OFCOM'S DIGITAL COMMUNICATIONS REVIEW
- SECOND SUBMISSION BY THE CONSUMER FORUM FOR COMMUNICATIONS

WHO WE ARE & WHY WE ARE MAKING THIS SUBMISSION

The Consumer Forum for Communications (CFC) is a grouping of some 80 organisations and individuals representing consumers and citizens with an interest in communications.

The organisations include the Communications Consumer Panel, Citizens Advice, Which?, the National Consumer Federation, the Voice of the Listener and Viewer, and many disability organisations, while the individuals include academics and consultants with a particular interest in communications consumers. [As a result of staff absence, Which? did not have time to endorse this submission.]

The CFC is hosted by Ofcom but is independent of the regulator with an independent Chair.

On 12 March 2015, Ofcom announced that it is conducting a wide-ranging Strategic Review of Digital Communications (SRDC) and published the proposed terms of reference for this review. On 1 April 2015, the CFC made an initial submission to the review addressing specifically the suggested terms of reference. That submission set out our views on:

- timing and transparency of the review
- outcomes of the review
- scope of the review
- focus of the review
- linkages with the review
- conduct of the review
- next steps for the review

On 11 May 2015, Ofcom held a general stakeholder forum on the review attended by a number of CFC members. At the end of the presentation at this meeting, six general questions were posed for discussion. Then, on 18 May 2015, Ofcom held a roundtable on the review specifically for representatives of consumers and SMEs and again a number of CFC members were involved. At the end of the presentation at this meeting, four consumer-focused questions were posed for discussion.

We understand that the Strategic Review has now been renamed for some reason as the Digital Communications Review (DCR). This second submission by the CFC to the DCR seeks to address the ten questions posed by Ofcom at these two events.

THE SIX GENERAL QUESTIONS

1. **Are there 'enduring bottlenecks' and what does this mean for future competition?**

The CFC would want to state at the outset that the term 'enduring bottleneck' is not one that many consumers, or even all consumer organisations, would understand and the terms of reference for the review make no attempt to define or explain the term. If Ofcom wishes to engage meaningfully with consumers – in whose interests apparently this review is being conducted – it needs to ensure that all regulatory terms are made clear and ideally that a consumer-friendly summary of each public review document is made available.

As we understand it, an enduring bottleneck is a significant and ongoing limitation on the capacity of new entrants to join a market. In all sectors involving physical networks that connect with all homes in the nation (which include for example supply of gas, electricity, water, sewerage, and indeed telecommunications), the most formidable bottleneck is the network itself and more specifically the local part of that network.

In the fixed telecommunications market, this problem has been addressed in three main ways:

- allowing end users to maintain line rental from BT but use another company to carry their calls, a process known as carrier pre-selection (CPS)
- allowing competitors to use BT's local loops and BT's own exchange equipment, a process known as wholesale line rental (WLR)
- allowing competitors to use BT's local loops while deploying their own equipment at BT's exchanges, a process known as local loop unbundling (LLU).

In our view, these processes have worked well for consumers. According to the latest data (April 2015) from the Independent Office of the Telecommunications Adjudicator (OTA2):

- the number of telephone numbers using CPS is 2.04 million
- the number of lines using WLR is 5.58 million
- the number of LLU lines is 9.71 million
- the total number of BT lines not using BT for carrying calls is 17.33 million

When LLU was made available, many of BT's competitors made the necessary investments to take advantage of it. We understand, however, that now the overwhelming majority of unbundled local loops are operated by just two companies: TalkTalk and Sky.

Of course, LLU was a competitive remedy designed for the era of wholly copper local loops. Over recent years, BT has been rolling out fibre to the cabinet (FTTC) that required a different access remedy which Ofcom has called virtual unbundled local access (VULA). A key part of Ofcom's DCR will have to be an assessment of the effectiveness of VULA as a wholesale product.

As the CFC understands it, VULA is a very flexible product and the network architecture involved in FTTC – involving the grouping of BT exchanges - means that competitors to BT need access to fewer BT exchanges to reach any given percentage of consumers than is the case with LLU. This makes it an even more competitive model.

As recently as March 2015, Ofcom confirmed that it is content with the VULA margin and that BT is not margin squeezing.

But is VULA being used? The latest figures we have seen (September 2014) show that some 3.7 million VULA connections are in operation and that this number is increasingly rapidly. Around 2.7 million of these connections are used by BT Retail, but hundreds of thousands are used by TalkTalk and Sky. **The CFC would like to see up-to-date figures on VULA take-up.**

Meanwhile, take-up numbers do not make a clear case that "enduring bottlenecks" are the main barrier to effective competition and we expect that BT's competitors, in their own submissions to the review, will highlight if, in their view, there are still bottlenecks to be addressed.

Some might argue that Virgin Media's network should be opened to competitive access. We understand that BT will argue that there is a bottleneck in premium television services. **Ofcom will have to clarify whether these issues are in scope of the DCR.**

In the view of the CFC, the major issue for the review is not that there are enduring bottlenecks and limited competition, but that the current sector structure is still not delivering for consumers as they would wish and expect. Most especially, at every level – both wholesale and retail – and in almost every company, there are still major quality of service issues. This is a matter to which we will return again and again in this submission and in all our discussions around the review.

2. What does the increasing pressure of consolidation and convergence mean for regulation?

This review takes place at a time when BT is seeking to acquire EE and the mobile operators 3 and O2 are planning to merge, while reports have claimed that Vodafone and US cable operator Liberty Global are exploring a range of transactions including a merger, so consolidation is a reality. It is also taking place at a time when bundling of services has become commonplace (some 63% of consumers now take bundled services) and 'quad play' is expected to become an attractive market proposition, so convergence is a reality too.

Consolidation and convergence present a mixture of opportunities and threats for consumers.

On the one hand, these trends offer larger, more extensive networks and the convenience and lower cost of bundled services. On the other hand, they can involve short-term problems, such as the merger of networks, IT systems and customer service systems and more enduring issues such as reduced choice and more difficult switching.
Ofcom cannot control consolidation: mergers are a matter for the Competition & Markets Authority or the European Commission. Equally Ofcom cannot control convergence: ultimately this is driven by technology and markets. **What Ofcom can do is consider counter-balancing measures, including appropriate *ex ante* and *ex pos*t approaches, and empowerment of consumers at both the individual and market levels.**

3. **How can incentives for efficient investment be maintained and strengthened?**

As so often in regulation of complex and fast-changing markets, a balance has to be struck:

- Understandably today's consumers want to see prices kept as low as possible, but we need to balance low prices now against reliability and resilience of networks in the medium-term and quality and investment for the longer-term.
- Companies need encouragement to invest and time to obtain a reasonable return on such investments but, in such a fast-changing environment, there needs to be periodic reviews to ensure that returns are not excessive and competition is not discouraged.

Currently market reviews are conducted every three years and the SCR will need to consider whether this periodicity needs to be revisited and, if so, the arguments for and against any change.

There are two particular investment challenges: the first is how to take fibre to the cabinet (FTTC) to virtually all homes in the country and the second is how to make fibre to the home (FTTH) available to a growing proportion of the country.

The first challenge is currently being addressed by Government through Broadband Delivery UK (BDUK) and Ofcom will have to work closely with DCMS to ensure that the DCR aligns with relevant Government policy and aspirations. The second challenge may not be the subject of much discussion currently but, in the timescale of the DCR (which we hake to be up to a decade), it needs to be considered.

4. **How should our future competition and demand-side policy evolve across communications services?**

When Ofcom was created at the end of 2003, the overwhelming priority of its then leadership was the promotion of more competition. This focus on supply-side issues very much shaped the Strategic Review of Telecommunications (SRT) that took place from 2004-2005. Effectively the SRT had nothing to say on demand-side issues. Indeed at that time, Ofcom did not even have a Consumer Policy Team.

The CFC welcomes the promotion of competition but does not believe that supply-side policy is enough. We acknowledge and welcome the transformation in Ofcom's approach since it was first created: it is now much more consumer-focused and has an effective Consumer Policy Team. In recent years, it has put a growing emphasis on demand-side measures such as the provision of consumer information and changes in switching processes.
However, in spite of all these measures, the reality is, for all the competition and choice in the market, switching levels in the communications sector are lower than in other sectors and are actually declining. The last Ofcom Consumer Experience report (2014) showed that switching levels have declined since 2013 in all communications markets except digital TV. The largest decline was in the mobile market, down four percentage points since 2013 (11% in 2013 vs. 7% in 201410). Switching in the fixed-line and fixed broadband markets each dropped by three percentage points since the previous year (from 9% in 2013 to 6% in 2014). The total level of switching of the main TV provider remained lower at 2%, but statistically unchanged since the previous year (3%).

When the original terms of reference for the DCR were published, we felt that it concentrated much more on supply-side issues than demand-side measures, but the balance seems to be becoming better as the review unfolds. Measuring the effectiveness of competition is not just a matter of number of competitors or their market shares, but of empowered consumers exercising meaningful choices with a world-class range of options. **At the end of the review, we would like to see an effective balance and integration of supply and demand side policies.**

5. **How can quality of service be secured in future?**

The UK communications faces a major quality of service challenge. This needs to be acknowledged by the companies involved and addressed by Ofcom. QoS has to be addressed both short-term and long-term, quite possibly by different actions, which might even conflict with each other to some degree.

At the wholesale level, it is clear that the Openreach model is still not delivering fully for its corporate customers which in turn impacts on the quality of service offered to retail customers. Ofcom's Fixed Access Market Review (FAMR) of 2014 found that fault repair performance on LLU lines started at around 95% in April 2009 for BT Retail but fell to around 50% in January 2013 and started at around 88% in April 2009 for BT's competitors and fell to around 40% in January 2013. However, more recently there have been significant improvements. As a consequence of the FAMP, Ofcom imposed no less than 60 quality of services targets on Openreach and it is currently meeting all of them.

At the retail level, complaints are still far too high and the way they are handled by companies is still inadequate. For four years now, Ofcom has published an analysis of complaints regarding telecoms companies received by its contact centre (around 300 a day). This comparison exercise has been of real help to consumers and we commend Ofcom for this work. The data shows that some companies are still far exceeding the industry average in the level of complaints about them received by Ofcom.

But the complains that come to Ofcom's attention are a fraction of the number of complaints received by the companies themselves. Furthermore the number of complaints do not tell the full story of quality of service: how complaints are handled and overall consumer satisfaction with the company are just as important.
Starting with the wholesale challenge, the CFC has noted that Sky, TalkTalk and Vodafone have all argued that the solution to the QoS problems of Openreach is to move from functional separation to structural separation.

On the basis of current evidence and arguments, we are not convinced that the break-up of BT in this manner would be the best approach for consumers:

1. Unless BT agreed to the proposal, it would have to go to the Competition & Markets Authority and any inquiry would necessarily take time and consume managerial resources. Even if BT agreed to divest itself voluntarily of Openreach, this would be a complicated process that would take time. Consumers want improved service now and not in a few years time and they want BT's top managers addressing how to improve service and not how to split the business.
2. Structural separation would be a high-risk solution with very limited international experience to guide us. As we understand it, only Australia, New

Zealand and Singapore have adopted this remedy and, in each case, the context is rather different from that in the UK with public money involved in the investment in network infrastructure.

3. Above all, we are not convinced that structural separation is the answer to the Openreach problem which appears to be a quality of service one that BT seems to be addressing rather than a discrimination one. Furthermore we might reasonably expect that investments in fibre will help to improve QoS.

The DCR needs to consider all the policy options for improving Openreach's QoS and not simply focus on the separation option. Equally BT needs to step up to the plate and show that it can and will make substantial and sustained improvements to Openreach's QoS.

Moving on to the retail challenge, Ofcom needs to find an approach to QoS that goes beyond the complaints that come to its attention to embrace both all complaints and how those complaints are handled. **The CFC would recommend to Ofcom that it looks at the approach used by Ofwat with its Service Incentive Mechanism (SIM) which has now been operating for five years and has just been reviewed and revised.**

A major strength of the SIM is that it is based on outcomes rather than outputs which puts consumers in a stronger position by assessing their satisfaction levels with company performance. SIM uses a variety of both quantitative (25% of weighting) and qualitative (75% of weighting) measures.

Whereas SIM is mandated by Ofwat (since water companies are local monopolies), a comparable approach would probably not be mandated by Ofcom (since all communication providers face competition), but regularly publishing some sort of consumer satisfaction measure for all companies above a certain size would be more sophisticated than the current publication of complaints data currently coming to the attention of Ofcom.

6. What scope is there for future deregulation?

Too often, debates about regulation posit regulation as unhelpful and deregulation as beneficial. The CFC recognises that there are costs to companies (and therefore ultimately to consumers) from regulation, but there are also costs – sometimes spectacular – to consumers when regulation is inadequate. **We should not be thinking of 'light touch regulation' so much as 'right touch regulation'**. Regulation is often seen as a surrogate for competition, so that – all other things being equal – more competition suggests less need for regulation and less competition suggests more need for regulation. The trends in the communications sector to both consolidation and convergence do not suggest that competition is increasing, possibly the opposite, so that **we should be very careful not to rush to deregulation unless it can be clearly shown that the regulation to be abandoned is no longer needed or appropriate.**

As well as the appropriate scope of regulation, we need the appropriate resource for the regulator. In its Annual Plan for 2015/16, Ofcom stated: "The budget for 2014/15 was set at £117.0m, reducing the overall cost of regulation by 33.4% in real terms in comparison with 2010/11. This exceeds our original commitment to make total savings of 28.2% by 2014/15."

So Ofcom is now one-third smaller in resource terms than it was five years ago, even though its responsibilities have not decreased – indeed they have increased with the addition of regulation of postal services. **The CFC believes that an appropriately resourced regulator is essential for consumer and citizen interests to be both protected and promoted. Indeed the DCR might usefully produce some criteria for assessing what is appropriate resourcing.**

THE FOUR CONSUMER-FOCUSED QUESTIONS

1. **In a challenging environment, how can Ofcom continue to secure an appropriate degree of competition to the benefit of consumers, through both supply and demand side interventions?**

See answer to Question 4 above.

2. **Can regulation or wider public policy do more to promote widespread availability (beyond where private sector alone might go) whilst still promoting competitive outcomes for consumers?**

As we emphasised in our first submission to Ofcom on the DCR, it is not simply a matter of availability of networks and speeds, but also a matter of take-up of those networks and speeds plus the development of the skills and confidence to make best use of those networks and speeds. Again, as we pointed out in our earlier submission, it is vital to think of accessibility rather than simply access – we need to ensure that those with disabilities, whether blind or hard of sight, whether deaf or hard of hearing, whether of limited mobility, have equality of access to communications services so that all the other outcomes can be a reality for such consumers.

Ofcom could voluntarily adopt Part One of the Equalities Act 2010 – so, "when making decisions of a strategic nature about how to exercise its functions, have due regard to the desirability of exercising them in a way that is designed to reduce the inequalities of outcome which result from socio-economic disadvantage". At the moment, this part of the Act only applies to named public bodies but could and perhaps should apply to regulators and companies providing essential services.

Furthermore Ofcom's duties – as set out in Section 3(1) of the Communications Act 2003 - are about the promotion of the interests of citizens as well as consumers. Over the next five-ten years, one of the major developments in communications will be much greater use of online public services at both national and local level. Many of the social groups that make most use of public services include sections of the community that are either not on the Internet or are on the Net at low speeds or do not have the skills and confidence to use such online services with ease and efficacy.

Ofcom should be using the DCR to link up with wider public policy, including vital services such as health and education, to ensure that there are the resources and programmes to deliver digital services and widen and deepen digital skills and participation.

3. **What options are there for regulation to promote sufficient quality of service for end users?**

Throughout this submission, we have constantly come back to the central issue of quality of service. **Our collective objective should not be "sufficient quality of service" but best in class QoS and levels of service that genuinely meet customer expectations and wants.**

We acknowledge that customer expectations are high:

- This is partly because the companies themselves have driven up expectations with their marketing and advertising: "superfast", "ultrafast", "fastest", "up to", "largest", "cheapest", "no caps", "everything everywhere", "believe in better".
- This is partly because the technology itself is driving expectations as we see falling prices, increased speeds, increased capacity, increased functionality, and some truly transformative devices and services.
- This is partly because, at both an individual and societal level, we are becoming ever-more dependent on IT products and services, so network outages, network congestion, loss of signal, or expiry of battery life are not simply inconveniences but can seriously affect how consumers communicate, shop and work, how children can do homework, how citizens can access and use online public services, and how micro-businesses can compete.

Surveys show that the quality of service received by the majority of communications customers falls short of the best in class. In the Which? 2015 consumer satisfaction survey of broadband providers, none of the majority providers comes top: John Lewis and Zen are rated best. In the Which? 2015 consumer satisfaction survey of mobile operators, none of the majority networks comes top: both for contract and PAYG, Giffgaff and Tesco Mobile are rated best.

Twice each year, the Institute of Customer Service conducts sampling for its UK Customer Satisfaction Index (UKCSI). The latest data from January 2015 shows that Customer Satisfaction has dropped to its lowest level since 2010 and that John Lewis and Amazon come out on top for delivering high levels of customer satisfaction in 2015. The telecommunications & media sector is part of the general decline in customer satisfaction levels but should be aiming to achieve the sort of level enjoyed by Amazon.

In the latest UKCSI report, the telecommunications & media sector comes third lowest of the 11 sectors surveyed. The latest score for the sector is 71.6 compared to 72.1 in July 2014 and 73.3 in January 2014. As the report states, this is: "the sector which consistently generates the highest proportion of prob
customers." In short, benchmarked against other sectors, telecommunications & media is poor and becoming even worse.

4. **Is more required in other areas of regulation including end user protection?**

The CFC naturally welcomes any measures that can strengthen end user protection and empowerment. But empowering consumers as individuals can only go so far in a complicated and changing sector like communications. **Ofcom (and Government) would do well to think about how best to empower consumers through representative organisations that can make a meaningful contribution to regulatory debates – such as the DCR itself.**

In the field of economic regulation, there are broadly three institutional models for enabling a consistent and coherent consumer voice, which reflects the diversity of consumer needs, in any particular sector:

a) a body *inside* the regulator – for instance, the Communications Consumer Panel in Ofcom and the Customer Advisory Panel in Ofwat
b) a body *outside* the regulator – for instance, Consumer Futures (energy & posts), Passenger Focus (rail & buses), and the Consumer Council for Water (water & sewerage)
c) a body *inside the regulated company* – such as the Customer Challenge Groups (CCGs) in the water sector and the External Advisory Board in EE

Ofcom should consider as part of the DCR how each and all of these models could be strengthened in the case of the communications sector with particular reference to the following suggestions from the CFC:

a) Several years ago now, Ofcom decided to retain the Communications Consumer Panel (CCP) but to arrange cross membership with the Advisory Committee for Older & Disabled (ACOD) persons. At that time, the membership was reduced, the budget was cut back, and the staffing was curtailed. **It is time for Ofcom as part of the DCR to reconsider the resourcing of the CCP with a view to strengthening it, especially as regards staffing.**

b) When Consumer Focus was created from the merger of the National Consumer Council, Energywatch & Postwatch, it had a significant budget from BIS for work on the general economy, that is work beyond its specific responsibilities for postal and energy consumers. What was Consumer Focus – subsequently renamed Consumer Future – is now part of Citizens Advice and the Consumer and Public Services team of this organisation does some work in the communications sector, especially the mobile market. **As part of the DRC, Ofcom should invite Government to consider more funding for Citizens Advice to be more active in the communications sector across a wider range of markets and issues.**

c) The experience of CCGs in the water sector has shown that there is great value in having a standing consumer body embedded in the regulated company, able to engage with senior members of management on all the issues that matter to consumers on the basis of knowledge and trust. **Ofcom could not mandate such a model, but it could encourage companies in the communications sector to consider the creation of a consumer advisory body. It could publish information about the experience of different sectors with such bodies, convene a workshop to explore such models, and monitor progress on this proposal in the communications sector.**

Of course, funding is always an issue when considering recommendations for more resources. Recommendation a) would be a matter from Ofcom and would be funded by the fees it charges to the companies it regulates. The cost would be small and the benefit significant as the experience of the last 11 years of the Panel has demonstrated. Recommendation b) would be a matter for Government and the CFC believes that some of the fines imposed by Ofcom (BT has just paid a fine of £800,000) should be redirected by the Treasury. The fines reflect consumer detriment and it is appropriate that at least a small part should be directed to consumer empowerment. Recommendation c) would be a matter for companies.

Again the costs would be small and the benefits significant as shown in EE over the last two years.

As part of the DCR, Ofcom could implement recommendation a) and encourage Government to act on recommendation b) and companies to act on recommendation c).

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