

**Broadband Stakeholder Group
Response to the proposals to
implement the new European Electronic
Communications Code**

September 2019

Broadband Stakeholder Group

Response to the DCMS Consultation on the implementation of the European Electronic Communications Code (Directive (EU) 2018/1972)

September 2019

The Broadband Stakeholder Group (BSG) is the UK government's leading advisory group on broadband. It provides a neutral forum for organisations across the converging broadband value-chain to discuss and resolve key policy, regulatory and commercial issues, with the ultimate aim of helping to create a strong and competitive UK knowledge economy.

Executive Summary

The Broadband Stakeholder Group (BSG) welcomes the opportunity to respond to the DCMS consultation on implementing the European Electronic Communications Code, which updates the regulatory framework governing the telecoms sector across the EU.

We welcome that - at the core of this revised Directive - is the intention to incentivise investment in very high-capacity networks, support the roll-out of 5G, and protect and engage consumers. The right policy and regulatory framework must be in place to provide the support for industry to deliver on the targets set by Government - be they those of the 2018 Future Telecoms Infrastructure Review¹ to see nationwide full fibre coverage by 2033 and 5G coverage by 2027 - or the more accelerated deployment rate currently being discussed. Whichever timeframe, the road to roll out is far from smooth, and whilst we support the EECC's aspiration to maximise investment in very high networks through competition, we hope that the UK Government takes advantage of all the opportunities available to ensure that industry is able to benefit from a new regime and Ofcom granted the tools necessary to embed the policy direction in their regulatory strategy.

To reach nationwide full fibre coverage by 2033 will require a roll-out rate of two million premises a year for the next seven years. The Government intends for private sector investment to deliver the majority of these deployments, as it did for our superfast deployment. We welcome this endorsement for a competitive

¹ <https://www.gov.uk/government/publications/future-telecoms-infrastructure-review>

digital infrastructure landscape, along with the implicit backing for a suitable investment environment to support such deployments and believe this should continue to be a goal for both Government and Ofcom as the full-fibre roll-out progresses.

Connectivity is not just about connecting premises but recognising that a digital infrastructure that works for the UK is one that is truly seamless. Consumers and businesses alike are demanding higher coverage levels and better-quality connections – be it at home or on the move, which in turn requires a more far reaching and more resilient stable communications network.

Delivering these ambitious objectives will require innovative market solutions beyond those that we currently utilise. The new European Electronic Communications Code is important to facilitating these within a broader principles-based framework. Where the revisions to the existing UK legislation, underpinned by the EU framework of a decade ago, seek to enable Government to provide Ofcom with the means and support to ensure that the market conditions are conducive to industry investment, we wholeheartedly support the approach adopted by DCMS. To succeed in delivering nationwide roll out, it is vital that Government and Ofcom policies are aligned, and even as the UK prepares to leave the EU, the legal and regulatory certainty provided by the transposition of EECC is paramount, regardless of the terms of the UK's ongoing relationship. As a general principle, notwithstanding the details in the response, the UK should not, when transposing the legislation, seek to either strengthen or weaken what is in the EECC and risk losing any of the carefully nuanced drafting.

That being said, we would like to note that this response is submitted on the proviso that the UK Withdrawal Agreement is ratified. In a no-deal Brexit scenario we expect the Government to re-consult.

Finally, we note that once the UK has left the EU, with or without a deal, the European Commission will no longer have oversight of Ofcom. We would appreciate further discussions with Government over who will be best placed to fulfil that role.

We set out our thinking in greater detail below in our answers to some of the questions.

1. We propose that Ofcom’s regulatory actions must reflect the benefits of future-proof networks.

To what extent does this approach support objectives set out in the Future Telecoms Infrastructure Review, for 15 million premises to be connected to gigabit-capable networks by 2025, with nationwide coverage by 2033, and 5G deployment to the majority of the country by 2027?

We strongly support the proposal that Ofcom’s regulatory actions must reflect the importance of future-proof networks. Both the EECC and the FTIR have the common goal of boosting investment in ‘Very High Capacity Networks’ (VHCN), independent of the technology, and therefore Ofcom’s actions should apply to VHCN’s regardless of the mode of delivery – be it wireless infrastructure or fixed broadband. The working definition of a ‘Very High Capacity Network (VHCN)’ as set out in the EECC, whilst it doesn’t mandate technologies, is acceptable, and we welcome Ofcom’s continued inclusion in the current work being undertaken by BEREC on providing guidelines on criteria to be considered a VHCN.

Of the two options that Government sets out, we would generally advocate the technology neutral approach that Option 2 provides for. We would however welcome clarity on the distinction between the two approaches, for example, the meaning of ‘certain technologies’ under Option 3 is unclear to us. We would prefer that the approach remains an outcome-focussed one, and that there is not scope for a winning technology to be picked. We therefore do not consider that the Government has made the case for Option 3 and that Option 2 provides sufficient direction to Ofcom.

Option 3 also specifies that Ofcom must ‘*aim for the highest capacity networks and services economically sustainable in a given area*’ and we would question how this fits with existing Government policy of providing fibre for all. We agree however that the build out of fibre for 5G backhaul should be incentivised, i.e. that Ofcom should regulate fixed networks in a way that supports the rollout of 5G and encourages investment by all potential investors – both the challenger networks as well as the incumbents. Different commercial approaches have the potential to see hitherto unseen levels of investment in traditionally challenging areas – be they indoor networks or the rural and remote.

2. We propose that Ofcom must conduct an annual forecast of near and medium-term broadband network reach, which it will have to publish to the extent that it is non-confidential.

What are the main benefits and risks this presents to accelerating the pace of commercial broadband network roll-out?

In principle we support greater transparency mechanisms and measures that may allow Ofcom to reduce uncertainty and Government to define precise actions to make areas more commercially viable whereas otherwise they would be at risk of no investment.

However, the costs and burden on resources in another request for information from operators should not be minimised, and the value of the exercise if a build that might be viable on paper, is not viable in reality. There could be scope for Ofcom's information-gathering processes – including Section 135 requests and data required for the Connected Nations exercise – to be aligned to minimise burdens on industry.

There is also a competitive threat, whereby the publication of intentions may undermine the case for build. These concerns need to be addressed by Ofcom in a future consultation.

3. We propose that Ofcom must share with Government all information that it collects through the survey and forecast process of article 22 of the EECC.

What should Government take into account when implementing this requirement?

In conducting the survey, Government should be mindful of the costs involved and the level of investment that would be required. There are external factors to consider which may create barriers, such as geological, environmental, planning, and political considerations. There is also a risk that areas that are non-viable for commercial or reasons mentioned above, are designated.

There are concurrent activities underway to achieve the same goal, such as Physical Infrastructure Access (PIA), still currently in its infancy, and the work of the Barrier Busting team. As such measures begin working, more areas should become commercially viable.

However, that being said, we are not yet convinced of the necessity for Ofcom to share all information with Government, and that further discussion about what information should or could be shared and how is necessary.

4. We propose that Government has the power to designate areas where there is no planned coverage of gigabit-capable networks, and clarify deployment plans in these areas, per the process set out in article 22 of the EECC.

To what extent do you agree that this will provide the right tools for Government to address problems associated with investment hold-up in

areas where the business case for gigabit-capable network investment is uncertain?

We support the new powers to designate Digital Exclusion Areas, however there are concerns on the risks of Government, should it be responsible as set out in Option 3 for designating the areas, allowing the process to become overly politicised and would welcome further discussion as to how Government proposes to remain independent and use objective criteria.

Option 3 could potentially deliver larger positive net value but at a higher cost. The direct benefits to businesses and overall investment from decreased market review cycles are coupled with the costs of conducting detailed network mapping and forecasting. This could change if the costs of option 3 are revised.

5. Article 29 of the EEC would enable the relevant authority to impose penalties on providers that knowingly or grossly negligently provide misleading, erroneous or incomplete information when invited to declare an intention to deploy in a designated area and does not provide objective justification for a change of plan.

How do you think the prospect of penalties will affect how providers act when invited to declare their intentions?

Given the considerable costs and complexity of navigating planning involved in the deployment of communications infrastructures, plans and forecasts are susceptible to change for many different reasons – many of which will be beyond the control of the operators. Whilst on paper a network build may be viable, once on the ground, the geographic conditions may pose unforeseeable complications, or a pedantic Council may inadvertently impede full roll out across the originally planned area.

The potential risks of penalties being imposed could create the conditions that undermine build plans and incentivise under-forecasting. We do however recognise that penalisation may be appropriate where information is deliberately misleading or inaccurate.

12. Do you have views on the appropriate competent authority for different spectrum management tasks?

Spectrum management tasks should remain under the remit of Ofcom, and in line with its powers under the Digital Economy Act 2017 and publication of the Statement of Strategic Priorities for telecommunications, the management of radio

spectrum, and postal services² DCMS should set the strategic direction for spectrum policy.

In general, DCMS and Ofcom should ensure that they harmonise measures and procedures for spectrum management and support the efficient and effective use of spectrum, whilst promoting competition and the timely roll-out of 5G services and widespread availability of mobile connectivity.

13. Do you think that a 'use it or lose it' mechanism would promote spectrum trading, prevent under-utilisation, enhance mobile coverage, and/or mitigate barriers to entry?

There is not a clear consensus amongst the BSG on this question.

A 'use it or 'lose it' mechanism would not necessarily be useful to achieve these objectives in every instance and could potentially frustrate these very aims. It may be relevant for specific scenarios – such as low-cost area licences, but not for national spectrum licences subject to market-based spectrum awards and secondary trading. Ofcom anyway already has the ability to include 'use it or lose it' conditions for all types of licences where it considers this appropriate; the new EECC does not require any specific new national measures.

A specific example of where the inclusion of the 'use it or lose it' provisions could prove important is in the making shared spectrum available in the 3.5GHz mobile bands on a lightly licensed basis to support alternative network investment models (including rural fixed wireless access and neutral host indoor networks).

14. In relation to any 'use it or lose it' mechanism, what do you consider would be the best measure of the 'level of use' of spectrum? Beyond 'level of use', what other conditions should be considered when designing a 'use it or lose it' mechanism?

We don't generally see a need for 'use it or lose it' conditions for market-based spectrum management. Where exceptionally Ofcom may decide that such a condition is needed, it would need to be defined to reflect the specific scenario.

15. Do you agree with our preferred approach for 'use it or lose it' to be applied to future mobile spectrum licences only? If no, please provide any supporting evidence.

No, to the extent that 'use it or lose it' obligations are appropriate at all, we don't think that future mobile licences should be the subject of particular focus.

² <https://www.gov.uk/government/publications/statement-of-strategic-priorities>

Use it or lose it obligations applied to future national mobile spectrum licences would have a number of drawbacks including a chilling effect on willingness to invest in spectrum to deliver new services and a barrier to spectrum trading. In addition, it would be challenging to define and measure required use and would not reflect the fact that some legitimate business cases, representing the most efficient use of the spectrum, may involve delay between spectrum acquisition and widescale use.

17. Is there a market demand for the 26 GHz band for 5G? (yes/no)

If yes, please provide any supporting evidence and give an indication of timing.

Yes, this is one of the three pioneer bands identified on a European basis that would support the delivery of 5G services that require the highest data rates and provide capacity in locations where there is a very high density of users. The band is included in relevant 3GPP specifications for 5G New Radio and is implemented in chipsets for 5G devices.

18. What do you estimate the total value of making available the 26.5-27.5 GHz spectrum band for 5G services in the UK to be?

We have not undertaken an independent calculation but note that the GSMA study referenced by Ofcom is a useful source of evidence, albeit not specific to 26GHz spectrum alone.

19. What do you estimate the total value of making available the whole 26 GHz spectrum band for 5G services in the UK to be?

Making the entire band available for 5G rather than just 1GHz will better support multiple operators who want to each deploy the highest channel bandwidths to enable the best possible experience to be provided in locations where it is needed.

20. Under what circumstances should roaming obligations be imposed to improve coverage or support network deployment?

There is some divergence of opinion within the BSG sponsorship base as to how best to improve coverage or support network deployment.

The MNOs are already working together to improve coverage to 95% under the Shared Rural Network (SRN) proposal. Under the SRN programme, all MNOs would share existing sites in partial not-spots (PNS) and jointly provide coverage from new-build sites in total not-spots (TNS) and planned Extended Area Service (EAS) sites. This would increase individual MNOs' 4G coverage to 92% of the UK geography and collective 4G coverage to 95%, consistent with Government's stated ambition. The cost to Government of an SRN would be a fraction of the cost of the coverage obligations proposed in the auction consultation. Importantly, the

SRN would improve competition and quality of service for all customers, as all MNOs would benefit from increased coverage, rather than two if Ofcom proceeded with coverage obligations.

Mandating roaming risks creating inefficiencies for the management of the network (as complexity and cost are added at the edge of the network) and the arising uncertainty could damage the appetite for investment. One solution available is the use of independent infrastructure.

25. Do you agree with the Government's proposal for Ofcom to set up a comparison tool to comply with article 103(2), which will not require new legislation, in the unlikely event that a single comparison could not sign-up to Ofcom's voluntary accreditation scheme, that will be amended to comply with article 103(2)?

Whilst in principle we support the principle of a comparison tool set up by Ofcom, as a last resort, we do have concerns over this transitioning over into asking for ever more information and increasing the burden on businesses. It would be preferable to allow current providers the opportunity to meet the requirements of the article.

26. Do you agree with the Government's approach to implementing Article 107 by granting an express power to Ofcom to enable it to regulate communication bundles which include non-communication services?

The extension of Ofcom's powers to include non-communication services where they are included as part of a bundle does, as pointed out in the consultation, make for regulatory clash conditions. Whilst bundles including other utilities are not commonplace today in the UK, the risk that should one part of the bundle fall foul of Ofcom's rules, that the end-user would be able to cancel the entirety of the bundled services poses a real threat to future innovative products and offers.

It should also be noted that some communications providers whilst not offering services from other utilities within a bundle, do incorporate special deals and partnerships with other companies operating within a similar sphere. There is a risk that if end users retain the right to cancel all the package should one part not comply with the requirements, that the motivation for communication providers to form these partnerships is removed and ultimately the end-user lose out from not having access to special offers.

The extension of regulations under existing General Conditions to the entirety of bundled offers would also likely result in significant costs - costs that haven't been justified and haven't arisen as the result of consumer harm nor necessity.

28. Do you agree with the Government’s assessment that the potential for Article 107 to create ‘regulatory clash’ is limited at the current time? If not, please provide evidence and any views on how these could potentially be addressed.

As stated in our response to Question 26, whilst the offers of cross-utility bundles are currently not commonplace in the UK, it would be unfortunate if the threat of regulatory crash impedes something that may be a natural step commercially. We do however disagree that Ofcom should be granted powers to regulate industries outside its current remit, just as we would have concerns if the regulatory powers were granted reciprocally. The relevant regulator of the sector should have the mandate.

The water, energy and telecoms sectors however whilst not inherently linked, could benefit from greater collaboration amongst the regulators. This could, as set out in the Government’s draft Statement of Strategic Priorities for telecommunications, radio, spectrum and post³, include Ofcom working with other regulators – for example through the UK Regulators’ Network – to facilitate access to the passive infrastructure owned by other utilities and the transport infrastructure providers and addressing the barriers to access without losing sight of the fact that whilst it may be possible to make use of other infrastructure to deliver telecoms services, many assets associated with energy or water have significant restrictions on use given safety considerations etc.

29. Do you agree that it should continue to be for Ofcom to consider affordability as part of the broadband USO and, if they identify an issue, to take the appropriate action, e.g. through the implementation of a special tariff?

We agree that Ofcom should consider affordability as part of the broadband USO, but that any subsidies for individuals should come from government budgets.

The provision of social or special tariffs should in addition not be imposed on non-Universal Service Providers. Special tariffs are already offered by many providers and there are requirements under the existing General Conditions to have policies and processes for vulnerable customers. As such, we feel that additional requirements on providers would be unnecessary and an intention to solve a problem that doesn’t exist.

30. Do you have any concerns about any of the articles not explored in this consultation document? (Yes/No/Don’t know).

³ <https://www.gov.uk/government/consultations/public-consultation-on-the-statement-of-strategic-priorities>

Yes.

If yes, what are your concerns?

Article 61: This represents a significant departure from the current Access Directive. Whilst we recognise that there is little discretion as to how this Article is transposed, we would welcome clarity from Government as to which regulator will be in charge of the process (Ofcom or another).

Article 76 (voluntary access and co-investment commitments): Ofcom is granted the discretion to consider additional criteria when assessing commitments, and whilst this is referred to in the consultation document there are no specific questions. We would support the proposal under Option 3 (page 24) which would require Ofcom to consult prior to introducing additional criteria.

Article 81 (migration from legacy infrastructure): the stipulations around transparency of timetabling and conditions, 'including an appropriate notice period for transition' should not be allowed to become overly prescriptive and risk not allowing networks the flexibility to deliver their objectives in line with their commercial plans.

The switching process - to enable customers to smoothly move between both networks and providers - is an area that is currently being examined by industry as well as Ofcom and Government. Industry is working to ensure that the process is aligned with policy and regulatory goals, and that ultimately the customer's needs and wishes are accounted for in the smoothest possible way throughout the switching process. It is incumbent upon Ofcom to show leadership and clarify the requirements and limitations and ensure that the approach adopted by industry is both cohesive and user friendly.

Article 83: Ofcom shall not apply retail control mechanisms under paragraph 1 of this Article to geographical or retail markets where they are satisfied that there is effective competition. We support this.

Security and Resilience - we are unclear as to how the EECC links in with the Supply Chain Review recommendations to bring in legislation and would welcome insight as to how these will work together.

Definition of Electronic Communications Services: This is touched on very lightly in the consultation. Electronic communications services are divided into number-based and number independent services in the legislation. The consultation document seems to assume that number independent services is the only new element (perhaps because number-based services are already covered under PATs in the Framework Directive?).

Definition of End User – the blending of consumer and business is concerning as it may see the unhelpful extension of a lot of the consumer-focussed requirements onto the business user.

Provision of access to the Emergency Services: How does Government plan to transpose these?