

**GOVERNMENT RESPONSE TO EU  
CONSULTATION ON PROPOSALS  
FOR A REVISED REGULATORY  
FRAMEWORK FOR ELECTRONIC  
COMMUNICATIONS NETWORKS  
AND SERVICES**

NOVEMBER 2008

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## **Introduction**

This publication contains Her Majesty's Government's (HMG's) statutory response to a public consultation exercise which was launched on 10<sup>th</sup> June 2008 and ran for a period of 12 weeks. A copy of the EU proposals can be found at <http://www.berr.gov.uk/files/file46498.doc>

35 submissions were received from non-governmental stakeholders and a list of these can be found at Annex One. This response takes fully into account the views of this wide range of stakeholders, and the detail of Individual responses can be found at <http://www.berr.gov.uk/whatwedo/sectors/telecoms/2006review/page26449.html>.

Annex Two contains details of the wider consultative process associated with this review, including meetings held by BERR.

## **Consultation Methodology**

In the public consultation document, HMG

- summarised the proposals put forward by the European Commission;
- asked stakeholders a series of 15 questions based on the proposals; and
- for some of the proposals, put forward an initial HMG view.

This initial view was based upon existing HMG policy relevant to the proposals and was supplemented by an understanding of pre-existing stakeholder views on these proposals. It was on this basis that HMG began initial negotiations on the package, with policy positions refined later by the package outputs of those activities listed in Annex Two, and also in reaction to the as the proposals changed through the opening stages of negotiation.

## **Layout of HMG Response**

Stakeholders chose to respond to the consultation process either on a question by question basis or by responding in areas that were of most interest or concern to them.

Consequently this document presents the UK position in the following format. Each analysis of response lays out the consultation question, followed by a summary of HMG's original position on the policy area where applicable. This is followed by a representative consolidation of stakeholder views and concludes with the position HMG has now adopted as a consequence of the review process.

Responses are listed in the original order of the consultation document. No indication of priority or weight of response is suggested in the order topics are addressed.

# Analysis of Stakeholder Responses and HMG Response

## 1. Objectives, Priorities and Scope of Proposals

Q1. Do you have views on the overall objectives and priorities of the Review including whether it establishes the correct balance between national regulators and the European Institutions. Is there anything else you would have liked to have seen included in the proposals?

HMG recognised that the proposals formed an important set of European legislative instruments that sought to improve upon an already successful legislative package. HMG also believed that these proposals would result in further opening up of the European market to greater competition, leading to benefits to both consumers and businesses alike and was in line with UK's 'Global Europe'<sup>1</sup> agenda. As such, HMG was largely supportive of the Commission package but registered a number of concerns that we wished to explore in detail. HMG's original comments can be read in full in the Public Consultation document, which can be accessed at:

<http://www.berr.gov.uk/files/file46498.doc>

Stakeholders generally supported the overall objectives and priorities of the Review and agreed that the 2002 Framework had created greater competition in the market place and had also driven up the standards of service; benefiting both consumers and businesses alike. It was also recognised that a liberal and harmonised regulatory package permitted innovative solutions that, in turn, could enhance benefits to all citizens.

In particular, there was a keenness to ensure an appropriate balance between national and European regulation. One of the key messages received was the need for consentient implementation of the current framework across all European national markets. This was strengthened by support for fully independent National Regulatory Authorities (NRA). However, there was some concern over proposal for the "Authority", as detailed later. Further comments were made stating that NRAs were best placed to monitor their own markets and this could be undermined by greater centralisation.

HMG has noted the comments and concerns of our stakeholders and, on the whole, the overall support for the proposals; a position that HMG agrees with.

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<sup>1</sup> Global Europe – Meeting the Economic and Security Challenges - <http://www.fco.gov.uk/resources/en/pdf/global-economy>

## 2. Delegation of Powers to the European Commission

Q2. What do you think of the increased tendency in these proposals to delegate to the Commission the power to make detailed implementing legislation? These delegated powers are subject to so-called comitology procedures which allow the Member States, the Council and Parliament to exercise a measure of control over the actions of the Commission.

There was general opposition from stakeholders in granting the Commission further powers, as it was the general view that NRAs were much better placed to analyse, design, and implement measures when dealing with their own national markets.

There was some support for the proposed new implementing provisions for the Commission, but it was also suggested that these be subject to some form of comitology, or specifically, comitology with 'regulatory procedure'.

HMG's negotiating position reflected the concerns of stakeholders and has been seeking to limit the extension of Commission powers which are not subject to some form of comitology procedure.

## 3. The "Authority"

Q3. Do you agree with the proposal to set up a European Electronic Communications Market Authority ("the Authority")?

HMG was not initially convinced by the Commission's case for the "Authority", although we recognised that there could be benefits to be gained through potential reform of the institutional structures associated with implementation of the Framework. One method through which these gains could be achieved was the creation of an advisory body consisting of properly resourced, expert and politically independent NRAs.

Stakeholders put forward a wide-ranging series of opinions. Those in favour of the "Authority" saw the benefits in terms of being able to ensure greater consumer protection and in strengthening a Single European market. Those who were against saw it as a disproportionate and over-ambitious proposal, with no compelling arguments in favour of its creation.

Stakeholders also strongly supported the idea of fully independent NRAs. Later discussions with stakeholders also indicated to us that they were content with how the proposals in this area had evolved and how UK was influencing them.

HMG has argued in favour of a Board of Regulators supported by a small secretariat. This has been agreed by the European Council, but it remains to be seen whether this will be acceptable to the European Commission and European Parliament.

#### 4. Merge of the “Authority” with ENISA

Q10. What do you consider would be at risk if we combined European Network and Information Security Agency (ENISA) and the Commission’s “Authority”?

HMG’s initial response was to question the benefits of combining ENISA and the ‘Authority’. It was also unclear which of ENISA’s functions would be transferred and a potential implication of this could have been a reduction in the EU’s ability to deal with security issues.

Without exception, stakeholders objected to the merge of ENISA with the proposed “Authority”, with the majority of concerns centring upon the absence of obvious commonalities between the remits of the two entities.

Since the original proposal was adopted, and in response to the opposition from Member States and the European Parliament, the Commission have withdrawn proposals for ENISA to be incorporated within the Authority. ENISA’s remit has now been extended to 2012.

#### 5. Increased Commission powers of “veto” and imposition of market remedies

Q4. Should the Commission have the power to a) veto remedies proposed by national regulators and b) impose its own remedies to address market failures?

HMG supported the principle behind the proposals to strengthen the Commission’s oversight role and ensure consistent application of the Framework, thereby benefiting competition. However, we also believed that any mechanism, veto or otherwise, should be clearly focussed on increasing the adoption of established regulatory best practice (‘levelling-up’). Although, in practice, the consecutive use of a ‘veto’ would result in an imposition by default, we had concerns at the ability of the Commission to possess enough detailed knowledge of national markets to impose a remedy on their own initiative.

Once again, stakeholder views were split concerning this issue and mirrored those lines taken with regard to Q3 the “Authority”. Those in favour of the veto saw that this could lead to greater NRA consistency, whereas others put forward the counter view that this would not only undermine the NRAs but also ran counter to better regulation principles. Others supported the idea in principle but were concerned about loss of subsidiarity. One submission predicted that its use would lead to adverse and unintended consequences.

HMG continues to explore a compromise position whereby the Commission, if supported by the new “Authority”, could ‘veto’ a proposed market remedy if this is not consistent with proven regulatory best practice.

## 6. Functional Separation

Q5. Should functional separation be available to national regulators as a remedy?

HMG took the view that functional separation had been successful in promoting competition in the UK and saw benefits in other NRAs having this option available to them within this regulatory framework. We did not see any justification for the requirement for the Commission to grant consent for its use nor for it to be used solely as a ‘remedy of last resort’.

Stakeholder views were largely positive. One saw its use as a logical component of liberalisation. Those who expressed concern wanted to see it used either as a ‘remedy of last resort’ or with the necessary safeguards and provisos; others cited potential negative impacts on investment as being the basis for their concerns and linked this issue to possible future negative impacts on the funding of next-generation networks.

We continue to believe that functional separation can, where the specific circumstances merit it, provide an important method of improving competition. We have been pushing for these proposals to be retained in the package.

## 7. Spectrum Management

Q6. What do you think about the Commission's proposal to further liberalise the allocation of spectrum?

Q7. Is the proposal to give the Authority and the Commission powers to... allocate spectrum for pan-European services necessary and will it achieve its desired objective?

Our initial views were based upon our support for spectrum liberalisation and a market based approach to spectrum management. These principles are considered essential if EU consumers and businesses are to maximise the benefit from this valuable resource. We also agreed that when managing spectrum each Member State should retain the ability to take into account clearly defined public policy objectives.

Conversely, we were not convinced that there was enough supporting evidence to justify the proposals covering authorisation of undertakings for pan-EU services and were opposed to this proposal.

There was a high level of support for spectrum liberalisation, and for spectrum trading. This ranged from cautious support to those who saw it heralding and paving the way for increased competition. However, many of these stakeholders added the caveat that exemptions should be made for those services that were seen to have a high social value. Those that raised objections to these proposals did so citing a series of perceived negative impacts on their particular sector, including an increased risk of harmful interference. These calls were often coupled with requests for exemptions to be applied to the spectrum of most use to them.

With regard to the proposed powers to authorise undertakings to use spectrum for pan-European purposes, there appeared to be very little support amongst UK stakeholders for this proposal. Stakeholders questioned the necessity for such powers and referred to pre-existing mechanisms such as Article 95.

HMG continues to believe that spectrum liberalisation remains of great importance to the European economy and our negotiating stance reflects this.

Further, we are convinced that emerging proposals that would allow Member States to deviate from the principals of technology and service neutrality in certain cases (such as where there are important public policy considerations) will meet the concerns raised by various stakeholders. An example of this being radio and television broadcast services which are provided to meet a general interest objective.

HMG remains unconvinced by proposals for EU authorisation of spectrum for pan-EU services and have been adopting a strong line in Council against this.

## 8. Number Allocation

Q7. Is the proposal to give the Authority and the Commission powers to allocate numbers ... for pan-European services necessary and will it achieve its desired objective?

Stakeholders, whilst recognising the benefits to both consumers and businesses of this proposal, mostly focussed their comments on how numbers were currently managed. These comments have been taken into account in the response below.

In negotiations we have supported measures that benefit: consumers (proposals to permit Member States to block numbers where there is evidence that those numbers are associated with consumer scams – for example, services that use premium rate numbers to defraud consumers); businesses (ensuring that access to numbers is made available to service providers by Member States on a transparent, cost-orientated basis to support services like directory enquiries) and support innovative new services (NRA powers to allocate numbers to new services such as VoIP).

## 9. Consumer Proposals

Q8. Do you think the Commission's consumer proposals are appropriate?

HMG welcomed the consumer focus of the package. In particular, improvements in the level of information relating to prices and service which HMG believed would benefit consumers and lead to increased competition.

There was a general welcome for the proposals covering e-accessibility from stakeholders. However, this was tempered with comment from those stakeholders representing disabled users, who believed that such proposals still did not do enough to enable their constituents to benefit fully from access to telecommunication services. Further consideration appears in Para 14.

Clearer pricing and service information was welcomed by both businesses and consumers alike. However, both groups raised concern about 'information overload' and were also keen not to see an increase in associated administrative burdens and costs.

There was a general welcome for spam and the anti-spyware provisions but one stakeholder was concerned that the proposals on spyware may inadvertently impact on other security activities.

It was also in response to this question that some stakeholders raised issues relating to copyright (Para 15).

We have continued to support the proposals for price and service level information and have noted the concerns associated with both 'information overload' and excessive costs and burdens.

## 10. Minimum Security Standards

Q9. Is the proposal to impose and proactively enforce minimum security standards on e-communications suppliers the right way to address concerns about resilience and security?

HMG saw network security as an important issue and wished to see how the proposals compared with stakeholder views, in particular because the proposals constitute a significant shift in regulation in this area. HMG also had some concerns that the use of the word 'security' (as opposed to 'availability') could cause confusion and does not limit legislation to networks themselves but extends it to services and applications delivered through networks.

Some stakeholders saw self-regulation by businesses as a solution; the counterview was expressed that NRAs could set minimum standards. Conversely, NRA-originated solutions were seen as being too slow to be able to react in what was perceived to be a rapidly changing and evolving arena and this lag would itself create new security problems. One stakeholder went further and questioned the need for the proposals and others were concerned that formalising security standards would have little practical effect.

Stakeholders also saw an active role for users to play in ensuring network security and hypothesised that great gains were to be made from increased awareness of security issues amongst users.

It was clear there was considerable diversity amongst stakeholder views. We believe that some legislation will be inevitable. However, we remain convinced that a vague, and potentially wide-ranging, legislative approach is not the most effective way of addressing concerns about security and availability of networks.

## 11. Notification of Personal Data Breaches

Q11. In what circumstances do you consider that providers of electronic communications services ought to notify customers of a significant breach of security?

HMG recognised the benefits of consumer confidence when encouraging online trade and that any measures implemented should be proportionate and relevant.

These proposals were welcomed by both business and consumers alike who raised the same issues relating to both proportionality of response and the very real needs of avoiding both 'information overload' for consumers and excessive burdens on businesses. Such burdens were seen as being potentially disproportionate on smaller and new companies and may inadvertently stifle innovation and competition. Other concerns focussed on whether sectoral-specific legislation was justified or required and offered the view that existing data protection legislation was a more appropriate vehicle.

With general agreement across the range of stakeholders, we have continued to show support for measures that will ensure that consumers are notified when there has been a serious breach of personal data. HMG has also supported the amendments proposed in the European Parliament that focus on introducing an element of proportionality in how disclosure is determined.

## **12. Access to Emergency Services**

Q12. Do you agree that all users of a service offering outgoing calls should be able to access the emergency services?

There was very strong support for this proposal. Customer expectation was cited as a point in favour but it was noted that there may be a need for specific exceptions, such as 'click-to-call' advertising. Interestingly, the sole submission that argued against this proposal also cited lack of customer expectation, along with safety concerns and issues relating to technical implementation.

Other technical implementation matters focussed on caller-location information and how this would be implemented.

Those representing disabled users also put forward the view that the issue was not only limited to accessing the emergency services but also how that call was handled once connected.

We have indicated broad support for these proposals and have been actively seeking compromise; where we can take into account matters regarding technical implementation issues relating to 'caller location' and allowing certain exceptions, such as 'click-to-call' to a single number.

### **13. Privacy Provisions and Future Proofing**

Q13. Are the privacy provisions appropriately future-proofed?

It was recognised that the proposals were appropriate to meet current market conditions and were seen as important moves in the right direction, when considered against the vast amount of information being shared, processed and stored using technology. However, it was seen that there was a clear need to review these to keep pace with technological change; a period of three years, to coincide with that proposed for the Framework Directive, was suggested.

There was also concern expressed and a request to ensure that such provisions do not have an inadvertent impact on third-party relaying services, such as those used by disabled users.

The stakeholder views expressed have been noted and we are seeking to ensure that no inadvertent negative impacts arise from the proposals.

### **14. Provisions for Disabled Users**

Q14. What do you think about the new provisions to help disabled people?

We placed importance on the focus of the proposals on e-accessibility and disabled users within the package and saw this as a potential opportunity to close the digital divide. We aimed to achieve a practically useful outcome that would make a real difference to the lives of disabled users.

There was universal recognition that disabled users should not be excluded from being able to enjoy the benefits of a modern telecommunications sector where economic technical solutions existed.

However, opinion was divided on how to achieve this. Some stated that the market alone could not address such needs and there was a clear need for government to take a role or for greater levels of regulation. The counter-point was that over-regulation stifled both the market and innovation and these potential sources of solutions should be encouraged. Others wanted greater levels of enforcement of the existing and any new regulations.

Views with regard to extending the scope of the Framework Directive to include terminal equipment were mixed.

Others raised points that also related to the issue of access to emergency numbers. They stated that disabled people received a lower level of service or that this service was simply not accessible in certain instances.

Some disability groups put forward the view that the proposals did not go far enough to address their needs; with one commenting that the requirement to monitor and report on quality of service parameters was the only proposal of any real value.

It was also suggested by some business stakeholders that there appeared to be existing provision under the Disability Discrimination Act (1995) and noted that a self-regulatory code-of-practice had been in place in and adopted by some businesses in the UK since 2003.

Finally, the disability representative groups and others noted the clear link between these proposals and the review of the Universal Service Obligation (USO).

It is clear that there was quite a diversity of views with regard to ensuring that disabled users are able to fully benefit from being able to engage with telecommunication services. However, all stakeholders do recognise these benefits and HMG has continued to support proposals that meet our aim above.

HMG is also aware that these particular issues are closely linked to the forthcoming review of the USO and is committed to taking a full part in that review.

## 15. Other Comments

Q15. Do you have any comments about anything else in the proposals?

Comments received included concern over proposals to bring private networks within scope of the proposed legislative package and the impact of the proposals on domain-naming powers.

In addition, a number of comments were received concerning issues that, whilst strictly outside the scope of this Review, were of clear interest to stakeholders. In particular we received comments covering:

- **The Review of the Universal Service Obligation:** as covered in paras 32 to 34 of the Public Consultation document, we provided information on the proposed review of Universal Service Obligation. Several stakeholders, particularly those representing disabled citizens, expressed concern about progress with the review and were equally concerned that the proposals would be watered-down. We have noted these comments and await the proposals from the Commission. In the interim, the relevant policy officials have been made aware of the comments received.
- **Next Generation Access and Networks:** comments received included how new networks would be funded and operated (including issues concerning risk- and facility-sharing) and regulated (including any future impacts of the proposed new legislation contained within this package) and how this related to the i2010 strategy. These comments have been noted and will be considered alongside the conclusions of the on-going Ofcom review. Since the negotiations have got underway, we have seen proposals from some Member States and the European Parliament for these aspects to be incorporated within the current framework, and have drawn from these comments and followed up with those stakeholders who expressed an interest.
- **Copyright:** there was general opposition from stakeholders to the later additional proposals. We also received strong representation from various groups representing rights holders who were seeking to extend the remit of the Directives to include issues relating to copyright. HMG retained its view that the proposals and the current legislative framework were not the best way in which to address such matters and is currently consulting on a range of possible options to regulate on the specific issue of unlawful peer-to-peer (P2P) file-sharing. This is running in parallel with the industry's own Memorandum of Understanding (MoU) under which they are taking a three-pronged approach, namely: education on the importance of copyright; trialling a notification process of cases where unlawful P2P has been identified; and investigating possible means of tackling repeat copyright infringers. Our preferred option, as outlined in the consultation, is for the MoU process to produce a series of Codes of Practice which would be underpinned by regulation in a co-regulatory regime.

## **Next Stages**

It is expected that the negotiations on this package will culminate in a Political Agreement being reached at the Telecommunications Council to be held on 27<sup>th</sup> November 2008 under the current French Presidency. As noted in the public consultation document, this package is subject to co-decision and as such, it will be subject to a second reading in the European Parliament in early Spring 2009. During this period, it is expected that any remaining issues will be addressed under the Presidency of the Czech Republic. Once these stages are completed, the new legislation will then be implemented at a national level in all 27 Member States; with the implementation date likely to be late 2010.

## **Acknowledgements**

HMG would like to thank those stakeholders from all three sectors – public, private and third - who took part in the various consultation activities associated with this public consultation and the overall review.

## **Annex One**

### **List of Stakeholders Who Submitted Written Responses**

*Alliance of Closed User Groups*; ASTRA (GB) Ltd; AT&T; *Broadcasters Joint Submission (BBC, ITV, C4 & five)*; BT; C4; Confederation of British Industry (CBI); CENTR; COLT; Disability Groups - A Joint Submission (RNIB, RNID, Sense and Leonard Cheshire Disability); Ericsson; *EuroISPA*; European & International Rights Group; European Satellite Operators Association; Foundation for Information Policy Research; Hearing Concern; Institution of Engineering and Technology; Intellect; Mobile Broadband Group; *Motorola*; Motion Picture Association; Nokia; Orange; O2; PhoneAbility; RadioCentre; SKY; Skype; *Symantec*; TAG; Thompson Reuters; T-Mobile; Virgin Media; and Vonage.

Those stakeholders who asked that their response be treated in confidence (para 4 of the Public Consultation document) are indicated in *italic* text in the above listing.

### **List of Stakeholders Who Participated in the Bilateral Meeting Programme**

AT&T; Broadcasters (BBC, ITV, C4 and five); BT; Business Radio Council (Federation of Communication Services); Inmarsat; Intellect; Leonard Cheshire Disability; Motion Picture Association of America; National Consumer Council; Nominet; Royal National Institute of Blind People; Royal National Institute for Deaf People; Sense; Skype; Symantec; TAG; T-Mobile; Vonage; and Yahoo.

## **Annex Two – List of Stakeholder Consultation Events Associated with the EU Review of the 2002 Regulatory Framework for Electronic Communications and Services**

1. **Stakeholder Event** (BERR Conference Centre - 19 November 2007): a consultation meeting with UK stakeholders, held to present and consider the Commission's proposals for a revised electronic communications regulatory framework which were published on 13 November 2007. Over 60 people attended the meeting to learn more about these proposals. Activities included: a Ministerial address by Stephen Timms (then Minister for Competition) and presentations from BERR and Ofcom officials covering the proposals and a critical examination of options for European-level coordination of National Regulatory Authorities.
2. **Formal Public Consultation**: the written public consultation was published on the BERR website on 10<sup>th</sup> June 2008 and email alerts were sent to those stakeholders on BERR's Telecoms Stakeholder mailing list. The consultation formally closed on 3<sup>rd</sup> September 2008. A listing of those stakeholders who responded is contained in Annex 1. These responses can be viewed, except those who exercised their right for their response to be treated as confidential, on the BERR website at:  
<http://www.berr.gov.uk/whatwedo/sectors/telecoms/2006review/page26449.html>.
3. **Stakeholder Event** (BERR Conference Centre – 23 June 2008): a consultation meeting attended by nearly 100 UK stakeholders. The event had two main purposes: to highlight the launch of the Public Consultation document with stakeholders and provide them with an update on progress; and to allow open discussion on four main areas that were perceived to be of particular interest to HMG and stakeholders alike. These four main areas (spectrum, network security consumer issues and disability issues) formed the subjects for consideration by four focus-groups that later reported back to the whole meeting in plenary sessions. The outputs from these discussions were passed to policy-leads for consideration.
4. **Stakeholder Bilateral Meetings** (June to September 2008): stakeholders were invited to attend a series of bilateral meetings with BERR officials to discuss areas of particular interest to them; either to replace or supplement a written response to the public consultation document. This invitation was made at the June 2008 Stakeholder Event and then extended via an email alert sent to all stakeholders using BERR's Telecoms Stakeholder mailing list. A total of 17 meetings took place that proved invaluable in refining policy positions; a list of those stakeholders who took part in these meetings can be found in Annex Two.

Department for Business, Enterprise & Regulatory Reform

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