

Minutes of the 62nd meeting of the Communications Consumer Panel

Wednesday 2 December 2009 at 9.00 hours

Ofcom, Riverside House, 2A Southwark Bridge Road, London SE1 9HA

Present

Consumer Panel

Anna Bradley (Chair)
Fiona Ballantyne
Louisa Bolch
Kim Brook
Colin Browne
Roger Darlington
Maureen Edmondson
Leen Petré
Damian Tambini
Bob Warner

In attendance

Alistair Bridge (Principal Adviser)
Nicola Ebdon (Panel Secretary)
Emily Keaney (Policy Adviser)
Angela Stainthorpe (Policy Advisor)
Andrew Walker (Lead Ombudsman - Otelo) (item 5)
Guy Parker (Chief Executive - Advertising Standards Agency (ASA)) (item 7)
Ofcom colleagues (items 4, 6, 8 and 9)

1. Declaration of members' interests

1.1 There were no interests declared.

2. Minutes of the meeting on 3 November 2009, matters arising, progress on actions and forward plan 2009/10

2.1 Members **APPROVED** the draft minutes for signature by the Chair, subject to the consideration of a requested change from a presenter.

2.2 Members **NOTED** the current status of actions arising including:

- Minute 7.3 & 7.4 – Members requested that the Advisory team ensured that mechanisms are in place for co-operation with Consumer Focus in relation to potential engagement with the European Union;
- AP3 – The Members planning on attending the Consumer Experience Report launch and Consumer Forum on Communications on 9 December;
- AP5 – Appraisals of five Members are scheduled before the Christmas break, with the four remaining Members to be scheduled in January and February; and
- AP23 (8/9/09) – Leen Petré has made contact with Ofcom colleagues in relation to accessibility and website user testing.

2.3 Members **NOTED** the content of the meeting forward plan.

3. Panel Work Plan and Panel Impact Report

3.1 The Panel **DISCUSSED** a paper which identified all the Panel's activities undertaken in implementing the 2009/10 Workplan. This will be the basis for an Impact Report that will inform the Panel's Annual Report. The following points arose from the discussion:

- The list of activities is a good point of reference for the Panel; and
- The final impact report would need to link the activities undertaken throughout the year to the impact which the Panel has had and the extent to which it has achieved its objectives.

3.2 In relation to the Impact Report the Panel **DECIDED** that it would:

- Gather acknowledgements from Ofcom and other stakeholders throughout the year to attempt to assess the impact made by the Panel over the year;
- Link where possible the advice provided by the Panel to a decision or final outcome; and
- Attempt to make an assessment of how well the Panel has achieved its objectives.

3.3 In relation to the Impact Report it was **AGREED** that:

- The list of activities, resultant outcomes and quotes gathered will be maintained throughout the year;
- The completed impact report will be presented to the Panel when it reviews its Annual Report;
- The impact report will be presented to the Panel on a quarterly basis; and
- Thought will be given to the process by which the Panel gives advice to Ofcom and what the Panel requires in return, as part of the review of the Panel's MoU with Ofcom, so that advice can be published if desired, but that this should not constrain dialogue.

3.4 The Panel **DISCUSSED** a paper which gave an overview of the Panel's work plan for the remainder of 2009/10 and plans for 2010/11. The Panel discussed each area of proposed significant and pro-active work at a number of points during the meeting and the following points arose from the discussion:

- The Mobile sub-group will meet shortly to agree what to say to operators, how to undertake the planned mystery shopping research (possibly including small and medium enterprises and possibly conducted in two stages to identify if there are improvements in operators' compliance with their 'try before you buy' policies over time) and whether to publish a summary of the responses from mobile operators in relation to the 'try before you buy' suggestion;
- A possible additional strand of work in relation to usability could be for the Panel to form a view on how the R&TTE Directive could be modified to help improve availability of accessible end-user equipment;
- Since last discussing the proposed work to be undertaken in the area of Policy Making processes a number of discussions with Ofcom had taken place and the Panel discussed and agreed an approach to be taken in relation to the review of Ofcom projects using the Panel's toolkit, and how to provide advice to Ofcom's Better Regulation project. A sub-group will be formed shortly to work on this area;
- Members felt that it will be beneficial for the Panel to undertake research to test the usability of products for the population at large to highlight the fact that usability is a mainstream issue. This research could build on the existing research undertaken by Ricability;
- Members felt that it was important to undertake research on consumer expectations of the internet, particularly as this was not in Ofcom's draft annual plan;
- Members felt that work on consumers' use of information is important; however did not want to duplicate the work being planned by Ofcom. A key question for Members is the extent to which the lessons learned from the study of behavioural economics apply equally to more vulnerable consumers as well as 'typical consumers' and whether any differences need to be incorporated into policy making and regulation. It was felt that work on this issue should be undertaken during 2009/10 in order to feed into Ofcom's review of policy making guidance; and
- In order to understand the full range of issues surrounding consumer engagement with the internet the Panel discussed various options in relation to a book or journal of academic articles, and noted that if progressed, the scope of the work should be started earlier than planned due to the required lead time.

3.5 The Panel **DECIDED** that it would:

- Balance advisory team workload by ensuring that once a 'significant proactive' area of work had achieved its objective, then the area would be changed to 'monitoring with

engagement as appropriate' and less resource would be committed to it. To ensure continued oversight on 'monitoring with engagement as appropriate' areas a six monthly update will be scheduled;

- Ensure that where possible clear objectives are identified for each issue on the workplan so that it is easier to evaluate the Panel's impact;
- Plan work throughout the year in order to stagger Advisory team workload and ensure that there are regular outputs from the Panel;
- Ensure the Panel and Advisory team have spare capacity to undertake reactive work, monitor progress of issues and follow up on issues where necessary;
- Schedule time at the January Panel meeting to critically evaluate the workplan against the agreed criteria and consider the balance of workload and resource implications of the plan; and
- Ensure that Ofcom's Advisory Committees are included in the consultation on the Panel's workplan.

3.6 When considering the work plan again it was **AGREED** that:

- A summary of the issues identified from the responses from mobile operators in relation to the "try before you buy" suggestion will be circulated to the Panel;
- It would undertake a Toolkit review of approximately three Ofcom projects, similar to the review undertaken in 2007/8;
- The Advisory Team would seek to identify via Ofcom the legal position in relation to the accessibility standards part of the Universal Service Directive to identify if it gave room to member states to impose requirements on communications providers in individual countries. It was unclear whether this would be viewed as contrary to the objective of a single European market. Depending on the response, the Panel will make a decision whether to undertake work in this area;
- The Advisory Team will look into undertaking some research to test the usability of products for the population at large during 2009/10;
- The Advisory Team will look into undertaking work on consumers' use of information to consider the extent to which the lessons learned from the study of behavioural economics apply equally to more vulnerable consumers as well as 'typical consumers' and whether any differences need to be incorporated into policy making and regulation during 2009/10; and
- The Advisory Team to investigate the options for drafting, editing and publishing a book or journal of academic articles on issues surrounding consumer engagement with the internet.

4. Services and equipment for people with disabilities

4.1 The Panel **CONSIDERED** a paper which updated the Panel on the work of Ofcom in this area. The following points arose from the discussion:

- Ofcom described the way in which the various strands of Ofcom's work in this area are joined up;
- It was noted that Ofcom's Advisory Committee for Older and Disabled (ACOD) had proposed that there should be a voluntary or mandatory requirement for companies to report the efforts they make in relation to accessibility and usability to a high-profile independent body on a regular basis;
- In relation to the European review of the Radio and Telecommunications Terminal Equipment (R&TTE) Directive Ofcom is considering how to influence negotiations to help improve availability of accessible end-user equipment;
- That Ofcom welcomes the new Mobile Manufacturers' Forum (MMF) website which improves information for consumers regarding accessibility of mobile devices;
- That Ofcom is doing work to understand how well companies are complying with their requirement to publicise services for disabled people;
- That Ofcom is exploring what the amendment to the Universal Service Directive to refer to "functional equivalence" could mean in practice (once the measures are transposed) and will then be discussing this with BIS; and

- That Ofcom had conducted an internal review of disability issues raised by stakeholders, a summary of which will be provided to Members on a confidential basis.

4.2 The Panel gave the following **ADVICE** to Ofcom:

- That it should where possible give support and advice in relation to ACOD's proposal;
- In relation to the R&TTE Directive Ofcom should ensure that it has clear objectives and should aim high. In relation to the accessibility standards Ofcom should, via its lawyers, look to other possible European legal frameworks (such as the Procurement Directive) to see if they provided a precedent for giving Member states flexibility about how to put the Directive into practice; and
- In order to clarify its thinking in this area it would be helpful for Ofcom to identify its key aspirations (within its boundaries) and then identify opportunities which could be used to fulfil its aspirations. If Ofcom decided to formulate a statement of aspiration in this area, it could return to the Panel for assistance.

4.3 The Panel **DECIDED** that it will think about whether it should form a view on how the R&TTE Directive could be modified to help improve availability of accessible end-user equipment.

5. **Otelo**

5.1 The Panel welcomed Andrew Walker to the meeting and **RECEIVED** a presentation on the background of, complaints process and current work of Otelo the Office of the Telecoms Ombudsman. The following points arose from the presentation and Panel discussion:

- Otelo covers approximately two thirds of the telecommunications market, the other third being covered by the Communications and Internet Services Adjudication Scheme;
- That Otelo will draw Ofcom's attention to companies or issues about which it feels that the regulator should be made aware;
- One issue of concern to Members is that some complainants may occasionally have credit-rating action taken against them if they suspended payments when pursuing a complaint. Members noted the action taken by Otelo to request companies to cease taking credit-rating action while a case is with Otelo (although this would only be requested on a good offices basis and Otelo cannot require it); however they remained concerned about the detriment to consumers this action can cause. It was agreed that the number of complainants Otelo were aware of, who had been subject to credit-rating action while a case was with Otelo, would be provided to Members;
- Members noted how Otelo deal with the issue of a complaint having to have reached deadlock with a provider before it can be taken on by Otelo, (unless eight weeks had passed since the complaint was first made), and were concerned that it is not always clear to consumers how and to whom they need to escalate a complaint within a company so that the eight week clock starts ticking and it can be brought to Otelo;
- Members noted that in communicating their final decision Otelo's approach is to explain, as far as possible, what went wrong;
- Members noted that currently information on levels of complaints attributed to companies is not made public; however felt strongly that this information would be of value to consumers;
- That BT Openreach was not required to have Alternative Dispute Resolution procedures under current legislation, however Otelo had received complaints which were either largely about Openreach work, or where there were several issues which could not be investigated because of Openreach's status, or because it was difficult to get information from Openreach when Otelo had no direct links to it. It would be helpful if Otelo could establish a better way of dealing with those complaints; and
- That Otelo felt that it would be helpful if Ofcom were able to investigate and take action on a small number of companies who were responsible for a disproportionate number of complaints and who were reluctant to comply with Otelo's decisions.

6. Broadband speeds

6.1 The Panel **CONSIDERED** a paper which updated the Panel on the work of Ofcom in this area. The following points arose from the discussion:

- Members discussed the various reasons why broadband speeds differ, the level of consumer awareness of these reasons, and the problems with using an average speed as an advertised measure of speed rather than an “up to” speed as is currently the practice;
- Members noted that Ofcom is undertaking mystery shopping in order to obtain information regarding ISPs compliance with the Code of Practice that requires them to inform consumers of the maximum speed their line is capable of during the sales process. The evidence will be reviewed to inform a decision as to whether a review of the Code is necessary. Ofcom would need to justify any decision to impose a formal requirement on ISPs to provide information, in terms of benefit to consumers;
- It was concluded that there is no simple way for consumers to get all of the information they need in order to make a decision about whether to switch their ISP. In deciding between DSL services the distance from the exchange would be the same for all providers, but contention would not, and information on contention is difficult to obtain and is constantly changing;
- Members believed that information provided to consumers by companies regarding broadband speeds should not be misleading and it was suggested that companies could provide a “try before you buy” option;
- In order to encourage investment in higher speed cable services, consumers requiring a high speed connection need to have information to understand the difference between DSL and cable to make an informed choice to switch; and
- Members noted that Ofcom had written to the ASA regarding the way in which broadband is advertised and is looking to the ASA to give guidance as to how consumers use the information provided in broadband advertising and to try to encourage ISPs to move away from advertising/promoting speeds.

6.2 The Panel **ADVISED** Ofcom to encourage investment in capacity to help with contention which would increase speeds for consumers on DSL services and to look for a pragmatic and quick solution to the broadband speeds issue.

6.3 The Panel **DECIDED** that it would revisit this issue when the results of Ofcom’s mystery shopping are available.

7. Advertising Standards Agency (ASA)

7.1 The Panel welcomed Guy Parker to the meeting and **DISCUSSED** a number of issues. The following points arose from the discussion:

- Members noted how the ASA works with the Committee of Advertising Practice (CAP), which writes the advertising code;
- Members noted that the AVMS Directive comes into force on 19 December 2009, which applies various rules to video on-demand advertising and programming;
- Members noted that the advertising industry is working on whether to extend the remit of the non-broadcast Code beyond its current online scope, which is paid-for adverts (including paid-search), sales promotions and viral advertising. In particular, should the Code be extended to advertising on UK companies’ own websites? There is a high level of complaints about such advertising, which are currently not covered by the advertising rules but which may be covered by trading standards under consumer protection law. Moreover, there is political and societal pressure for the remit to be extended to advertising on UK companies’ own websites. . If all online advertising content becomes subject to regulation then a levy , likely to be on paid-search ads, will need to be collected to fund the extra work;
- In relation to the advertising of broadband speeds the ASA is attempting to ensure consumers are not misled. Members noted that the ASA had upheld complaints where actual speeds were much lower than those advertised and, even where they were not, the ASA insisted on prominent disclaimers on all advertising quoting “up to” speeds. The ASA

felt that it would be very difficult to enforce a policy where advertisers had to quote the average speed of users as the average speed varies constantly and would therefore require continual monitoring. Also, if advertisers' average speeds changed regularly, it could be both confusing to consumers and more difficult for them to compare services;

- Members noted that complaints to the ASA regarding the advertising of broadband speeds have declined. The ASA speculated that this might be due partly to the work it has done, including ensuring prominent qualification of 'up to' headline speeds, and partly the industry Code of Practice brokered by Ofcom;
- The ASA has given considerable thought to the issue of DSL providers advertising speeds of, say, up to 8mb, when that might not be achievable either at all or by the vast majority of customers. Moreover, it recognizes that there are potential issues if many or most customers achieve significantly lower speeds, regardless of whether some achieve the maximum (or very close to it). The ASA believes there is force to the argument that 8mb is seen by consumers as something of a notional headline speed and that the majority of consumers understand that they, signify that a broad, not exact, speed of service. In that respect, it is not dissimilar to the old, and widely advertised, 52kb/s dial-up speed, which was never achieved in practice. That is relevant context to how people understand current advertised "up to" speeds, which are now subject to prominent qualifications. Also relevant is whether the expectations of consumers responding to adverts quoting "up to" speeds are met. If they upgrade from 2mb to 8mb, for example to enhance their online gaming, the upgrade should deliver the anticipated enhanced service. If it does, it is more difficult for the ASA to make the case that the consumer has been misled to their detriment, even if they've received, say, 6-7mb rather than the maximum 8mb advertised. But the ASA accepts this is a complicated issue and recognizes the force of the argument that says that headline speeds should only be quoted if, say, a minimum percentage of customers can achieve the maximum speed advertised. The ASA is not closed-minded to changing its policy and would welcome evidence that consumers believe they are being misled by advertising that complies with the current position; and
- Members felt that guidance to specify that in order to advertise an "up to" speed, advertisers should satisfy the ASA that a minimum percentage of customers can receive the "up to" amount, would help to ensure consumers are not misled.

7.2 The Panel thanked Guy Parker for his thoughts and requested that gave the ASA continue to keep under review the advertising of broadband speeds to ensure that the use of the "up to" reference is not misleading for consumers. Guy agreed to return to the Panel to update it on this, and other, matters.

7.3 The Panel **DECIDED** that it would consider whether to explore what customers expectations are of the speed they think they will be receiving when buying broadband advertised on the basis of an "up to" speed.

8. Ofcom Consumer Experience Report

8.1 The Panel **CONSIDERED** the Ofcom Consumer Experience Report, being launched by Ofcom on 9 December 2009. The following points arose from the discussion:

- That the level of consumer dissatisfaction with switching bundles has grown to the same level of dissatisfaction as switching broadband provider, and the possibility that this is due to more bundles now containing broadband;
- That the survey was based on consumers over the age of 15 and the reasoning behind this. Members felt that it would be useful to watch trends for all age groups;
- Members were interested to know what Ofcom was doing to address the difficulties identified in the survey in relating to consumers experiencing difficulties using communications services, in particular installing equipment; and
- That a higher proportion of consumers are unaware of their broadband connection speed, and the possible reasons behind this trend.

8.2 The Panel gave the following **ADVICE** to Ofcom:

- Consider whether a qualifying statement needs to be inserted on page 49 of the report in relation to the proportion of population who use digital radio; and
- Identify whether dexterity impairment should be included in the areas of impairment mentioned in annex 3 (page 155).

9. Any Other Business

9.1 Ofcom's Expenses system – members received a presentation on how to use the new expenses system.

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