



**Consumer
Focus**
Campaigning for a fair deal

Consumer Focus response to Ofcom's draft Annual Plan 2011/12

March 2011

About Consumer Focus

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

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

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

Introduction

Consumer Focus welcomes the opportunity to respond to Ofcom's consultation on its draft Annual Plan 2011/12. Since its establishment, Consumer Focus has been an authoritative voice on the digital and communications market and how it functions in the interests of consumers. We have paid particular attention to digital inclusion and how access to the internet can have severe social consequences for certain sectors of society, i.e. rural and low-income consumers as well as people with physical and mental impairments. We have actively been working on copyright enforcement in relation to peer-to-peer file-sharing since 2008. Previously, we submitted many consultation responses to Ofcom on topics varying from non-geographical calls, switching and net neutrality.

We aim to continue to champion consumers' interests in the digital and telecommunications sectors. Ofcom are right to draw attention to how consumers are using communication services with the broadening appeal of new technologies available on varying devices and platforms and the challenges that this indeed will bring to regulation. Ofcom's annual plan also mentions its proposed work following its assumption of responsibility for postal regulation envisaged under the Postal Services Bill; while it understandably gives few details of this we welcome the opportunity to share our postal expertise with Ofcom during and beyond this transition period.

We welcome and support Ofcom's ongoing commitment to working and engaging with stakeholders in the devolved nations. Consumer Focus Scotland, for example, have met and engaged with Ofcom Scotland regularly over the past year on issues such as broadband speeds, spectrum release, digital participation and switching. We look forward to continuing this engagement in 2011/12.

We also accept that Ofcom's proposed workplan is published at a time when the economy is making a slow recovery and raises challenges in the delivery of effective and targeted regulation while still striving to maintain value for money.

We have commented on both Ofcom's proposed priorities and work areas for 2011/12 and in doing so we have drawn on Consumer Focus's involvement and expertise in the telecoms policy area. We have also included suggestions of policy areas which Ofcom should pay attention to, given their principal duty is to further the interests of UK citizens in relation to communications matters as well as to promote competition within the communications market.

The areas we have commented on cover three of Ofcom's proposed priority work areas:

- Promote effective and sustainable competition
- Help communications markets to work for consumers
- Contribute to and implement public policy defined by parliament

Promote effective and sustainable competition

Promote competition and investment in the delivery of superfast broadband

In relation to Ofcom's proposed work to promote super-fast broadband competition and investment, we urge Ofcom in carrying out this work to focus on the particular needs of consumers in rural areas. These consumers arguably have the most to gain from super-fast broadband and the opportunities that it offers in terms of access to products, services and markets. However, we know from the roll-out of technologies such as basic broadband and mobile phones that issues of demography, geography and topography can lead to communications markets taking significantly longer to develop in remote rural areas. It is essential that the same pattern is not repeated in the roll-out of super-fast broadband, which must be seized as an opportunity to tackle, not exacerbate, the digital divide.

Despite continuing investment from super-fast broadband networks in specific areas and in new built-up areas together with £830 million committed by the UK Government from BBC licence fee and digital switchover funds, we have concerns that there will remain a large number of households who will not receive basic broadband speeds where there is not an economic reason to do so. We are also concerned that those citizens living in rural parts of England, Wales and Scotland will be left behind. We urge Ofcom to focus on those citizens' needs to ensure that they are able to access and participate in online services which are now increasingly provided in this way.

Help communications markets to work for consumers

Ensure communications providers deliver clear information so that broadband consumers can make informed choices

We welcome Ofcom's recent research which recommends if speeds are used in broadband advertising they should be based on a typical speeds range (TSR), so consumers have a clearer idea of what speeds to expect. Ofcom also recommends that the TSR must have at least equal prominence to any maximum 'up to' speed, and that a maximum speed must be used only if it is actually achievable in practice by a material number of consumers. Ofcom is also setting out what the TSR might be for each technology used to provide fixed-line broadband. We have previously issued statements on the confusion that consumers experience and the discrepancy between advertised broadband speeds and the actual speeds received. We look forward to continuing our engagement with Ofcom around the implementation of the voluntary codes of practice and with the Advertising Standards Authority who are consulting on how best to move forward on communicating broadband advertising in the least misleading way to consumers.

Spectrum release

On the clearing and release of spectrum, we ask that Ofcom considers how it can manage the release of spectrum to ensure that at least some of this vital asset is guaranteed to be used for the benefit of rural consumers who have generally been disadvantaged in the development and roll-out of digital communications technologies to date. As with super-fast broadband, it is critical that the digital dividend is used to bridge the digital divide and reduce the gap between those who have benefitted from the proliferation of a wide range of new digital technologies in recent years, and those who have regularly been left behind.

Switching

We support the work that Ofcom is planning to undertake to make it easier for consumers to switch and improve the information available to consumers. In addition to these key priorities we encourage Ofcom to continue its work in relation to the effectiveness of the redress systems in communications markets. We welcomed the changes that Ofcom announced in this regard in 2010/11, which will require all communications providers to adhere to the Ofcom Code and which will make it easier for consumers to find out about the redress mechanisms available to them. We urge Ofcom to monitor the impact of these changes during 2011/12, and if necessary to introduce further changes – such as requiring all providers to publish their complaints data – to improve the effectiveness of the complaints system for consumers.

Contribute to and implement public policy defined by Parliament

Post

Consumer Focus has a statutory duty to safeguard the interests of postal consumers in addition to having considerable expertise in the post and telecoms market.

With regard to taking on new functions in relation to postal services, we ask that Ofcom pays particular attention to the interests of rural consumers, and analyses and assesses the impact of any future changes to the universal service obligation (USO) within the context of the wider communications market. Specifically, we ask that Ofcom take account of the fact that any changes to reduce the scope of the USO in postal services are likely to have a more significant impact on rural consumers, who live in areas which are often more expensive and more challenging to serve. As highlighted elsewhere in our response these same consumers often have some of the poorest access to digital communications technologies. Therefore, it is absolutely essential that the impact of any changes to postal regulation are considered in relation to the context of other communications markets, and vice-versa, to ensure that the needs and interests of rural consumers are fully and properly protected.

Consumer Focus is actively engaged with the Postal Services Bill currently undergoing scrutiny in the House of Lords.

We have specific considerations with the Bill which are:

- The regulatory framework set out in the Postal Services Bill provides Ofcom with an opportunity to put consumer protection at the heart of a new regime.
- We recognise that Ofcom may not wish to commit itself too heavily to particular plans during the passage of the Bill but would have welcomed more detail of Ofcom's plans for the future nature and content of postal regulation.
- We have a close working relationship with Postcomm that we hope will continue with Ofcom during and beyond the transition of responsibility

One provision of the Postal Services Bill is the transfer of regulatory responsibility for postal services from Postcomm to Ofcom. We believe that Ofcom's wide experience of regulating across the communications sector has positive implications for postal consumers. As mentioned in the draft plan Ofcom will therefore need to prepare for its new duties in the postal market. The Bill endows Ofcom with a primary duty to exercise its functions in relation to postal services in a way it considers will secure the provision of the universal postal service. It will also need to have regard to the financial sustainability and efficiency of the universal service. A key change is that the Bill scraps the licensing regime and establishes an authorisation regime modelled on that in the electronic communications sector. The initial regulatory conditions imposed on postal operators after the Bill is introduced must be

substantially similar to the licence conditions that apply prior to the Bill's introduction, with the stated exception of consumer protection conditions.

This legislation represents a considerable new burden for Ofcom, but also the chance for it to broaden its horizon across the communications sector. Some of its new powers and duties include:

- designating one or more postal operators as universal service providers
- requiring information necessary to carry out its functions from current or former postal operators
- mandating access to postal operators' downstream networks
- setting out a universal postal service order detailing the services that must be provided in the UK and the standards with which these services must comply

This draft plan provides few details of Ofcom's likely approach to this incipient responsibility. We accept that, given the uncertainty inherent in the parliamentary process, Ofcom might not wish to commit itself too heavily to particular plans. However, we would be very keen to know more of Ofcom's proposed areas and methods of working once these have been considered. We have established a close working relationship with Postcomm and are keen to ensure that the benefits to consumers that flow from such a relationship continue. For example, in November 2010 we published the findings from joint research reviewing consumers' needs from the universal service. This work benefited from the combined input of both the technical expertise of the regulator and the consumer experience of the watchdog, which undoubtedly strengthened its conclusions and widened its audience.

One area of potential serious consumer detriment that Ofcom will be taking on is the procedures for complaint handling and redress. Currently, the complaint handling standards for licensed postal operators come from the Postal Services (Consumer Complaint Handling Standards) Regulations 2008, which require licensed operators to have in place a complaints handling procedure, including a publication requirement. The Postal Services Bill implements European Directive 2008/06/EC which extends consumer protections beyond the existing licensing regime to require all postal operators to have a simple complaints handling system. This will be provided for under conventional regulatory conditions; we have been informed that Ofcom will consult on the contents of these conditions between Royal Assent and vesting and then impose the conditions from vesting. **We are therefore keen to see further details of the proposed consultation, such as potential consultees, length of consultation period etc when these become available, and to input at the earliest opportunity drawing upon not only our expertise in the mail market but also our broader cross-sector knowledge.**

In terms of redress, the Postal Services Regulated Providers (Redress Scheme) Order 2008 currently requires all licensed operators to be members of a redress scheme. We have been informed that the current redress scheme will be maintained throughout the transition period, and it will be for Ofcom to ensure continued access to a redress scheme. Ofcom will have the power to require all postal operators to belong to an approved redress scheme, and it will be for it to decide whether that is necessary, taking into account its general duties in relation to consumers as set out in the Communications Act 2003.

Postcomm shares our concern that the existing complaints handling procedures, which are provided for under the existing licensing regime, do not provide sufficiently clear routes to consumer satisfaction and redress. We therefore see the new 'light touch' consumer protection conditions in the Bill as providing Ofcom with an opportunity to ensure its regulatory spotlight shines on those areas where it is most required. As such we are keen to share our postal expertise with Ofcom to ensure that any changes to the current system lead

to it being more consumer-centred. We are also concerned that the hard-won consumer protections enshrined in the current licensing system should not be lost in the move to reduce the legislative burden on postal operators promoted in the Postal Services Bill.

We know that Ofcom already takes its responsibilities to telecoms consumers very seriously. However, in some ways the needs of postal consumers are very different, partly due to the market structure. The telecoms market is a competitive market, with consumers enjoying the benefits that competition confers. However, competition alone is not sufficient to ensure that consumer protection remains foremost in the minds of telecoms providers, and we noted with interest Ofcom's published evidence showing that 'a significant proportion of consumers have a very poor experience when pursuing a complaint with their provider'. We welcomed its announcement that it will, as of July 2011, require telecoms providers to adhere to minimum standards for complaint handling procedures. As Ofcom states, 'providers' incentives to compete on the basis of customer service are not proving sufficient to ensure that individuals will receive satisfactory treatment from their provider when they try to pursue a complaint'. Residents and SME postal consumers do not even have the benefits conferred by competition, and they will soon be facing the situation that their postal service will be provided by a private monopoly. Ofcom's recent experience in regulating telecoms complaint handling will be vital during implementation of the new postal regulatory regime. This will require careful consideration to ensure postal consumers do not face similar detriment to that experienced by consumers in the telecoms market, with mandatory minimum standards considered only after consumers have suffered.

The move away from licences also affects other areas of consumer detriment. An issue of great concern to Consumer Focus is that Ofcom will not be required to impose essential conditions on postal operators. Essential conditions guarantee mail integrity – confidentiality, security, data protection etc – and as such is an absolute minimum requirement for an operator providing a communication and/or logistics service. We would like to emphasise the importance of mail integrity and would expect that it is given due consideration by Ofcom as we believe all postal operators must be required to adhere to essential conditions. Two additional licence obligations of particular value are mail integrity figures, and delivery and collection exceptions; data that under Royal Mail's current licence are provided only to Consumer Focus and the regulator and never made public. We therefore provide the only scrutiny in these areas and we believe that Ofcom should require provision of this information to it and to Consumer Focus (or any successor consumer representative organisation).

Copyright and the Digital Economy Act

In relation to Ofcom's planned work to take forward its responsibilities for implementing a number of provisions under the Digital Economy Act 2010 (DEA), specifically in relation to online copyright infringement, Consumer Focus believes that Ofcom needs to ensure that its work is in line with its general duties. Specifically, its general duty to: '*further the interests of citizens in relation to communications matters*'. We would also like to highlight that the DEA places an obligation on Ofcom not to approve the initial obligations code unless it is satisfied that the provisions of the code 'do not discriminate unduly against particular persons', 'are proportionate to what they are intended to achieve', and 'in relation to what those provisions are intended to achieve, they are transparent.' After nearly one year of work by Ofcom to draft an initial obligations code, Ofcom has yet to publish such an assessment.

We are also concerned that, to date, Ofcom has failed to give sufficient weight to measures designed to protect the rights and interest of consumers. In particular, we are concerned that Ofcom, in its draft initial obligations code, has not made the required provisions on 'the

means of obtaining evidence of infringement of copyright for inclusion in a report' and 'the standards of evidence that must be included', as required by the DEA. These safeguards were added into the then bill by parliament specifically to prevent large numbers of innocent people being accused of online copyright infringement. Parliament was mindful that the DEA process should not be abused by the likes of ACS:Law, but Ofcom has, to date, refused to make the required provisions on the means of obtaining evidence and the standard of evidence. According to the annual plan Ofcom intends to consult with stakeholders on 'establishing an independent body to hear subscribers' appeals against reports'. We would welcome such stakeholder engagement and we hope that Ofcom will focus its attention on engaging meaningfully with consumer representatives to protect the rights and interests of consumers.

Net neutrality

Our position is reiterated from previous consultation responses on the issue:

Consumer Focus response to the Department for Business, Innovation and Skills consultation on implementing the revised EU Electronic Communications framework <http://bit.ly/hP3kPQ> (PDF 398KB)

Consumer Focus response to Ofcom's discussion paper on Net neutrality and traffic management <http://bit.ly/i2qck5> (PDF 399KB)

We welcome Ofcom's plans to continue work on the issue of net neutrality and we recommend Ofcom looks into the area in the context of addressing switching barriers. We believe that the new transparency rule on the information on traffic management which will come into UK law under the provisions of the revised Framework Directive, although an important step towards ensuring consumers are informed about traffic management practices, alone is insufficient to prevent discriminatory practices. We recommend that Ofcom takes account of other factors that are likely to ease anti-competitive behaviour such as (1) switching barriers, (2) mobile termination rates (MTR), (3) complaint and redress mechanisms, (4) market surveillance, and (5) infrastructure investments. Typical switching barriers faced by consumers include contract cancellation fees, costs of setting up the new network in case of bundled services (eg software, equipment, installation costs), and time costs associated with informing third parties about new contact details (telephone number/and or email address). We are aware Ofcom is carrying out work in this area and we await its outcome in the hope that it will lead to a reduction in unnecessary obstacles to consumers.

In addition we also would like to point to the negative effect of high mobile termination rates (MTRs) that act as a deterrent to competition as they may limit the number of mobile broadband providers available and hence impact on consumers' choice. We support Ofcom's efforts to reduce MTRs over a period of five years. We believe that continuing reduction in MTRs is likely to reduce retail prices, drive competition and deliver investment in new services such as mobile broadband.

In parallel there is a need for easily accessible, low cost and timely complaints handling and redress mechanisms to facilitate consumers' complaints and to rule on redress in cases of detriment. This is particularly relevant to consumers in areas dominated by one service provider, or those who cannot afford to switch to a provider that offers better service quality at a premium price. According to Synovate research on consumer expectations of the internet, only 10 per cent of consumers in the UK were willing to change to a more expensive provider in case of traffic blocking or service limitation. Effective complaint and

redress mechanisms would work as a deterrent and provide incentives for companies to abide by the law.

We also recommend that Ofcom improves market surveillance and monitoring mechanisms in order to verify information on traffic management provided to consumers, and intervene if necessary. Network operators and ISPs should be obliged by Ofcom to justify intervention in the network.

Finally, and above all, we recommend that Ofcom considers examples of national regulatory authorities from other countries. Ofcom should engage with the development of net neutrality and traffic management co-regulations or self-regulations to prevent anti-competitive behaviour and safeguards consumers and citizens' access and choice to internet services.¹

International

Consumer Focus would welcome further details on Ofcom's policies with regard to the flagship EU Digital Agenda², including issues of digital single market, digital inclusion, net neutrality, USO and online consumer protection. As they stand at present they are not clear cut.

¹ Consumer expectations of the internet, Synovate 2009

² <http://bit.ly/dRSIaL>

Summary

Consumer Focus supports Ofcom's annual plan and makes particular comments relating to three priority work areas where we have common ground.

Consumer Focus reminds Ofcom of its principal duties to further the interests of citizens in relation to communications markets and urges the regulator to pay due attention to disadvantaged consumers, those living in rural areas in particular and those who may have a physical or mental impairment.

Consumer Focus looks forward to continuing engagement with Ofcom throughout 2011/12 to ensure that consumers are central to Government policies on digital and telecommunication matters. We also welcome the positive implications for consumers of Ofcom's forthcoming role as postal regulator, and look forward to working with it in this capacity to ensure consumers are at the heart of the new postal regulatory regime.



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