



1. Introduction

UKCTA is a trade association promoting the interests of competitive fixed-line telecommunications companies competing against BT, as well as each other, in the residential and business markets. Its role is to develop and promote the interests of its members to Ofcom and the Government. Details of membership of UKCTA can be found at www.ukcta.com. UKCTA welcomes the opportunity to respond to this consultation since the subject matters which it encompasses are of fundamental importance to our member companies.

2. Appeals

The BIS consultation raises the legitimate question of what is an optimal appeals regime for Ofcom decisions and whether (as Ofcom have requested) the regime should be replaced with an 'enhanced JR' regime which might make certain Ofcom decisions (or parts of decisions) much less susceptible to challenge.

Perhaps the most compelling argument for no change is that we understand operators are very nearly unanimous in wanting to retain the current regime even though they pay all the costs of Ofcom defending appeals¹. It would be absolutely extraordinary for the Government to deprive operators the right to appeal Ofcom's decisions when Ofcom already levies administrative charges on Operators to recover its costs.

We consider that the appeals regime forms a critical and beneficial part of the overall regulatory framework in ensuring that regulatory decisions are sound.

- Ofcom, like any other regulator, can and does make mistakes in some of its decisions. This is not unusual. A variety of mistakes can occur including legal and procedural errors, lack of sound evidence and incorrect judgement/reasoning.
- The level of challenge to Ofcom appeals is comparatively low, especially when compared with what happens in other EU member states such as Germany or Belgium.

¹ A report by Towerhouse Consulting Report (THC), reaching this conclusion, includes research with most major and many smaller Communications Providers
http://www.towerhouseconsulting.com/docs_2010/TOWERHOUSE%20CONSULTING%20APPEALS%20REPORT%20FINAL.pdf

- Appeals play a critical role in correcting mistakes when they occur, and deliver better regulation and consumer benefits. Of the 28 appeals that have been lodged in 24 cases (i.e. over 85%) Ofcom's original decision has been fully or partly overturned. Further, in almost all cases the issues and corrections were material involving corrections of £10s and £100s millions
- The possibility of being appealed tends to improve decision making across the board since all Ofcom's decision will be exposed to scrutiny. More generally appeals improve the accountability of public bodies such as Ofcom, and provide an important check on their power and reduces the risk of 'regulatory capture'

Importantly, the regime has not been misused or used frivolously - around 10% of Ofcom's decisions are appealed and those that are appealed are generally both genuinely important and materially wrong. Given the number of important test cases that have gone through, the effectiveness and efficiency of the regime should improve.

Ofcom's concern to reduce cost is laudable. However, its suggested means (reducing the right to appeal) will destroy the very fabric of the regulatory framework. We consider that rather than limiting the ability of operators to appeal, Ofcom and Government should instead look at alternatives that reduce the cost of defending appeals, not least by improving decision-making.

The central approach to reduce the number of appeals should be to reduce the desire/need for operators to appeal Ofcom's decisions. This can be provided through:

- More transparency. Better transparency will: avert appeals that are today brought on the basis of a misunderstanding of Ofcom's evidence or the materiality of an issue; narrow the breadth of an appeal; and, allow appeals to be processed more quickly/cheaply. For the most part better transparency can be achieved by Ofcom simply adjusting its behaviour.
- Making better quality decisions by being more open-minded to new evidence and reasoning and properly taking it into account. As well as resulting in better decisions (and thus fewer appeals) it will also mean that any appeals made will cost less to defend (in fact if the regulatory proceeding is done properly then any appeal should require little or no new evidence/reasoning)
- Proactively set policy and regulation rather than leaving a vacuum which tends to result in uncertainty, disputes and appeals

The incentives on parties to appeal could be refined to ensure immaterial issues don't get appealed and reduce the cost of appeals. In general we consider that there is a good balance of incentives today since only material decisions where there appears to have been an error are actually appealed though there may be some refinements such as:

- Creating some more potential 'downside' for an appellant - e.g. making it easier for parties to recover costs. This might also avoid situations where an operator appeals one way because another operator might appeal the decision the other way

- Requiring appellants to have put ‘best foot forward’ in consultation
- Allowing retrospection of decision (currently in charge control appeals there is no repayment of overcharging prior to the CAT decision). This will both allow fuller correction of mistakes (and so greater consumer benefits) but will also reduce any incentive for the parties to delay or prolong proceedings.

Lastly the cost of defending appeals could be reduced by improving and streamlining the appeals process to both reduce the duration of appeals as well as the resource / cost. Efficiencies are likely to result anyway from all parties learning from experience. The CC is also reviewing its process which should achieve added efficiency. It may be that some review of CAT procedures may be appropriate.

BIS has put forward the idea of an ‘enhanced JR’ (instead of the current merits based appeal). It has been suggested that under this framework challenges of Ofcom’s judgement would not be allowable. However even this is unclear - LJ Jacobs said in the Sequencing Decision that “[appeal body] ... *can look into whether the regulator got something material wrong*” i.e. an appeal can look at all aspects of why a decision was wrong including matters of judgement.

Irrespective of the impact of a change to an ‘enhanced JR’ regime such a change would be harmful. Either the change would have no ultimate effect on what appeals are brought (in this case there would be no benefit yet the change will cause uncertainty and add legal cost to work through test cases and precedent) or alternatively the change would in fact reduce the ability to appeal. As highlighted above this would be inappropriate since it would result in worse regulation and there are far better ways to address the cost of defending appeals.

At various times Ofcom and BIS have advanced various other arguments to support a reduction in appeals. Overall we consider these either spurious or of very limited relevance. We describe these below

- The original intent was for a more limited appeal. The intent in 2002 is irrelevant to the pertinent question of what is the best approach today
- The Directives don’t require a full merits appeal. The Directives merely set a minimum level of appeal, but they do specifically mention consideration of the merits. It is wholly right to go above this if it is beneficial for the UK (which it is)
- The current approach is a re-hearing and that is not appropriate. This is factually incorrect - we do not have rehearing today. In the CC there is a strong presumption Ofcom is right and the burden of proof is on the appellant to demonstrate that Ofcom is wrong. The same is true in the CAT
- Without change there will be ‘gridlock’ due to more frequent market reviews and more disputes. These are minor changes to Ofcom workload and in no way justify destroying key aspects of regulatory regime
- Appeals are costly to defend. The high cost is both proportionate to achieving materially better decisions and the high cost is mostly the result of inadequate consultation. There is little extra cost required to make decisions ‘appeal-proof’ or ‘appeal-ready’ if the consultation was carried out properly

- Appeals create uncertainty. Though they do result in some uncertainty in the short term, in the medium and longer term appeals deliver better certainty since added transparency / robustness improves understanding and confidence
- Some appeals are inevitable (such as MTR). While this may be true, there are only very few cases like this (that are highly material) and only in cases of new assumptions (e.g. valuing spectrum, use of pure LRIC) and as the regime becomes more established the volume of these type of appeals with diminish.

In summary, the case put forward by Ofcom / BIS to reduce the right to appeal is wholly unjustified. UKCTA disputes the assertion that there is any regulatory uncertainty stemming from the appeals process. We believe that regulatory uncertainty can and does occur but the root cause of this is poor decision making rather than the fact that such decisions can be challenged. Indeed the absence of an ability to challenge poor decisions on the merits would do far more to create regulatory uncertainty.

UKCTA disputes the portrayal of the appeals regime in the Consultation document as a system which has been failing. On the contrary we believe the fact that Ofcom has been subject to a comparatively low number of appeals (both as a proportion of the total number of Ofcom decisions taken and as compared with other EU regulators) suggests that in the main Ofcom's decisions are well founded and go unchallenged, and that CPs only challenge the most important decisions and only then when Ofcom gets it wrong.

UKCTA disputes the suggestion that there have been any frivolous appeals. If there *were* any appeals which were more speculative, testing the boundaries of regulation, then the tendency for anyone to run these would invariably reduce as the appeals process becomes more established and the CAT builds up a body of jurisprudence.

The decisions taken to date by the CAT and CC have revealed fundamental flaws with the original work undertaken by Ofcom and that rather than being frivolous this shows that the appeals were merited and underlines the need to hold Ofcom decision making to account.

The simple fact is that the current process is still bedding in and any reform is, in UKCTA's view, premature. If introduced, BIS's proposed reforms would result in substantially worse regulation and be highly harmful to the UK telecoms sector and consumers.

3. Implementing reform via s.2(2) of the European Communities Act 1972

UKCTA is also doubtful about the proposal to reform the appeals regime via ECA Regulations. The powers to make secondary legislation under s.2(2) of the European Communities Act 1972 ("ECA") are supposed to be used for the enactment of changes which are required under EU Directives. Unless there has been some suggestion that the Appeals regime enacted in the Communications Act 2003 is somehow non compliant with EU law (and we are not aware of any such suggestion) then it seems quite clear that these reforms are not required by the Better Regulation

and Citizens Rights Directives but rather are considered desirable by the UK Government.

s.2(2) ECA sets out two purposes for which the power to make Regulations may be invoked:

- (a), for the direct purpose of implementing Community obligations and
- (b), for the purpose of dealing with matters arising out of or related to any such obligation

We believe that the proposed reform of the appeals regime could not reasonably be justified as being purely for the direct purpose of implementing the Directive. The amending Directive merely makes a minor wording change to clarify that the appeals body should have the appropriate expertise to carry out its functions effectively. The Framework Directive is amended in the following way:

Article 4 - Right of Appeal

*1. ... "This body, which may be a court, shall have the appropriate expertise available to it to enable it to carry out its functions **effectively**. Member States shall ensure that the merits of the case are duly taken into account and that there is an effective appeal mechanism."*

The reform proposed by BIS is altogether more radical, fundamentally amending the right of appeal against poor regulatory decisions. UKCTA believes strongly that a reform of the appeals regime would therefore be outwith the direct scope of implementing the Directive. The Directive has already been implemented and the UK has a compliant appeals system and the changes introduced in the amending directive are wholly unrelated to the changes now proposed by BIS.

Neither do we believe that the Government can rely on the power in s.2(2)(b), (the the power to make regulations "for the purpose of dealing with matters arising out of or related to any such obligations or rights or... the operation from time to time).

There is case law which establishes that regulations made under s.2(2) may make wider changes to the law than that which is required by the Directive² So were BIS proposing a right of appeal which was more extensive and yet consistent with the Directive that might be a legitimate use of the power. But that is not what is proposed.

The Directives now being implemented amend the existing requirements to strengthen appeals regimes in the Community. The appeals body must no longer merely have access to appropriate expertise, as was the case previously, instead it must itself have that expertise.

The BIS proposals, on the other hand, go the other way: they would tend to limit the appeals regime. As BIS puts it, "There may be a reduction in the level of scrutiny to which Ofcom decisions are subjected on appeal."³

² *R. v Secretary of State for Trade and Industry Ex parte Unison* [1996] ICR 1003 held that s.(2)(2)(b) could justify making a change to UK law by regulation which was wider than the change to law required by the directive if related to it. Confirmed by *Oakley*.

³ BIS document 'Implementing the Revised EU Electronic Communications Framework - Impact Assessment' September 2010, p.28

UKCTA believes that the proposed changes run in the opposite direction from those made by the Better Regulation Directive and they therefore fall outwith the legitimate exercise of the powers conferred by s2(2)(b).

While using the ECA powers to implement far reaching reform by means of regulations might be a bold and innovative way of achieving the reform advocated by BIS we fear that it would inevitably result in litigation - thereby creating a great deal of regulatory uncertainty. This would be a perverse outcome given BIS's stated objective of eliminating uncertainty.

There is a long history of legal challenges to the exercise of these powers due to vague wording in the ECA so it seems likely that ground breaking reform of the rights of appeal would be challenged given that it would weaken the rights of so many participants in the market.

We believe that the current situation has parallels with the case of *R. v Secretary of State for Trade and Industry ex parte Orange Personal Communications Ltd*, where the purported use of the power was successfully challenged. In the Orange case the Regulations in question were made under section 2(2) of the 1972 Act and they would have taken away rights which Orange had enjoyed under the Telecommunications Act 1984. The Court held that the Regulations were ultra vires, since they had failed explicitly to state that rights enjoyed under primary legislation were being taken away. The relevant Act provided clear rules for making amendments to licences. The Government claimed they needed to amend the licences to comply with a European Directive, but the new regulations did not specifically dis-apply the regime for amending the licences. It was found that the Government should have made it clear in the statutory instrument that the protections were being removed.

UKCTA believes that the Government's current proposals are vulnerable to challenge on the basis that scaling back the appeals regime does not further the essential aim of the Directive and that it undermines the objective of securing an expert body that can examine effectively the merits of the case. This would appear to be taking the UK in a different direction to that which the EU intended, and using the Directives as a device to do so.

4. Rights of Way

Rights of way, specifically wayleaves and easements are a critical component in the deployment of next generation networks. There is a widespread view, both here and in other countries, that broadband is now a vital part of modern life, akin to any other utility. In order to deliver the modern electronic communications networks which the UK economy needs, operators need a clear process with certainty around terms, timescales and costs in relation to rights of way. This can be achieved in the UK by amending the Electronic Communications Code.

We agree that statutory amendments are required to comply with Article 11. Earlier in the year, UKCTA presented BIS with a paper setting out key areas of the Code that desperately need reform. In UKCTA's view, the Code is simply unworkable, a view which has had recent judicial endorsement. The amendments required by Article 11 now present a perfect opportunity for BIS to implement the wider, much needed

reforms to the Code to best meet the needs of the UK in the 21st Century rather than continuing to rely on a regime drafted in the early 1980s. The communications industry, and our economy, has been transformed and the code as it stands is simply no longer fit for purpose.

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We agree that amendments to the timescales for securing rights of way are necessary. However, we believe 3 months, rather than 6 is a more suitable time period. This is consistent with the process for rights of way in the public highway under the New Roads and Street Works Act and the longest period acceptable to customers to wait for a network connection. Setting a time period greater than 3 months risks a return to the current position where an operators practical option to utilise the process within the Code is removed and costs inflated due to landlords awareness of the existence of ‘anxiety to settle’. We believe all right of way processes under the Code should be amended to a 3 month period. These provisions include rights of way under: paragraph 2 (the general regime), paragraph 9, (street works), paragraph 10 (overhead lines), paragraph 11 (tidal waters), and paragraph 12 (linear obstacles).

As set out in UKCTA’s briefing paper, we urge BIS to take this opportunity to make wider reforms to the Code and create a clear and workable process for land access rights. Although timescales are a significant issue, there are also other fundamental problems within the Code that need urgent reform. On a positive note, recent case law (see *Geo Networks Limited v The Bridgewater Canal Company* ([2010] EWCA Civ 1348) (*Bridgewater*) and *Star Energy Weald Basin Limited* and another *Star Energy v Bocardo SA* [2010] UKSC 35 (*Bocardo*)) give some useful judicial indicators as to a potential route for reform:

- **Consideration:** There is no clarity surrounding payments for rights of way under the Code. As a result, many landowners create ransom situations and refuse consent unless they receive inflated consideration. An operator may have alternative options to deploy its network but in the real world, it often faces practical constraints coupled with the knowledge that the judiciary procedure and its timescales are too uncertain. As result, many landowners exploit this uncertainty in order to obtain disproportionate consideration payments. The recent *Bocardo* case involved a similar right of way dispute between a landowner and an oil drilling company and overturned the leading Code case in relation to paragraph 7, *Mercury Communications Limited v London & India Dock Investments Ltd* [1994] 1 EGLR 229. In *Bocardo* the Supreme Court held that, in compulsory purchase situations, the Point Gourde principle applies. Under the Point Gourde principle, value is calculated by reference to the loss to the landowner, rather than gain by the operator. It also removes any value created by the scheme (in that case the oil drilling rights, in our case network rights under the Code). It also removes any ransom element or value from delay tactics or anxiety to settle.

Further to this, in the recent landmark Bridgewater case, the Court of Appeal held, under the Code that there is **no consideration payable** for a right to keep a network across a railway, canal or tramway. The Court recognised the sections of the Code where no consideration is payable, namely linear obstacles, public highway, overhead lines and tidal waters. The industry welcomes this result as it will serve to stop statutory operators of railways, canals and tramways exploiting what often amount to “statutory ransom strips” for disproportionate sums of money. This issue is just one of many areas where, to date, industry has debated the true meaning of the Code, particularly in relation to consideration payments. Rather than debate, we believe the Government could usefully provide a clear direction in a reformed Code.

UKCTA welcomes both the Bridgewater and Bocardo cases; however, they both serve to illustrate the need for reform of the Code. Indeed, for the Bridgewater case, the High Court judge said, in relation to the Code:

“In my view it must rank as one of the least coherent and thought-through pieces of legislation in the statute book.”

We believe that statutory amendments are urgently required to reinforce these recent Supreme and Court of Appeal cases, namely, clarify those sections of the Code where consideration is payable and those where it is not. Where consideration is payable, a schedule of rates should be included to benchmark fair prices and avoid ransom or delay tactics from landowners.

- **Unfair Contract Terms:** There is a lack of certainty around terms and conditions for rights of way under the Code. Similarly, many landowners impose restrictive terms on operators, which, in many cases, threaten the integrity of the network or the operator’s rights to access, alter or retain the network in order to provide electronic communication services. We would wish to see either the full terms, or template terms, introduced into the Code.
- **Infrastructure Sharing and BT’s Ducts and Poles:** While the Government and the European Commission promote infrastructure sharing, many landowners restrict sharing rights (usually as a tactic to extract additional payments from the operator). This creates a serious issue for operators and investors in open access networks. It also creates a potential conflict with the European State Aid Guidelines. A real life problem with this issue will become apparent with Physical Infrastructure Access (PIA) in relation to BT’s ducts and poles under Ofcom’s recent Wholesale Local Access (WLA) Market Review. BT has advised industry that operators who wish to use its ducts and poles must obtain their own wayleaves from every relevant landowner. This creates a significant level of unnecessary complexity and bureaucracy for operators, who will have to obtain duplicate rights of way across countless parcels of land. Unless the Code is quickly reformed, it will be a huge inhibitor for operators to use PIA efficiently. Given that the Code was designed (some 27 years ago) to facilitate the roll out of networks this would be a perverse outcome.

As set out above, we recommend template terms in the Code to allow infrastructure sharing without the need to agree duplicate wayleaves and without having to pay double consideration when the physical intrusion on the land is unchanged. Specifically in relation to infrastructure sharing, UKCTA believes that regulation should only apply where there is widespread control of economic bottlenecks. Regulatory measures to impose infrastructure sharing obligations on non SMP operators of privately funded networks would be disproportionate. In some cases a voluntary code of practice for infrastructure sharing might be effective (in particular for other utility networks) but it is essential that private networks are not regulated in this manner and retain pricing freedom in all respects.

The UK's regime for rights of way is now some 27 years old. It pre dates the Framework Directives and is no longer fit for purpose. Operators cannot rely on their rights under the Code as it is unworkable, a view shared by the Courts. The Government should seize this opportunity to reform the Code in a way which removes the obstacles to delivering on the Government's policy objectives in relation to next generation networks and superfast broadband.

5. Infrastructure Information Questions 3,4,5,6

UKCTA is sceptical about the idea that it is really necessary to compile a detailed inventory of the nature, location and capacity of all UK infrastructure. Our concern is that such inventory would ultimately serve only a very limited, if any, purpose for government policy-making in telecommunications. If any such exercise is to be carried out UKCTA believes Ofcom (and we would strongly recommend that only Ofcom would have the right to request this information) should carry out this piece of work in a realistic manner. Our concern is that an obligation to establish a network inventory becomes a goal in its own right and that Ofcom then tries to "gold-plate" the fulfilment of its statutory duty.

At the very least, we are concerned that Ofcom should ensure that the collection of the data is proportionate and is confined to the minimum necessary to achieve the objective of producing the inventory. Ofcom needs to ensure that it makes the best available use of other data sources such as the information it already receives from operators on a quarterly basis and that which it gathers through the various market reviews and other regulatory projects.

Finally, Ofcom also needs to ensure that providers are given reasonable timescales to collect the requested data and that the collection exercise is carefully coordinated with any other formal information requests from Ofcom in other policy areas.

6. Security

As we understand it, Government's approach to implementation of Article 13 is intended to be a relatively straightforward transposition of the Directive, with Ofcom being designated as the competent national authority. We have no quarrel with the approach taken overall, and would support Ofcom as being the most appropriate agency to undertake the responsibilities outlined. However, we do have a number of concerns about how the new powers may be applied in practice, as we believe that

they may form a new and unquantifiable source of regulatory risk to communications providers unless the powers granted are applied proportionately and are always subject to thorough consultation and debate, and an effective right of appeal.

The security and resilience of networks is obviously of key importance to customers and responsible CPs will plan and operate their networks so that their customers both understand what level of performance they can expect, and that this level is actually achieved. Both the Digital Britain report and the review of the EU Telecoms Framework that led to these proposed changes have identified the need to ensure that telecoms networks are secure and protected against malicious and inadvertent threats. In the light of both their increasing importance to the economic well-being of the country, and mounting evidence that this is perceived as a potential opportunity to do damage by malicious forces, we agree that there is a clear need for appropriate standards setting, monitoring and enforcement powers to be put in place for the appropriate government agency. We agree that Ofcom is the right agency to undertake these responsibilities, with appropriate liaison through relevant bodies such as NICC and NGNUK.

However, in exercising such powers, it is vital that the bar is not set higher than is necessary. Whilst the consultation document does not suggest how the thresholds required should be defined, and, indeed, notes that it is not, in the first instance, the intention for Government to prescribe the level of resilience in the network, nevertheless there is a danger of “creeping scope”. In our view, this is best avoided by tying the reporting and assurance powers to those already being implemented through existing parallel activities in related areas, and by encouraging the development and adoption of industry Codes of Practice for different service types. Only in the last resort should Ofcom use the powers granted to impose resilience and integrity standards, and this should always be subject to obligations to undertake full consultation on proposals and be subject to the same right of appeal as any other Ofcom decision.

We accept that the collection and reporting on risk assessments will be necessary to ensure the resilience of networks and the services that are provided over them. The key issue is whether such assessments should be within a unified framework, and, if so, what standard should be expected. Under current corporate governance practices, operational risk assessments should be the norm for most CPs and, in order to meet the requirements of ISO 27001 and BS25999, these need to be both robust and comprehensive. In the first instance, we believe that adherence to such standards and the visibility of subsequent reports to Ofcom should be sufficient for the purposes outlined in the consultation.

It should be noted that Government has already been addressing issues associated with security in an NGN environment, through the development of assurance processes for interconnection between networks and provision of services to most public sector users. The former is covered by the NICC ND1643 document “Minimum Security Standards for Interconnecting Communications Operators” and the latter by the CESG standard: Security Procedures Telecommunication Services and Systems July 2009. Together they form an important benchmark that may be used to derive equivalent, and potentially less onerous regimes for other service sectors. We welcome the recognition that different service and customer sectors will have

differing security and resilience needs, and would urge that the convenience of a “one size fits all” regime is resisted. In order to ensure that suitable guidelines and standards are in place in the required timescales, it would be useful if Ofcom could take the lead in requesting NICC to add a workstream item to its activities addressing this issue.

However, in the light of the immaturity of these standards, and the potential for “scope creep” previously mentioned, there is concern that the reporting and auditing regime required under the new proposals will represent an unwarranted step change in both complexity and cost to responsible CPs. Ofcom must maintain a reluctance to intervene and impose standards until such time as voluntary approaches have been exhausted and/or risk of significant consumer or economic harm can convincingly be demonstrated. There may be a need to marry work on agreeing performance standards with clear guidelines on their publication so that consumers, in particular, have a realistic understanding of what they should be able to expect to receive in practice.

Turning to the requirements on reporting, we would repeat earlier representations that sought to minimise any overlap with or duplication of the obligations of the Digital Economy Act. More widely, we would also welcome clarity as to how these new powers and responsibilities are to be integrated with the various existing “Network Security and Resilience” work programmes and policy developments through CESG, CPNI and EC-RRG, and also how they might overlap with the requirements of the Civil Contingency Act. We would also encourage Government and Ofcom to target reporting thresholds only on key service metrics that have a real effect on significant communities of users, and resist the creation of a “reporting conformance” industry that has dogged previous network performance schemes and delivered little, if any, benefit to consumers.

We note Ofcom’s intention of publishing guidance on the risk assessments, security standards and reliability metrics needed for compliance prior to the Amended Framework coming into force. We would urge both BIS and Ofcom to ensure that the process of developing this guidance is as open and transparent as possible and consults widely and effectively with CPs.

7. Dispute Resolution

UKCTA questions whether it is actually necessary to reduce the number of disputes. There is also concern about a blanket requirement to submit to ADR since there are many disputes which are simply not amenable to ADR and a requirement to add ADR will simply lengthen the process, increase the costs (and thereby add to regulatory uncertainty). If this is aimed at vexatious disputes then arguably there are already steps which Ofcom can take.

The proposal is vague and guidance is really needed as to what would be applied - for example the long overdue Ofcom guidelines on dispute resolution would be very useful to see!

If Ofcom is minded to make changes in this area, there is some sympathy for an approach that requires those raising disputes to pay for the costs, but this would **only** be justifiable where it was reflected in a commensurate reduction in the

administrative fees which CPs pay to Ofcom. Were such a change introduced we don't believe it would be appropriate to charge a party whose dispute was subsequently upheld. Would it not be more appropriate for Ofcom to seek to recover the funds from the party who was found to be in the wrong? It would be appropriate to set a maximum amount that could be recovered via this mechanism, as it would be unacceptable for any party to refer a dispute without having an understanding of the maximum cost consequences of the referral, particularly when they have no direct control over the costs.

UKCTA considers that the additional clarity as to the subject matter of disputes is welcome and is supportive of the Government's proposal to amend section 185 of the Act to reflect this. We also note the extension of the dispute process to companies that benefit from access and/or interconnection obligations under the telecoms framework. The Government has confirmed that these changes will expand the range of disputing parties to include disputes brought by non-telecommunications network and service operators where they benefit from framework obligations. This clarity is beneficial as it will provide greater certainty going forward to businesses as to the scope of Ofcom's dispute jurisdiction.

We also note the Government's proposal to introduce the "one step" beneficiary test to clarify which parties can bring disputes and to amend s.185 of the Act to reflect this. There appears to be some ambiguity as to who will be covered by this new test and whether it will extend to cover parties that, for example, use transit operators or other wholesale providers to obtain communications services. It appears that these parties will likely be communications providers and fall within the scope of the dispute provisions. However, we consider that additional clarification from the Government as to its specific proposals is required to ensure this class of disputant is not inadvertently classified as an indirect beneficiary and therefore excluded from the scope of the dispute provisions.

UKCTA is concerned by the Government's proposal to lift the current restriction on cost recovery for disputes. We consider that it is important for parties not to be deterred from bringing genuine disputes and this possibility could dissuade such action. Ofcom already seeks to refer potential disputes to ADR in appropriate circumstances and it is not clear that this proposal will encourage disputing parties to seek ADR. Parties do already consider ADR options and submit a dispute to Ofcom as a last resort when all commercial avenues have been explored without success.

Unfortunately the disputes which end up at Ofcom often involve multilateral relationships which are not well suited to ADR. We are not aware of ADR having been successfully employed in such scenarios. We believe that ADR is best suited to situations where there is a willing supplier and purchaser with terms which have been freely negotiated between the two.

We are also concerned that this process has the potential to result in double recovery of administrative costs by Ofcom and therefore suggest that any contributions towards dispute costs would have to be fully reflected in a reduction to the administrative charges levied across industry and that the necessary transparency ought to be given to this process. We do not consider that this cost recovery

proposal will provide the right incentives and sufficient encouragement for disputing parties to seek resolution of disputes through ADR.

UCKTA further considers that a better way to reduce disputes is for Ofcom to tackle areas of key industry concern which often lie at the root of disputes rather than focusing on areas where there is limited evidence that reform is required.

8. Q10 Disabled Customers.

UKCTA fully supports equivalence for disabled users and member companies take their existing obligations under Condition 15 of the General Conditions seriously.

We support amendment of the Communications Act 2003 to clarify Ofcom's power to impose a General Condition in relation to equivalence. However, we are concerned about the possible implications of the Government's comment that if Ofcom chose to impose the equivalence obligation by way of General Condition it will need to consider at the same time whether those measures achieve equivalent effect to an obligation on universal service providers, in which case it may be appropriate to remove the obligation on universal service providers.

The current universal service obligation on BT goes further than simply requiring equivalence in that it requires BT to provide funds for the operation of the Text Relay service, whereas the equivalence obligation in General Condition 15 is about, amongst other things, providing access to that service. The obligations are therefore not directly interchangeable and we would argue that unless an alternative means of providing Text Relay service is proposed it is necessary to retain both sets of obligations.

We would welcome early visibility of any changes which Ofcom proposes to make as a result of the new Framework provisions to ensure that we are able to comply with all relevant provisions when they become effective.

More generally, UKCTA does have concerns about the funding of the Text Relay service which we believe Ofcom should address when reviewing the General Conditions and Universal Service Obligations. While BT is obliged to fund the Text Relay service, the charges levied on other providers using the service contribute towards that funding. Charges are significant and the split of funding between BT and other providers is not particularly transparent to industry - in the past large increases in the wholesale charges levied by BT for Text Relay services have caused some concern for CPs. We stress that these charges are not passed onto customers but rather borne by providers.

We believe that there is very real merit in considering alternative funding models which extend beyond the communications industry and look to the wider business community. All businesses are subject to obligations under the Equality Act 2010 and we would therefore argue that it would be reasonable for the funding of services such as Text Relay to be provided by a wider range of businesses than simply communications providers as is the case at present. We are not suggesting any specific model and appreciate that Ofcom would not have the power to impose a wider obligation but believe that this is something which should be considered in any review of Text Relay services and recommendations made to Government as appropriate.

9. Minimum QoS

Article 22(3) of the Directives gives NRAs discretionary powers to impose minimum quality of service (QoS) standards in order to inter alia prevent degradation and slowing of traffic. The Government is proposing to implement the changes to Article 22(3) through a minor (but unspecified) amendment to the Communications Act.

As the Government highlights this provision is linked to the net neutrality debate. A minimum QoS standard is a potential remedy for addressing reducing network quality particularly where ISPs provide so-called managed services (i.e. prioritised services for certain content / content providers) and the 'best efforts' part of the service may suffer. UKCTA have two main comments on this: firstly around the need for a minimum QoS standard and second relating to the procedure under which it might be imposed.

UKCTA is very sceptical that such a measure would be needed in the UK given the highly intense nature of the market. If a customer considers that the service quality being provided by their operator is inadequate they can simply 'vote with their feet' and change provider. The market can and will discipline operators to act in consumers interest as it has done throughout the history of broadband. This lack of restriction of QoS standards has allowed considerable innovation and consumer choice with a vast variety of quality levels offered today (in terms of speeds, capacity and traffic management).

There are two necessary conditions for the market to work in consumer interests - transparency and easy switching. We are confident that both of these are or will be met. Several members are involved in developing a transparency approach through BSG and even though switching is reasonably easy Ofcom is currently consulting on improving it further.

Thus in a competitive market we see it as unnecessary to set minimum QoS levels since the market will ensure consumer interests are met. Any intervention is likely to restrict innovation by, for instance, precluding lower quality services that certain customers may want (for a lower price). A minimum QoS obligation could also effectively restrict the ability of ISPs to charge content providers for prioritised services - a practice that will (in a competitive market) be economically efficient in consumers' interests.

Regarding any procedure for introducing a minimum QoS level given the potential harm it could cause it is essential that it must only be introduced if it is objectively justifiable and proportionate. In particular a very clear case must be made as to the harm not having such a measure would have (e.g. by reference to evidence harmful practices existing in the market at that time).

10. GC4 999 Services

Since the nature and extent of the proposed changes to GC 4 are not set out in the consultation it is difficult to respond to this section of the consultation. UKCTA members have had some experience and discussions in this area and have held a number of workshops with 999 service providers to discuss the best way to achieve compliance in an IP environment. The current GC 4 is comprehensive and

technology neutral so it is difficult to predict the nature of the ‘minor change to calling location information’. Any change should be carefully considered to ensure that the requirements imposed on CPs are workable. UKCTA stands ready to work with Ofcom and to give the benefit of our experience to date in this vitally important area, however it is impossible to comment further until we further understand the nature of the changes which are being proposed. Is it envisaged that there will be a separate consultation on these issues given the absence of detail in the current consultation?

11. Porting

The BIS proposals appear to seek to maintain the current processes. While this stability is welcome, UKCTA questions how this will work in a fixed environment when we have a 10 day cooling off period. We also question how paragraph 210 would work in scenario where a CP has no porting agreement. End users now expect to be able to port their numbers when transferring providers and do not always appreciate that there can be significant delays, especially where no porting agreements are in place. It remains important that Ofcom is able and willing to intervene on those occasions where CPs occasionally wilfully refuse or delay implementing porting agreements.

12. Cookies

We would welcome clarification on how the Government can conclude in light of the recent infringement proceedings against the UK by the European Commissioner that maintaining the status quo with regard to the use of cookies will achieve compliance with Article 5(3) (Option 2). Going forward on this basis means there is a continued risk that the UK will again be regarded as having failed to fully implement its obligations under EU law. This may mean the UK will have to revise its position at a later date. According to a strict reading of Article 5(3), leaving the ICO to issue guidance and permitting subscriber browser settings to be read as consent or otherwise does not appear to constitute full implementation of the Article’s requirements.

However, from a commercial and practical perspective we acknowledge that full compliance with this provision would present challenges to the online experience for both businesses and users.

Therefore, if Option 2 is followed, an effective and constant campaign of subscriber education regarding their online privacy must be in place so that consent can genuinely be inferred from their browser settings. Additionally, those organisations using cookies and similar technologies must be reminded of both their confidentiality obligations under this Directive and the transparency, notice and fair processing requirements of the Data Protection Act where appropriate.

13. Question 14

UKCTA is concerned that industry does not currently have an adequate understanding of the steps which Ofcom will be undertaking to implement the new Framework. This is a key area for CPs and is it essential that we understand how and

when any changes will be implemented. For example, we understand that Ofcom will be consulting on revisions to the General Conditions and Universal Service Obligations which are necessary as a result of the new Framework however, we are unclear as to what the likely amendments will be. We are conscious that there may be changes which we will need to make to ensure compliance with any revised Conditions and are concerned that we will be left with very little time within which to ensure compliance.

Likewise, it is unclear what steps Ofcom will be taking in relation to other aspects of the new Framework, particularly where it has new powers. For example, is it Ofcom's intention to proactively consult on how it might use the power to mandate infrastructure sharing and if so when? How does Ofcom intend to use information gathering powers in relation to security and resilience?

These are key areas for industry to understand and on which it is vital there is early engagement with Ofcom yet there seems to be some reluctance on the part of Ofcom to clarify a work plan and timing. UKCTA would urge Government and Ofcom to provide as much detail as soon as possible and to take account of the time which industry will need to adapt existing business processes and systems to achieve compliance.

14. Information gathering powers and enforcement:-

UKCTA has concerns in relation to the Government's proposal to clarify that information requests made by Ofcom apply both to information that a company holds and information that it can reasonably be required to produce or pull together. Whilst this might be relevant where a company has firm development plans (e.g. further LLU exchange roll-out plans) it is certainly not appropriate for Ofcom to be able to require companies to pull together evidence or produce information pursuant to statutory information requests where there are legal consequences for non-compliance or the provision of misleading information where the information is not accurate or held. It is entirely conceivable for example that Ofcom could use this power to obtain market research on overseas markets from a foreign communications provider with a UK arm.

The burden on stakeholders in responding to information requests is already significant. Any extension of Ofcom's powers should be limited to where it is fully justified and a minor change to the information gathering powers to cover future network developments (as required by Article 5 of the Framework Directive_ in wholesale services should not be used as a basis for a wider change to the scope of Ofcom's information gathering powers.

We are also concerned by the Government's proposals to increase the level of the financial penalty for breaches of the information gathering powers. We consider that the current limit of £50,000 is already dissuasive. Ofcom has only issued one fine for a failure to comply with an information request - £30,000 to Prodigy Internet in November 2007 - and on this basis we consider that there is no justification for increasing the level of the fine. Were there a widespread problem then a case might conceivably be made for an increase but this is simply not the case.

UCKTA notes that the revised Framework makes a number of changes designed to streamline the enforcement process. In relation to the need for Ofcom now to only provide parties with a “reasonable time limit” to respond, whereas previously the period was one month, UCKTA considers that it is important for Ofcom to provide parties with a response deadline which is proportionate to the alleged infringement and in most instances, as now, a one month deadline would appear to be proportionate unless there are exceptional circumstance where more urgent action is required.

We are also concerned by the removal of the requirement to give a party the opportunity to remedy a breach before the imposition of a penalty. In this regard UKCTA notes that Ofcom is still to issue final enforcement guidance and that draft guidance has been in use for a number of years. We would urge Government to ensure that Ofcom initiates a new enforcement procedure consultation process at the earliest opportunity in order to provide stakeholders with the necessary clarity in relation to this revised enforcement process so as to ensure rights of due process are duly respected.

15. Conclusions

UKCTA is concerned that the consultation proposes reform without seeking opinion in some key areas. For example in relation to cost recover for disputes, the proposal has no associated question. We have of course offered our views on all matters of concern to our members but we feel that where significant reform is proposed, BIS really ought to have highlighted this and sought opinions from industry stakeholders.

As can be seen from our response above, we are far from convinced that BIS has presented sufficient justification for many of the changes proposed. In some cases the changes proposed are simply not required by the Directives and, in the case of reform of the appeals regime they actually run counter to what is required by the Directives.

We would urge the Government to consider very carefully the likely regulatory uncertainty which would result from many of the changes which they have proposed in this consultation.