agenda to 2020 [http://ec.europa.eu/information\\_society/digital-agenda/index\\_en.htm](http://ec.europa.eu/information_society/digital-agenda/index_en.htm)

2. In the business community all business is moving to e-business. This includes payment of suppliers and banks; home worker access to central files and databases; distributed sites with large data files uplinked and down linked, e.g. for architects or the construction sector. The current slow economy is providing a stimulus for businesses to look to efficiency and financial gains from their communications systems to give them a competitive edge, lower costs, better functionality and improved work-life balance for their employees. Flexible working and video conferencing support the national green agenda and the need to reduce travel and associated carbon footprint.
3. For the near future we can look at the USA today and observe how, as its economy recovers, more small businesses are using the public cloud and larger businesses are building private clouds. Gartner<sup>2</sup> has forecast that the industry is poised for strong growth through to 2014, when worldwide cloud services revenue is projected to reach USD 148.8 billion. There is no doubt that higher bandwidths and faster speed broadband will be needed to satisfy business and consumer demand in the next decade.
4. The growth in demand for radio spectrum services has led to a one-track focus on the spectrum market in the UK. However, the differing requirements of legitimate spectrum users need to be recognised and different approaches to spectrum management put in place before all available spectrum is auctioned off never to be recovered. Again the Government of the USA<sup>3</sup> has taken a lead in separating the requirements of commercial mobile spectrum for broadband from the needs of the Critical National Infrastructure. It is projected that the auctioning of spectrum freed up as part of the US 500 MHz initiative will net \$27.8 billion over the next decade, and that \$9.6 billion can go for deficit reduction. Of the funds raised, the White House proposes to use \$10 billion to build a nationwide mobile broadband network to connect public safety agencies. We suggest that something similar could be considered for the UK.
5. As the digital economy gathers pace in the UK, clearly regulation must reflect and facilitate the changing landscape, which will be an important outcome of the new Communications Act. Connectivity will form the underlying basis for the future economy with the backbone of effective and efficient infrastructure provided by fibre and wireless. As with the consolidation of the regional railways in the last century, communications infrastructure needs to be considered as a single logical national entity, although there might be a few different ownerships. The current EU Framework enables the regulator to impose functional separation on major entities, but the reliance of the nation on its digital infrastructure might lead to a need for full structural separation. The new Communications Act ought to facilitate that option.
6. New infrastructures such as those being developed locally should be able to "plug in" to national infrastructure so their end users can get access to the general level of content and services available in other parts of the country. This will require software development, logically sourced from the £530 million set aside for broadband development<sup>4</sup> to support the "final third". Management of these co-ordination arrangements would be by means of a national governance body for change management.

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<sup>2</sup> [http://www.informationweek.in/Cloud\\_Computing/10-06-22/Global\\_cloud\\_services\\_market\\_to\\_surpass\\_USD\\_68\\_billion\\_in\\_2010.aspx](http://www.informationweek.in/Cloud_Computing/10-06-22/Global_cloud_services_market_to_surpass_USD_68_billion_in_2010.aspx)

<sup>3</sup> <http://www.whitehouse.gov/omb/overview>

<sup>4</sup> <http://www.culture.gov.uk/images/publications/10-1320-britains-superfast-broadband-future.pdf>

7. Delivery of communications services comprises two distinct aspects; infrastructure connectivity and content. Future regulation of each should be governed by separate legislation in a healthy communications market.
8. Consideration of the underlying infrastructure as a utility, with associated relevant regulation, need not inhibit competition in delivery, which is the driver for competition and innovation of services into the hands of customers. While infrastructure is a utility, and in our opinion should be regulated as such, regulation to require wholesale access to the infrastructure would deliver the competition in services such as voice, content and video applications, which will support the growth economy.
9. There are international drivers for changes in product development to comply with the green and environmental agendas. The EC Energy Using Products Directive, for example, that will have an impact on all products, including communications equipment, within the timeframe of the new Communications Act, will require changes in product design and use to minimise energy use over the lifetime of equipment. This will include equipment in homes, offices and vehicles and in home base stations for in-house roaming and needs to be taken into consideration when drafting the new Act.

#### **D. Summary of current concerns**

In response to the announcement by the Secretary of State for Culture Media and Sport in January 2011 that a review of the Communications Act 2003 would take place, FCS brought together the views of our diverse member companies and set out an 8-point list of current concerns and opinions.

1. **The Communications Act 2003 (CA20013) is unwieldy:** the current Act drew together the legislation across the 5 individual regulators that were brought together to form Ofcom in 2003. There are cross references to other relevant Acts and small updates as other legislation has varied. It is important for the industry that legislation is clear, concise, and wherever possible consolidated. We recommend therefore:
  - A simpler Communications Act 2014 that is based on the EC Framework and its successors with Ofcom as the economic regulator for this industry.
  - Consolidation of all radio spectrum legislation into a single Wireless Telegraphy Act; our arguments for this are set out in **Appendix 1**.
  - Removal of broadcast elements to a Broadcast and or a Content Act.
  - Removal of section 120 et al of the CA2003; this refers to Premium Rate Services. These services are micropayment mechanisms and are expected to develop as the “mobile wallet” becomes more prevalent as envisaged by the Digital Agenda. Payment mechanisms are best placed under financial regulation rather than an offshoot of communications to avoid regulatory overlap.
  - Consideration as to whether consumer protection legislation should be placed into a single Consumer Act that covers all utilities, removing the clauses associated with the Consumer Panel to a new Consumer Act.
  - Redefining a “consumer” as an individual rather than including small business.
  - Introduction of a proportionate and speedy appeals regime for all industry participants.

- Adding a new concept to the Communications Act, i.e. a requirement for a co-regulatory industry body set up by Ofcom.
2. Ofcom is an **Independent Regulator** but ought to be subject to government policy where the national interest dictates; hitherto Ofcom has appeared to focus on the letter of the Communications Act (or its own interpretation of the letter) with a dominance of activity for the individual “consumer” rather than taking into account business customers and organisations that depend on communications. This might be remedied in the new Act by clarifying the extent and reach of Ofcom’s regulatory powers and where Government should offer formal advice and ultimately direction. The BIS consultation published in January 2011 on principles of economic regulation sees some role for "guidance" from Government to regulators that could be a vehicle for what is proposed here.<sup>5</sup>
  3. **Co-regulation:** A multi supplier market has evolved to deliver communications services and, in common with other utility sectors, a well functioning market needs structure to operate effectively. Currently, ad hoc unincorporated groups develop operational industry processes to be applied to the whole industry, to the frustration of those outside the core. Ofcom has neither the resources nor the in-depth industry knowledge to direct detailed implementation of its policy principles. A process and organisational gap has evolved which would best be filled by co- or self-administration of the kind that has been successfully adopted elsewhere in Australasia and in the UK energy sector. The establishment of the co- or self- regulatory organisation would be included in the new Act with implementation via a new General Condition on all industry players to join or co-operate with the body. **Appendix 2** sets out the rationale for co- or self-regulation.
  4. **Platform neutral regulation** of service is now overdue as the same content can be delivered by broadcast or mobile services spectrum or the cable, copper or fibre internet; platforms currently have individual regulation but the same principles will have to be applied to avoid competitive distortion. In our view all platforms should be treated as utilities with similar requirements for security, resilience and maintenance. The long term solution looks to be a single “fat pipe”, of fibre or wireless infrastructure, which has the capacity to accommodate fast broadband services as well as low volume services delivered by competing suppliers. We have described our proposals for the fibre infrastructure in our response<sup>6</sup> to Ofcom’s consultation on the wholesale local access market
  5. In order to deliver services in a utility market, fair and competitive **access to platforms** is required to avoid walled gardens that squeeze out new and small players from the market; competition at the retail level should be specifically acknowledged in the new Act
  6. A well functioning market has to be effectively **enforced** by the regulator targeting fraud and criminality as the highest priority while at the same time assisting the industry with clear guidance on compliance.
  7. The **General Conditions** have worked well, more or less, since they were introduced in 2003 as a framework for industry players, although the definitions must be rationalised as soon as possible

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<sup>5</sup> <http://www.bis.gov.uk/Consultations/principles-for-economic-regulation-call-for-evidence?cat=closedawaitingresponse>

<sup>6</sup> [http://www.fcs.org.uk/my%20files/fcs\\_pdfs/responses/10-06-01\\_ofcomreviewofthewholesalelocalaccessmarket\\_fcsresponse.pdf](http://www.fcs.org.uk/my%20files/fcs_pdfs/responses/10-06-01_ofcomreviewofthewholesalelocalaccessmarket_fcsresponse.pdf)

to avoid the current confusion. The new Act should clearly refer to a “Consumer” as an individual customer, since the current definition including small business leads to uncertainty for the customer and the supplier alike. We also recommend the removal of section 120 et al CA2003 on Premium Rate Services. The digital economy is pushing telephony, particularly mobile, to become a payment mechanism, which for consistency ought to be regulated under financial regulations rather than an offshoot of communications regulation. Duplication of regulators is no longer consistent with a need for streamlining better regulation for industry. We have advocated in our concern No 4 above that a new General Condition to require telephony suppliers to join a self regulatory body should be set up.

8. Ensure that there is a **proportionate appeals mechanism** against Ofcom decisions. Smaller players now form an integral part of the communications services industry but there is no proportionate method (in terms of relative cost and resource) for them to appeal. We have set out our views in **Appendix 3**

## E. Consultation questions

### ***Q1. What could a healthier communications market look like? How can the right balance be achieved between investment, competition and services in a changing technological environment?***

It is disconcerting to hear from Lord Laird in a meeting on the Future of Telecom and Broadband on 29 June 2011 that there are clear problems with the UK telecoms industry and the lack of broadband coverage is a disgrace to the country. We acknowledge that there are deficiencies within the industry and make the following proposals.

FCS believes that the underlying growing dependence of the UK economy and social life on the digital economy and broadband, which will be predominant during the lifetime of the next Communications Act, is best served by a communications market that has a regulatory framework for communications infrastructure and a separate framework for services delivered over the infrastructure.

As we have put forward in paragraph C 5 above, communications infrastructure should be regulated as a utility network similar to transport, energy and water to ensure that the highest levels of resilience, maintenance, continuity and security are applied. There should be universal access requirements for key digital services such as smart energy meters and telemedicine

The challenge for regulation is to ensure that access and use of infrastructure are maximised to ensure that economic growth and innovation are supported, while ensuring adequate cost recovery to support and maintain the network. We propose a multi-service pipe model of the infrastructure pipe where different communications providers can purchase wholesale services to be provided over a single connection. Central to this model is separate ownership of the pipe from service delivery. We have discussed this in paragraph D4 above.

In addition to traditional voice and broadband services, this will include new services such as IP Television and Video on Demand. This model also caters for the delivery of non-communications services such as smart energy metering and remote diagnostics.

To facilitate UK economic growth, customers must be able to take advantage of new communications service offerings from suppliers and to switch their provider and their phone number easily and seamlessly. This does not happen at the moment. There are separate mechanisms for switching fixed, broadband and mobile services- some are even provider led, where the current provider has to agree whether to allow the customer to move to a new supplier. Ofcom has a project to look at consumer switching but resolution appears slow.

The industry itself has to acknowledge that it could implement Government and Ofcom policy direction more effectively without recourse to the courts. We propose that within the new Act there is an obligation on Ofcom to ensure industry sets up a co/self- regulatory incorporated body with a governance process that ensures all stakeholders participate in process decisions. We have set out our views in more detail in **Appendix 2**.

Clearly, new thinking is needed for the delivery of mobile services to avoid the mass of “not-spots” around the UK. An immediate action that could be implemented by the new Act is to obligate national roaming between mobile networks; there is roaming for 999/112 services already so the process is technically feasible. We also propose obligated wholesale access to infrastructure so that new entrants and new mobile services can be introduced.

Currently, new entrants to the mobile markets are faced with a number of hurdles. These include a convoluted mobile number portability process with a need for multiple bilateral agreements and an imbalance between the large incumbents and smaller new entrants, where the former have little incentive to co-operate with new entrants who might acquire their customers.

Current press reports<sup>7</sup> indicate that customers of the larger operators have significant control over their distribution partners, who are theoretically independent businesses, inhibiting switching, mergers and acquisitions.

## ***Q2. What action can be taken to facilitate greater innovation and growth across the wider competition regime, and how can deregulation help achieve this?***

The objective of a competitive market in communications is to deliver products, services and innovation to customers to drive wider economic benefit. Regulatory oversight of the market aims to ensure that effective and sustainable competition prevails. The communications services market has demonstrated an ability to take wholesale products and deliver innovative new services and bundles to customers.

Wholesale Line Rental (WLR) is an example; 6.15 million<sup>8</sup> lines and services are delivered by competing CPs to business customers and individual consumers. WLR is a regulated product purchased wholesale from Openreach by CPs and sold to customers, delivered over copper lines to the premise.

On the back of the WLR market hundreds of new companies have been set up to deliver competitive WLR services and other products. These companies not only succeed by their sharper pricing menus but

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<sup>7</sup> [http://www.mobiletoday.co.uk/Blog/10102/Are\\_operators\\_stopping\\_dealers\\_from\\_selling\\_their\\_businesses?.aspx](http://www.mobiletoday.co.uk/Blog/10102/Are_operators_stopping_dealers_from_selling_their_businesses?.aspx)

<sup>8</sup> Office of the Telecommunications Adjudicator in May 2011: <http://www.offta.org.uk/>

they also deliver valued customer service that their larger competitors cannot match. A You Gov survey<sup>9</sup> carried out among SME end users for FCS at the end of 2010 reported that their preference for smaller suppliers included better customer service and account management, being responsive and tuned into the needs of SMEs, and flexibility.

The preference of almost 3 million customers in the smaller CP or reseller sector may be under threat as fibre is rolled out to deliver superfast broadband across the country. Instead of continuing a regulated wholesale access voice product suitable for smaller CPs and resellers in the fibre world, regulation has pulled back to a point where only larger, well financed and often vertically integrated companies will be able to join the new fibre access market. This we believe is a retrograde step because the extent of deregulation here has the potential to undermine the reseller model and to lead to significant commercial failure, restricting customer choice and service innovation. Ofcom has clarified that the BT Group has SMP in this market but has not directed the provision of a fibre based product to enable continuing equivalence of access for resellers and CPs. This is an example where an attempt at deregulation has the real potential to adversely skew the market.

***Q3. Is regulatory convergence across different platforms desirable and, if so, what are the potential issues to implementation?***

Yes. DCMS is right to focus on streamlining regulation so that industry has clear and unambiguous rules that govern its operation. The same principles of regulation ought to be applied whatever the platform. The pricing for access to each platform for retail services will be dependent on costs of investment and maintenance and customer experience.

Another view of regulatory convergence is how mobile payments are regulated. The mobile wallet is an undisguised aim of the European Digital Agenda and is becoming a reality in the UK, with the announcement by the 3 largest mobile operators on 20 June 2011 of a common mobile payment mechanism. However, regulation appears to take place in two overlapping areas - financial regulation and premium rate regulation via a code of practice managed by PhonepayPlus under a MoU with Ofcom. As mobile payments grow in importance it is clear that financial regulation in line with other payment mechanisms will be most appropriate and that regulatory duplication should cease.

***Q4. What barriers can be removed to facilitate greater exports and inward investment and make the UK more globally competitive in digital communications?***

In addition to our comments in answer to Q1, we would add that some UK phone numbers cannot be dialled from other EU Member States. These include the number ranges 0844 and 0871 which are often used by advice lines. Many doctor's surgeries have 0844 telephone numbers for enquiries which cannot be accessed by UK tourists travelling in Europe or expatriates living in other European countries. Companies seeking to enter the UK mobile market have faced hurdles such as the mobile number portability process mentioned in the answer to question 1.

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<sup>9</sup> <http://www.fcs.org.uk/News/NewsArticle.aspx?WAlid=214>

***Q5. What further market and regulatory developments would lead to widespread take-up of superfast broadband? What regulatory action would government need to take to make superfast broadband more readily available in a) urban areas; and, b) rural areas?***

As we have noted above, separating regulation of infrastructure pipes from services regulation would assist the market.

A multi service pipe with wholesale access from competing suppliers (not the same entity as the pipe owner) would drive take up of services, while maintaining universal service access for essential smart energy meters and telemedicine. Only one broadband pipe needs to service each premises for smart energy meters, rather than a new and completely separate and expensive communications network for them.

Where this infrastructure is provided by local developers there should be regulatory underpinning to permit competing service providers or resellers to have access to the infrastructure and all players in their local market should comply with national rules such as the General Conditions

***Q6. What are the competing demands for spectrum, how is the market changing and how can a regulatory framework best accommodate any rapidly changing demands on spectrum and market development?***

In the most profound sense, spectrum is needed to keep the country functioning via CNI access. This overrides all other demands for spectrum. There are different requirements for professional radio.

The current Act is interpreted by Ofcom as requiring spectrum to be delivered only by market mechanisms. But this is too simplistic and not suitable for the totality of spectrum users. The new Act should reflect the current and future requirements; we recommend that spectrum is co-ordinated under a single WT Act - see **Appendix 1**

***Q7. How should spectrum be managed to deliver our growth objectives whilst also meeting our policy objectives of furthering the interests of citizens and consumers in relation to communications matters?***

We have set out arguments on the limitations of the Communications Act 2003 in **Appendix 1** as regards radio spectrum. We conclude that matters relating to the management of the radio spectrum can be handled with a modified Wireless Telegraphy Act and thus the proposed new Communications Act need not have provisions in respect of radio spectrum in it at all. This would permit the management of the radio spectrum to be sufficiently flexible that the regulators would feel empowered to take the most appropriate course of action depending on the need as it changes in the future.

***Q8. How should the UK engage on an EU/International level in relation to spectrum?***

The main issues from a spectrum perspective are these. UK policy makers may understand better an example such as the UHF continental interference whereby radio systems on the south and east coasts of the country suffer from interference from neighbouring countries in certain weather conditions. A

solution whereby the UK changes, but Ireland does not, risks transferring the problem from the East coast to West. The answer is that we have to work with other countries, even if there is some compromise of UK objectives, because the consequences of not collaborating more than outweigh the short term benefits of going it alone.

Because there are so many international organisations involved in spectrum – EU, CEPT, EBU, ICAO, IMO, ITU, etc – the temptation is to focus on just a few, such as EU and ITU. But to do so risks missing out in the development of policies which, once formulated, become difficult to change. Industry, Government and Ofcom ought to be able to formulate a mechanism for UK representatives to attend and feedback from all relevant international organisations.

There are two main types of spectrum uses that are important to the UK. The first is the consumer use such as public mobile telephony, and the second is professional uses that are not amenable to assignment of spectrum by market mechanisms. Experience has shown that these groups are quite separate and have to be managed differently; a report<sup>10</sup> published by FCS in June 2010 explains the background.

The UK needs a process or processes whereby both these groupings need to have policies developed and pursued with vigour by UK representatives through all the relevant international forums. This will involve the active participation of a number of Government Departments, industry, appropriate user groups and regulators to develop policy in the two different usage groups. Because the groups are so different it might even necessitate the UK Government advocating separate international processes in some forums.

***Q9. Is the current mix of regulation, competition and Government intervention right to stimulate investment in communications networks?***

We believe that the time is right to rethink infrastructure competition policy because the demand for services is very likely to outstrip capacity even for well engineered networks.

The UK has had an infrastructure competition policy for the last decade, when the public could also use post and paper to support their communications and pay their bills. However, we are now at a fulcrum where business and the public will become almost entirely dependent on their IT and digital communications into the future. The Digital Agenda and national citizen agenda both call for electronic access to conduct our daily lives. Thus the old policy of infrastructure competition - where competing infrastructure providers compete in the same densely populated areas, which provide the maximum commercial return, leaving less densely populated areas with lower quality or no service - has had its day. The focus for national policy has to be how and in the most effective way high volumes of information from every member of the population can be managed. Like electricity and the railways, electronic communications is a utility and a new regulatory framework is needed so that the UK can fulfill its growth and best broadband agenda. Private investment in a network can be supported by state aid, but all investors will need to be confident of an adequate rate of return over an extended period of time. It is the duration of the return that will be important for the nation and should be set by Government.

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<sup>10</sup> [http://www.fcs.org.uk/my%20files/fcs\\_pdfs/member%20groups/business%20radio/10-06-28\\_fcs\\_contribution\\_on\\_sfbr\\_publication\\_version.pdf](http://www.fcs.org.uk/my%20files/fcs_pdfs/member%20groups/business%20radio/10-06-28_fcs_contribution_on_sfbr_publication_version.pdf)

***Q10. Are there disproportionate regulatory barriers to investment in content? If so, what are they and how can increased investment in UK content production be encouraged?***

We have no comments.

***Q11. Should the core focus of public service broadcasting be on original UK content?***

We have no comments.

***Q12. What barriers are there to innovation in new digital media sectors, including video games, telemedicine, local television and education?***

Some of these should be regarded as a requirement for universal service and regulated accordingly. Each premises/building ought to have assured access to telemedicine, smart energy meters and education without delivery by a walled garden supplier that might go out of business. We support arguments by other respondents that Government needs to intervene to set up necessary organisation for a sustainable service market. Unless there is certainty of delivering a service at a reasonable price, then innovators will be deterred.

***Q13. Where has self- and co-regulation worked successfully and what can be learnt from specific approaches? Where specific approaches haven't worked, how can the framework of content regulation be made sufficiently coherent and not create barriers to growth, but at the same time protect citizens and enable consumer confidence?***

In **Appendix 2** we set out our proposal for co-/self regulation by the communications services industry to provide an open, transparent and proportionate mechanism for addressing industry processes. We cite two examples of successful implementation of similar organisations in New Zealand and in the UK electricity industry.

## Appendix 1

### RADIO SPECTRUM UNDER THE 2003 COMMUNICATIONS ACT

In considering the proposal to have radiocommunications transferred from the current Communications Act to a revised Wireless Telegraphy Act it is important to identify the problems seen in the current (2003) Communications Act.

**The 2003 Communications Act established Ofcom as an all-encompassing regulator and gave detailed guidance on duties towards commercial / consumer segments but had almost no references to the essential professional uses of spectrum. Ofcom therefore has almost no duties towards the support of essential services necessary to the UK. Furthermore, the Act guides Ofcom to use competition and associated market mechanisms when managing the radio spectrum but with no account for fundamental differences between the various types of uses of the radio spectrum.**

There is a very significant difference in the objectives for management of a market-sensitive segment of radiocommunications and the professional radiocommunications segment that we need in order to function as a modern society. The market-sensitive segment can obviously be managed by applying market principles even accepting that these may result in some spectrum being under-utilised. The stakeholders should be given the freedom to run profitable businesses based on the use of spectrum in a consumer environment under a fair competition regime.

However, in the case of spectrum that is used for essential tasks, the priority must be to make the resource meet as many of the needs as possible. The amount of radio spectrum available is already insufficient to meet all the needs that could be placed on it. The UK cannot afford spectrum to be used inefficiently. Therefore, the management of spectrum to ensure that maximum benefit for the UK can be delivered must be better directed than will be achieved through market forces in which large amounts of spectrum can be left unused for long periods.

Unfortunately, in almost the very first lines of the 2003 Communications Act, the guidance is towards managing the radio spectrum through the use of competition where appropriate<sup>11</sup>. The optimal use of spectrum is called for but there is no indication how this should be measured. Even though it is not explicitly stated, the Act definitely implies that the optimum use of spectrum is to be achieved through promoting competition.

It is therefore understandable that regulators will seek to use competition to manage the spectrum. This has inevitably led to a market-based approach to all radio spectrum assignment. “Optimal” appears to be judged only in terms of very narrow prices attached to spectrum in the belief that this will result in the spectrum being placed at the disposal of the entity that values it the most.

This approach has several fundamental flaws. These include that it does not address essential uses of spectrum that cannot be evaluated in monetary terms and it does not address situations where spectrum is used to provide support for other essential services that are of inestimable value but which are not themselves directly linked to the use of spectrum. In neither case could our society manage

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<sup>11</sup> **3 General duties of OFCOM**

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

without the resulting services<sup>12</sup>. Our citizens need electricity, water, buses, trains, trade through the ports and airports and a long list of other vital public needs.

In addition, regulation that promotes competition tends to fragment spectrum by parceling it out to the contestants. If the spectrum is already in short supply, the amount of spectrum available to each successful bidder may be small. This limits the amount of service that each block of spectrum can provide and so in turn inhibits the benefits that can be delivered to the end users.

The use of market mechanisms for spectrum assignment may be appropriate for consumer applications but not for the large number of services of public interest that the UK will need for the foreseeable future.

The topics Ofcom needs to focus on are listed in the General Duties within the Act. Professional uses of spectrum are not specifically considered as part of Ofcom's duties beyond doing what is necessary to further the interests of citizens. That wording is far too vague to form the foundation of a coherent approach to address professional uses of spectrum that we all need to run smoothly. There is not even a specific duty to ensure the correct operation of a large number of critical services upon which we all rely.

The closest the Act comes to that essential function is that Ofcom should have regard to the desirability of preventing crime and disorder. In contrast, Ofcom are required to secure a wide range of television and radio service providers.

In contrast, the Wireless Telegraphy Act is based on completely different principles and is a much simpler instrument. It handles the matters that are essential to manage the spectrum to maximise the efficiency of use. It also provides the regulator with the necessary flexibility to make the correct decisions as they see fit. It does not seek to guide the regulator to use market mechanisms or any other approach. That decision is left to the regulator who has a duty to use the best approach.

Whilst the WT Act requires Ofcom to have due regard for competition in services that are provided using the radio spectrum, there is no requirement to use competition principles in the assignment of the spectrum itself. The Act even permits Ofcom to consider which duties are applicable and which are not.

However, the WT Act does require that duties under the 2003 Communications Act take precedence over the duties under the WT Act in cases of conflict<sup>13</sup>. This at least will have to be changed.

Therefore it is proposed that matters relating to the management of the radio spectrum can be handled with a modified WT Act and thus the proposed new Communications Act need not have provisions in respect of radio spectrum in it at all. This would permit the management of the radio spectrum to be sufficiently flexible that the regulators would feel empowered to take the most appropriate course of action depending on the need.

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<sup>12</sup> For a full discussion of the huge value of radiocommunications used in such applications see "The Strategic future of Business Radio", FCS, June 2010, [http://www.fcs.org.uk/my%20files/fcs\\_pdfs/member%20groups/business%20radio/10-06-28\\_fcs\\_contribution\\_on\\_sfbr\\_publication\\_version.pdf](http://www.fcs.org.uk/my%20files/fcs_pdfs/member%20groups/business%20radio/10-06-28_fcs_contribution_on_sfbr_publication_version.pdf)

<sup>13</sup> Section 3 (5) Where it appears to OFCOM that a duty under this section conflicts with one or more of their duties under sections 3 to 6 of the Communications Act 2003 (c. 21), priority must be given to their duties under those sections.

## Appendix 2

### SELF ADMINISTRATION IN COMMUNICATIONS

FCS believes that a well-structured communications industry supplies better consumer outcomes and an effective competitive market needs clear governance processes. The communications market is delivering essential public services already and the political push of the EC Digital Agenda and the UK Government will result in communications/broadband/digital services rapidly becoming an essential utility with a requirement for utility regulation at the infrastructure/platform level

Several competing infrastructure suppliers might have been the model for the emerging market when customers could use paper and post as an alternative, but the political thrust for all things digital – mobile wallets, public services, smart energy meters, telemedicine – means that the assurance of infrastructure that is not allowed to fail becomes imperative.

Competition in the market is at the access level. A competitive market depends critically on an underlying disciplined and coherent structure. How can this be achieved without an over-large prescriptive regulator, where there is no political will for such an entity? We propose that there is need for an independent market body for management, co-ordination and system operation to arrange appropriate change control of industry processes.

#### *What are the drivers for this proposal?*

- Ofcom is setting industry outcomes and then becoming involved in processes without detailed knowledge of the industry itself, which industry is best placed to set out, if it were properly organised to do so.
- Currently there is micro decision making on different aspects of telecoms processes taking place in scattered, unincorporated, and fragmented ad hoc groups, generally populated by the larger telcos. Stakeholders are not generally sought out nor proactively invited to attend working groups relevant to them.
- There is an opportunity to structure industry process making with the new Communications Act and ensure that all competitors are included to produce a well ordered industry.
- Ofcom has reduced resources to look in detail at every issue in the market, but consumer advocates and users still require change.

#### *What happens now?*

- The OTA2<sup>14</sup> is an independent body tasked by Ofcom to bring industry together. It has no basis under the Act and appears to operate under direction from Ofcom assigning process projects such as switching and number portability to work with industry. It has no decision making powers.
- The Broadband Stakeholders Group<sup>15</sup> is another independent entity seeking to bring industry together but is not structured to make decisions
- Meanwhile consumers continue to complain and industry players, particularly new entrants, are frustrated by entrenched processes, which they see as restricting their market entry, and slow progress on reform.

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<sup>14</sup> <http://www.offta.org.uk/>

<sup>15</sup> [http://www.broadbanduk.org/component/option,com\\_frontpage/Itemid,1/](http://www.broadbanduk.org/component/option,com_frontpage/Itemid,1/)

### **What could be in place?**

- A central body for the communications industry operated as a legal entity in accordance with Better Regulation principles that is the source, guardian, and maintainer of the change control function for all industry processes.
- All relevant players would know what was expected of them, and would have the opportunity to seek change and to review change impacts on their business.
- Crucially this body would ensure participation encompasses the new entrants and smaller players in a proportionate way and work to prevent competitive barriers to market entry.
- The body would have decision making powers
- Competition issues would be directed to Ofcom to resolve
- Ofcom would have a single industry body that it could address and require to carry out specific reforms.
- Crucially more projects could be carried out in parallel to introduce reform more rapidly than the current arrangements

We would recommend that the Act sets out a duty on Ofcom to establish a Self administration system.

Although Governance of the body will take time to set up and gain agreement, this body could be well underway in advance of the final Act and operate over the anticipated lifetime of the Act

An illustration of a problem that occurs now is a company seeking to enter the mobile market with their own mobile number range. In order to become compliant with General Condition 18, number portability, the new company has to apply to the unincorporated Mobile Number Portability (MNP) Operators Steering Group<sup>16</sup>, seek out bilateral porting agreements and technical tests with the four full members of the OSG (the national operators) and up to 12 participating members of the OSG. This would add up to a year of activity before the new company could sell its services to the market. On the current timeline for the Ofcom switching project reform of the losing provider led MNP may not be addressed for another 2 years. Under either calculation the new entrant cannot service the UK market until possibly 2013 and UK customers cannot use the products.

With a self administration system in place, Ofcom could, in parallel with other process reforms, direct the organisation to:

- Review mnp processes to introduce a gaining provider led process within 18 months
- Set up a single multi lateral porting agreement for all market players to use
- Set up a number porting database, and
- Deal with competition issues as they arise quickly

We cite two examples where such self administration system the New Zealand Telecoms Carriers Forum<sup>17</sup> and the Master Registration Agreement<sup>18</sup> approved by Ofgem. Both have been successful because they have had the direction of Government and support of the relevant regulator. They are transparent, providing customer confidence, are able to deal with several issues providing economies of scale and have clear leadership.

**We recommend our proposal to the Department of Culture.**

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<sup>16</sup> <http://www.mnposg.org.uk/>

<sup>17</sup> <http://www.tcf.org.nz/content/default.html>

<sup>18</sup> <http://www.ofgem.gov.uk/Licensing/ElecCodes/MRA/Pages/MRA.aspx>

## Appendix 3

### MODEL FOR AN APPEALS MECHANISM

One of the necessary ingredients for stimulating investment in communication networks is investor confidence in the rationality and accountability of the regulatory regime. This in turn requires confidence in the ability of industry participants, particularly the smaller market players, to challenge the regime effectively in an appropriate legal forum, by appropriate legal means, and with equality of arms.

Such confidence can be enhanced by the availability of a reasonably fast, flexible, and effective mechanism for appeals against regulatory decisions. This should be a mechanism that goes beyond a mere replication of the conventional judicial review process, which is generally an ineffectual means of resolving serious or intractable differences between service providers and regulators. It should also avoid so far as is practicable the complexity, cost, and hugely time-consuming characteristics of traditional court or tribunal-based proceedings.

A model worth considering in this respect, at least in principle, though the formal details of its application might need to differ for the communications sector, is the appeals mechanism established for the regulated gas and electricity industries under sections 173 to 176 of the Energy Act 2004. This mechanism allows industry parties to appeal to the Competition Commission against the modification decisions of the energy regulator, Ofgem, in relation to the core industry codes that govern almost all of the key commercial, technical, and operational transactions of the sector.

Against that background, the Energy Act mechanism is distinctive in a number of important respects. For example, although the right of appeal is restricted to people “materially affected” by the relevant Ofgem decision, or bodies representing people so affected, the practical effect of that test is that the right is enjoyed by all of the parties to the framework agreement applicable to the code which is the subject of the appeal; by all persons holding gas and electricity licences under the sectoral legislation, who are obliged by licence conditions to comply with the relevant code; and by other interested groups representing consumer, licensee, or other trading party interests.

Another distinctive feature of the mechanism is its specification of the grounds on which the Competition Commission is to reach its decision. The Commission must allow the appeal if it is satisfied that Ofgem’s decision was **wrong** because Ofgem had failed to have proper regard to the applicable legal objectives of the code, or to the regulator’s statutory obligations; or had failed to give the proper weight to one or more of those objectives or obligations; or because the decision was based on an error of fact, and/or that the decision was wrong in law.

While the framing of these grounds of appeal clearly contains some elements of the traditional grounds for challenging a public authority’s decisions by way of judicial review, they also equally clearly enable the Competition Commission to substitute its own views and conclusions for those of Ofgem by way of a finding on the merits of the case. The Commission can confirm, or quash, the original Ofgem decision, or remit it to Ofgem with directions to reconsider the decision, taking account of certain factors specified by the Commission.

The final significant factor of the Energy Act model that makes it worth considering as a basis for appeals against regulatory decisions in the communications sector is the speed with which it is required to operate. The legislation prescribes a very tight timetable of 12 weeks for the process as a whole, running from a party's decision to appeal, through its initial application to the Competition Commission, to the deadline for the Commission's decision to grant or refuse permission to appeal; and then onwards through the submission of the case in detail by way of information specified in the appeal rules, to the receipt of parties' representations, and finally to full hearings and then the disposal of the case.

The right of appeal established under this legislation has been explicitly designed to improve the accountability of Ofgem's ultimately decisive role in the ongoing process by which the detailed rules that govern industry activities are amended. In the absence of an appeals mechanism of this kind, providing ultimately for a review and decision on the merits by an expert independent body, the only means of redress for the industry parties and market participants governed by the codes would be to initiate a probably fruitless judicial review of Ofgem's modification decisions.

These appeal provisions are being extended later this year to cover appeals against Ofgem's modification decisions relating to industry licence conditions. There is much in this model that could with advantage be replicated, with necessary adaptations, within the communications sector. FCS commends the model to DCMS for serious consideration.