



The Law Society

DCMS Communications Review Team,  
2 – 4 Cockspur Street,  
London.  
SW1Y 5DH

14<sup>th</sup> September 2012

Dear Communications Review Team,

**Re: The Communications Review**

The Law Society of England and Wales is the representative body of over 140,000 solicitors in England and Wales. The Society negotiates on behalf of the profession and makes representations to regulators and Government in both the domestic and European arena. This response has been prepared on behalf of the Law Society by members of our Communications Review Reference Group. The reference group is comprised of senior and specialist lawyers with expertise in telecommunications regulation, competition, internet and IT law.

The Law Society welcomes the Communications Review and this opportunity to contribute to the consultation process.

The purpose of this letter is to set out our high-level observations and comments and is not intended to be a detailed response or commentary on the *Seminar* discussion papers produced by the DCMS.

The Law Society supports periodic review of the regulatory framework, in order to make sure it remains up-to-date (in particular, in light of rapid technological change). This is important both to ensure an effective rule of law but also, as the representative body for the solicitors profession, we have an interest to ensure that the communications infrastructure:

- Delivers good value for all users such as law firms; and
- Can support the adoption of the latest technologies by our members and their firms.

However, we are concerned that the current Communications Review may imply wide ranging upheaval to the current regulatory framework without a significant evidence base showing a need for such a radical overhaul. Before reform is undertaken, a thorough analysis of the available evidence of the deficiencies of the current regime should be conducted. As part of that analysis the scope for improvements within the current framework and better use of existing powers should be examined. We believe it is likely that that these could go a significant way towards achieving the policy goals of the Government.

Further, we believe that any reforms need to be consistent with principles of good law. Therefore, before detailed policy development gets underway the review should set out the framework of principles and themes that emerging proposals should embody and be measured against. These key principles should include that:

- Any proposed regulatory intervention should be supported by clear evidence, showing:
  - (a) the necessity,
  - (b) that the intervention is likely to achieve the policy goal,
  - (c) that the negative impacts of the intervention do not outweigh the problem or failure being addressed, and
  - (d) the risk of unintended consequences of the intervention is minimal.
- Enforcement powers and the exercise of such powers should be fair and proportionate.
- Rules should be consistent and transparent.
- There has been due process in quasi-judicial or other administrative decision making processes.
- Any new regulations are clear and technologically neutral (future-proof).

It is also important that the communications review:

- Takes account of other Government initiatives; and
- Minimises any overlap into policy issues that may be best dealt with under a different policy area.

We offer three examples below, to illustrate our point:

- A number of the questions in both the *Seminar 1* and *Seminar 2* discussion papers bear directly on the area of Intellectual Property. Recently a comprehensive review was undertaken by Professor Ian Hargreaves and now some reforms deriving from that review are being implemented in the current *Enterprise and Regulatory Reform Bill*<sup>1</sup>. It is important that the Communications Review should take this into account.
- A similar issue arises in respect of data protection. Both an EU Regulation and Directive are currently under discussion in the EU<sup>2</sup>.
- In the *Seminar 1*: discussion paper a number of questions are raised relating to the issue of e-payments, the use of communications devices to make them and whether the current regulatory framework is adequate in this rapidly changing area. While these are valid questions to ask, we have concerns regarding overlap with other policy areas and initiatives. For example, the issue of electronic money (and the provision of related payment services) is already subject to detailed regulation by the Financial Services Authority under the terms of the *Payment Services Regulations 2009* and the *Electronic Money Regulations 2011*<sup>3</sup>. In

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<sup>1</sup> The Bill is currently waiting to go through its report stage, in the House of Commons. Source:

<http://services.parliament.uk/bills/2012-13/enterpriseandregulatoryreform.html>

Part 6 (Clauses 56 to 60) of the Bill will allow the Secretary of State (through regulations) significant powers to alter the current copyright framework in relation to a wide range of issues, including copyright exceptions and collective licensing. The Bill can be accessed at: <http://www.publications.parliament.uk/pa/bills/cbill/2012-2013/0061/13061.pdf>

<sup>2</sup> The EU published proposals for a *Regulation* updating the existing *Data Protection Directive* and an accompanying Directive specifically focused on information used for Justice and Home Affairs purposes.

The Directive can be accessed here: [http://ec.europa.eu/home-affairs/doc\\_centre/police/docs/com\\_2012\\_10\\_en.pdf](http://ec.europa.eu/home-affairs/doc_centre/police/docs/com_2012_10_en.pdf)

The Regulation can be accessed here: [http://ec.europa.eu/justice/data-protection/document/review2012/com\\_2012\\_11\\_en.pdf](http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf)

<sup>3</sup> These Regulations implement the *Payment Services Directive* and the second *E-Money Directive* in the UK.

addition there is also the Treasury's current consultation on reforming the governance structures of the UK payments system<sup>4</sup>. We are concerned that addressing this particular issue under the Communications Review may lead to regulatory inconsistency and duplication of effort<sup>5</sup>. We further note that the trends identified in the discussion paper are to a large extent happening already, within the current regulatory framework. This raises questions as to whether there are any significant barriers in the existing laws. However, where reforms are deemed necessary (to ensure the further development of e-payments), we consider that any new laws will be most effective if they are technologically neutral<sup>6</sup>.

In order to avoid confusion and inconsistent policy it is sensible to allow these other recent policy initiatives to work themselves through and remain discreet policy areas for the time being. Once these other work streams have reached that point, then their outcomes, if necessary, should be taken into account by the Communications Review.

The Law Society is also uncertain that extensive primary legislation is needed in order to achieve the Government's public policy goals. As you know, OFCOM has wide ranging powers. It may well be that where there are concerns over enforcement gaps and market deficiencies the solutions are to be found in procedural and organisational changes within OFCOM and considering mechanisms to deploy existing powers more effectively. We illustrate this point with four brief examples below:

- On issues of blocking and discrimination online (i.e. net neutrality) the Law Society takes no policy position. We note however, that OFCOM already has powers in this area<sup>7</sup>. It makes sense to wait and see if OFCOM's existing powers are adequate before legislating for new ones.
- There is a similar issue in relation to unsolicited phone calls. However, we acknowledge that there does appear to be a loophole in the rules, allowing some 'cold calling' to continue. However, it seems likely that a change could be made with regards to the rules, which would resolve this issue without the need for primary legislation.
- The domestic law is likely to have only a limited role to play in relation to reducing the quantity of 'spam'. In the UK laws restricting the sending of 'spam' to

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<sup>4</sup> HM Treasury (2012). 'Setting the Strategy for UK Payments', pub: SO, accessed at: [http://www.hm-treasury.gov.uk/d/setting\\_strategy\\_uk\\_payments190712.pdf](http://www.hm-treasury.gov.uk/d/setting_strategy_uk_payments190712.pdf)

<sup>5</sup> The case for ensuring all payment systems operate on a level playing field is a strong one. It will mean consistent, clear rules, ensuring that the user can access the same protections; however they are paying for their goods and services. Keeping these issues within financial services policy will help deliver a coherent and consistent policy framework.

<sup>6</sup> Professor Chris Reed, in his book 'Making Laws for Cyberspace' makes a powerful case that adhering to the general rule of technological neutrality as the only practical way of ensuring a credible legal framework in these rapidly evolving areas. Source: Reed, C. (2012). 'Making Laws for Cyberspace', pub: OUP. We further note, for example, that the first *E-money Directive* was widely criticised because it was not technologically neutral. The first *E-money Directive* was considered by some as too technology specific and thus potentially out-of-date before it was properly implemented. HM Treasury for example raised concerns about the narrow definition of e-money and the impact could have had on the development of the sector. Source: HM Treasury (2001). 'Implementation of the Electronic Money Directive: A consultation document'. Pub SO, accessed at: [http://www.hm-treasury.gov.uk/mediastore/otherfiles/e\\_money.pdf](http://www.hm-treasury.gov.uk/mediastore/otherfiles/e_money.pdf)

Others highlighted that a number of applicability issues caused difficulties for mobile network operators. Source: Mansour, Y (2007). 'The E-money Directive and MNOs: Why it all went wrong', pub: British and Irish Law Education and Technology Association annual conference, University of Hertfordshire, accessed at: <http://www.bileta.ac.uk/content/files/conference%20papers/2007/The%20E-Money%20Directive%20and%20MNOs%20-%20Why%20it%20All%20Went%20Wrong.pdf>

The first Directive has now been replaced by a more suitable second Directive. Avoiding such mistakes should be a priority when drafting new laws in this area.

<sup>7</sup> For example under Article 22(3) of the *Universal Service Directive* and *ex post* competition powers to prevent anti-competitive behaviour.

individuals are already in place<sup>8</sup>. These laws need to be effectively enforced. However, most 'spam' e: mails are largely international in their origins<sup>9</sup>. Therefore; we consider that the most effective action against 'spam' is likely to reside in technological measures/ counter-measures (absent any additional specific international agreements) along with international enforcement cooperation. The latter is mostly an administrative action, rather than one requiring significant legislative input.

- Another example of where there appears little need to introduce extensive reforms to existing legislation is in the area of competition, in particular, competition in content markets. Our reasoning for this view is as follows:
  - (a) While there have been concerns raised about the length of time OFCOM takes to bring an action and draw it to a successful conclusion, we consider that the reasons behind this are not a lack of laws. We consider that the reasons are organisational, procedural and administrative issues e.g. how evidence is examined and filtered in the first place.
  - (b) Behind the Seminar 2 discussion paper is a concern over how technology is creating new converged markets (where once there were separate markets) and the implications of such changes for competition. However, OFCOM already has the flexibility to deal with this. The adaptability of the definition of a 'market' means that OFCOM should be able to adapt to any emerging conditions<sup>10</sup>.
  - (c) In addition to the standard competition enforcement powers, OFCOM already has a set of wide ranging powers which stand outside the competition law regime.

However, we do note a small number of areas in which a strong case for legal reform is apparent.

The Law Society would support more emphasis on consumer education and similar measures to stimulate 'demand conditions'<sup>11</sup>. A more informed and pro-active population of end-users will stimulate competition and innovation. We note that while there have been significant improvements to the switching framework in the telecoms sector over the last decade, reforms to the rules in this area only take the market so far<sup>12</sup>. In the end, users have to want to switch. Therefore – while there could be scope for further improvements in the transparency of pricing, billing, contract terms, user comparisons tools and redress mechanisms - the biggest impact on the market is likely come from a step change in consumer behaviour.

We would also like to suggest that this review is an important opportunity to reform the law in relation to media plurality, where the legislation has long-standing and unnecessary complexities. This was noted recently by Lloyd LJ in *British Sky*

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<sup>8</sup> There is a question over whether such laws should be extended to business e: mail addresses. To increase legal simplicity and enforcement, it makes sense to ensure as uniform a law as possible.

<sup>9</sup> Asia and South America are considered the main sources of most spam. Source: Securelist (2012). 'Spam in Q2 2012', accessed at: [http://www.securelist.com/en/analysis/204792242/Spam\\_in\\_Q2\\_2012#1](http://www.securelist.com/en/analysis/204792242/Spam_in_Q2_2012#1)

<sup>10</sup> OFCOM has most recently reflected this in its recently updated Enforcement Guidelines. Section 8.11 deals with these issues setting out what factors OFCOM will look at to understand how relevant markets should be defined when exercising its competition law powers. Source: [http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement\\_guidelines.pdf](http://stakeholders.ofcom.org.uk/binaries/consultations/draft-enforcement-guidelines/annexes/Enforcement_guidelines.pdf)

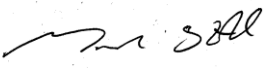
<sup>11</sup> Michael Porter identified 'demand conditions' as a key element in driving innovation and national competitiveness, in particular the need for a demanding and sophisticated domestic customer base. Source: Grant, R. (1991). 'Porter's *Competitive Advantage of Nations: An Assessment*', Strategic Management Journal, Vol 12, pp 535-548.

<sup>12</sup> OFCOM have relatively recently consulted extensively on further reforms to the switching framework. The final changes that emerge could make switching even easier for end-users. There appears little that changing the legal framework could add at this stage as OFCOM's actions seem to suggest they have adequate powers in relation to this area. Source: <http://stakeholders.ofcom.org.uk/consultations/consumer-switching/summary>

Broadcasting (and others) v Competition Commission (and others) [2010]<sup>13</sup>, highlighting in particular s58 and s58A of the *Enterprise Act 2002*.

Although this letter is necessarily brief, we consider that it is worthwhile taking the time to write to you in order to indicate the Law Society's interest in this policy area in terms of our members both as users of information and communication technology and as advisors to other users, regulators and service providers and therefore with a strong interest in an effective legal framework, which reinforces the rule of law. Furthermore, the Law Society is looking forward to the development of specific proposals by the Government and contributing in greater detail to the ongoing debate over the Communications Review.

Yours sincerely



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<sup>13</sup> British Sky Broadcasting (and others) v Competition Commission (and others) [2010] EWCA Civ 2 at paragraph 123.