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NON-CONFIDENTIAL

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Dear Tim

Hutchison 3G UK Limited (Three) response to Ofcom's Consultation Draft Annual Plan 2013/2014

Three is grateful for this opportunity to respond to Ofcom's consultation on its annual plan for 2013/14. Three's response will address the strategic priorities set out in the Draft Annual Plan for 2013/ 2014, it will also comment on areas of work urgently needed but not in the plan and on some missed opportunities.

Three welcomes the publication of the Draft Annual Plan for 2013/2014. It is useful to have a clear understanding of both Ofcom's strategic priorities for the forthcoming year as well also of its wider programmes of work. Like all businesses, Three needs to be able to plan and allocate resource accordingly to ensure that it too meets its strategic objectives for 2013/2014. An understanding of Ofcom's priorities and work programmes for the year helps with this.

However, Three is concerned at what can only be described as a lack of the sort of detail, particularly around timings and concrete policy proposals, necessary for a business operating in the UK communications market to plan effectively.

Three has noted previously that the Ofcom Annual Plans have lacked this detail and asked that it be addressed in future iterations. This has not happened. Ofcom should state clear commitments on its plans, both to ensure the effectiveness of its own organisation and that the transparency objective of publishing the annual plan is substantiated. Therefore Three requests that the final version of the report should include greater detail on the likely timing of work programmes and consultations, particularly given the significant resource requirements necessary to respond properly and fully to Ofcom consultations and information requests.

It is also with some dismay that Three notes that programmes of work scheduled in previous Annual Plans have been carried over into the Draft Annual Plan for 2013/2014 without any obvious signs of progress or proposals to mitigate that lack of progress. This is most obvious in the case of switching (dealt with in more detail below). The Draft Annual Plan for 2013/2014 notes that Ofcom intends to make significant progress in ensuring consumers can switch between communications providers.

However, this intention has been expressed in Ofcom's annual plans for several years previously. Furthermore, the proposals for action by the regulator are limited to fixed lines and do not address the real and entirely unnecessary barriers in relation to mobile.

Whilst Three cautiously welcomes the intention to undertake work in this and other areas, we are concerned that such proposals will be subject to a lack of planning and organisational drift. Therefore, we urge Ofcom not only to be much clearer with regard to the likely timing of programmes of work but also that it do all that it can to hold to those timing.

General approach

Three welcomes the broad strategic objectives set out in the Draft Annual Plan for 2013/2014. We firmly believe that effective competition and the securing of the optimal use spectrum are fundamental to ensuring not only the ongoing success of the UK communications sector, but also to making certain that consumers are able to enjoy the benefits and opportunities that advances in communications technology may bring. Three also recognises that some specific regulatory interventions may be necessary to improve the overall consumer experience and, indeed, help ensure that consumers are well placed to make informed decisions about the choices they make in relation to the services offered by Communications Providers.

However, Three is concerned that the proposals brought forward by Ofcom will not deliver on those objectives as they do not address a number of fundamental flaws in the market as currently structured. Rather than acting proactively to ensure that the regulatory framework delivers a level playing and in so doing, a competitive market, the proposals contained in the Ofcom Draft Annual Plan for 2013/2104 seem intended to intervene in market outcomes rather than correct market flaws that led to those outcomes.

This seems to Three to be the continuation of a trend that has seen a failure of ambition and progress on big decisions and instead a growing focus on reactive micro-management of issues as they arise, despite the very real scope for delay built into this method. Three believes that this is the wrong approach. It will only deliver only short term changes while unnecessarily increasing the regulatory burden. It will also increase the risk of regulatory failure over time as specific interventions become outdated.

As Ofcom approaches its 10 year anniversary it should renew its focus on progressing some of the basic inputs to building a market that delivers for the consumer. [See summary at Figure 1]

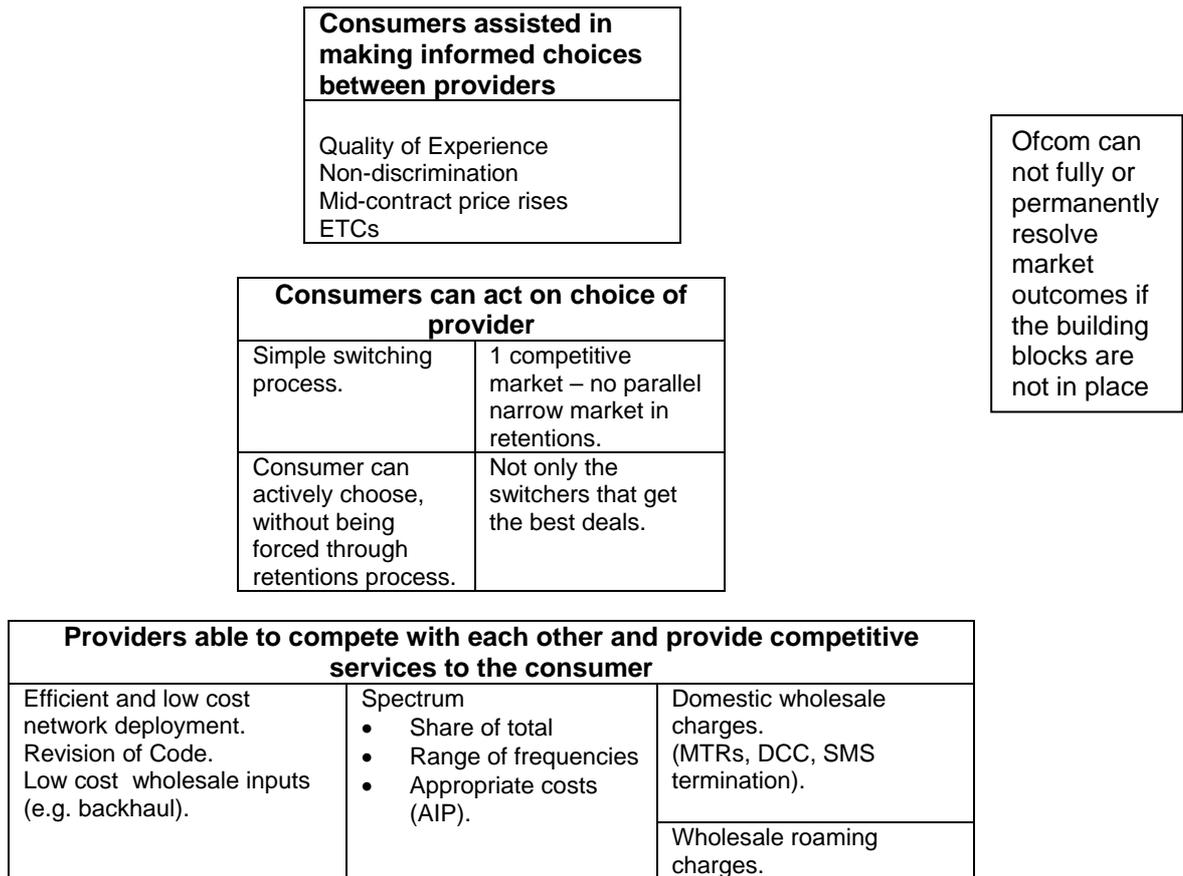
Three strongly believes that Ofcom should renew its focus on ensuring that:

- It fixes the big picture issues first as a matter of priority.
- It acts proportionately and genuinely encourages self-regulation.
- It articulates a clear and strategic vision for outcome related regulation and does not act through incremental creeping intervention.

If Ofcom regulates to ensure a more competitive market, then the increased strength of competition will encourage further forms of competitive differentiation and consumer benefits far greater than those achievable through individual initiatives by the regulator. In turn, issues such as guarantees of fixed prices, quality of service, or additional charges could be addressed by the exercise of consumer choice rather than regulatory prescription.

At present, the Ofcom approach relies on an innate inefficiency targeting resource on areas which can deliver only focused changes, whereas Ofcom should, on the occasion of its 10th anniversary, reaffirm its ambition and resolve to make real differences by reforming the market rather than micro-managing it.

Figure 1 – Ofcom should focus on the foundations of a competitive market and consumer choice, rather manage market outcomes



Areas for regulatory intervention to ensure a competitive market

Three believes that there are a number of big ticket proactive interventions in relation to the deployment of networks, the management of spectrum and the wholesale market that the regulator should make ensure that the wider communications market delivers on Ofcom's objectives. Initially, these interventions should focus on the creation of a more level playing field. This will enable providers to compete more vigorously and effectively with each other, which in turn will deliver benefits for consumers.

Specifically, Ofcom should act to encourage more efficient and low cost network deployment through revisions to code powers – it has been almost two years since the appropriate powers were granted to

the regulator by Government – and the regulation of BT's backhaul pricing, doing more to ensure accountability for delays. Regulatory objectives such as ensuring improved coverage and services to consumer cannot be resolved exclusively or efficiently via the spectrum auctions and the Mobile Infrastructure Project ("MIP") alone: operators must be able to deploy masts and connect them to their network too.

While Ofcom should be congratulated on progress to release and auction spectrum, there remain a number of issues that need to be tackled as a matter of urgency. Mindful of the need to ensure competition and to further the interests of consumer, public resources that have not been auctioned but are effectively rented on an ongoing basis (e.g. 900 MHz and 1800MHz spectrum) should have that rent (the Administrative Incentive Pricing – "AIP") reviewed. The AIP paid by some operators have led to the significant distortion of parity of cost bases among competitors and leaves the public severely out of pocket compared to the return it should see on the use of public resources by private companies. Re-rating the AIP to reflect true market value would lead to significant direct benefit to the Treasury and society.

Consistent with this, and the requirements of the European Regulatory Framework, Ofcom should start the process of charging broadcasters for their use of spectrum. Currently, the broadcasters do not pay for the spectrum they use and are therefore not incentivised to do so efficiently. Absent such an incentive, it cannot be ensured that such scarce and valuable public resources is being used to serve the public interest as effectively as possible.

Three also believes that there are an number of specific interventions that Ofcom should make to ensure that the wholesale costs do not distort the market, These include:

1. Supporting EU objectives in driving further reductions in the wholesale costs of roaming .
2. Ensure that in relation to MTRs and FTRs the migration to pure LRIC continues. In this context, Consistent with this, Ofcom should also consider more closely regulating other significant input costs such as backhaul, as noted above.
3. Taking action to reduce Donor Conveyance Charges. These are currently significantly above costs and penalise growing companies and new market entrants. Three has faced significant resistance to proposed reductions in DCCs by other MNOs who benefit from the current DCC rate.
4. Ensure that wholesale pricing is properly considered in the forthcoming price increases consultation otherwise originating providers may be left liable for covering wholesale price increases. This will result in more price disputes being submitted to Ofcom or higher consumer retail prices to cover exposure.

Three firmly believes that Ofcom were to tackle these long standing and intrinsic regulatory priorities the result would be a far more competitive market, in which there would be considerable less need to make the specific interventions in relation to consumer harm that Ofcom has set out in its Draft Annual plan for 2103/2014: competition and consumer pressure would in many cases have prevented these issues arising whatsoever or placed operators in a position to effect changes that Ofcom might otherwise propose through improvement and innovation of their services.

Switching

Three is pleased that the Draft Annual Plan for 2013/2014 includes as an objective a commitment to develop and implement policies that will improve the ease of switching between Communications Providers. Ofcom will only succeed in promoting effective competition if consumers can switch from one communication provider to another without the undue hassle and delay for consumers that characterise the current system. Until this happens, consumers will still face unnecessary and unhealthy barriers when trying to move between providers

However, we are concerned that:

- Ofcom's proposals in the plan relate only to fixed line switching; and
- Ofcom has made no progress substantial in achieving reform since first including switching in the annual plan for 2008/09.

Ofcom's Draft Annual Plan places considerable emphasis on improving the ability of consumers to make informed choices – yet sets out no measures through which the processes by which such choices are exercised will be improved. Given that switching is intrinsic to the exercise of consumer choice Ofcom must improve switching if it is to achieve its wider policy aims.

Nevertheless, the Draft Annual Plan does not set out any strategic steps and interventions that might be taken to make a difference. We remain concerned that Ofcom is not proposing to do anything differently with regard to switching and that the same approach will continue to deliver the same failure to progress this "strategic issue". We are also concerned that diverting resource to explore policy options with regard to fixed line porting will lead to further delay in relation to mobile porting. Unless Ofcom proposes to take concerted and determined action with regard to mobile switching, and the annual plan gives no indication that this is the case, then consumers will continue to suffer. As a first step, Ofcom should look to enforce the current PAC process. The efficacy of the current process is dependent on an enforcement process that is not enforced in any meaningful way.

Not only is the consumer experience in need of improvement, but industry level arrangements also require substantial reform to ensure new entrants can access the market quickly and efficiently. The current system of bilateral contracts and testing between providers for mobile number porting is needlessly time consuming and expensive and inevitably results in many bilateral porting arrangements being neglected. As the system currently stands, these are not only administratively burdensome and costly processes for existing providers but introduce substantive and damaging delays for new entrants.

Such an intervention could be usefully complemented by other linked regulatory measures to increase the overall competitiveness of the wholesale market. These might include, for instance, measures to ensure that the Donor Conveyance Charge does not function as a barrier to MVNOs switching between mobile network operators.

Deregulatory measures

Three notes that Ofcom also sets out in the Draft Annual Plan its overall approach to the regulation of the sector overall. The annual plan makes clear that this should be in accordance with the principles of better regulation and should seek to not only be proportionate but where possible remove regulation. The Draft Annual Plan also sets out the options that Ofcom should also explore before adopting a regulatory solution to a perceived problem. This includes industry led self-regulatory solutions that can be light-footed, adaptable and better suited to tackling issues than more formal regulatory interventions,

The Ofcom annual plan also sets out the steps that Ofcom should take to ensure that it challenges itself and reduce the existing regulatory burden where appropriate. The Government has also made clear that it believes that overall regulatory burden on business should not be increased. It has said that where new regulation is applied, then regulation with equivalent impact in terms of costs and burdens on the affected industry should be removed (the principle of one in, one out). The objectives and measures set out in the Draft Annual Plan for 2013/2014, do not appear consistent with that approach.

It is therefore disappointing that the Annual Plan does not appear to contain any deregulatory measures beyond a very limited number of measures in relation to the fixed line market. Overall there have been very few instances of de-regulation in the mobile communications market. Rather, Ofcom has sought to expand its regulatory reach and the depth of its interventions.

In this regard, Three notes that Ofcom amended provisions in the General Conditions in relation to mis-selling before the self-regulatory regime established by the industry had time to take effect. Similarly, pursuant to changes introduced in relation to the security and resilience of networks by Articles 13a and 13b of the European Framework Directive, Ofcom has placed new burdens on the industry despite a commitment by Government and Ofcom to ensure that any requirements in this area would be lightweight and would be drawn up with the industry Communications Providers are now required to report on an almost continual basis, placing significant resource and administrative burdens on a provider.

The Draft Annual Plan mentions in brief the continued implementation of the Ofcom e-services initiative, and the development of an Ofcom web portal for consumers, but this is no meaningful way deregulatory for the industry.

Further the Draft Annual Plan notes that the s6 of the Communications Act 2003 requires Ofcom not to impose burdens that are unnecessary or maintain regulations that have become unnecessary. However, it is the opinion of Three that Ofcom's current practice pays little heed to what should be the underlying principles of the regulatory regime. Rather than seeking to reduce the regulatory burden, Ofcom's current practice, more often than not, adds unnecessarily to the burdens placed on Communication Providers.

In this respect the recent consultation on GC4 is illustrative. It will add unnecessary to the administrative burdens placed on Communications Providers in relation to a service that works well. Three notes that with regard to 999 call centres, Ofcom has not identified any perceived problem in the existing service provided by the CHAs that might justify further scrutiny or regulatory intervention, and yet is proposing just this: the proposed Guidelines increase the regulatory burden on CPs without proper justification and will therefore not provide any discernable additional benefits to consumers but instead serve only to increase costs.

Similarly, by writing technology specific detail into GC4 on VoIP Ofcom has only served only to ensure that the General Condition is already out of date and risks creating serious difficulties in the provision of novel services.

However, this is not to suggest that there are not areas where Three does not believe that regulatory intervention is necessary. However, such interventions should be restricted to those where improved competition alone will not bring about effective solutions and help ensure a wider good and a level playing field across the industry..

There are some areas in which Three would support targeted regulatory intervention. These are in relation to:

- Coverage advertising where the use of similarly different measures may mean that consumers are unable to properly compare options and subsequently make fully informed purchasing decisions.
- The Complaints metrics used by different Communications Providers: These vary significantly between providers and can lead to potentially misleading interpretations of the quality of service offered to consumers by providers. It should not be the case that honesty should lead to unfair penalisation.

However, to ensure that Ofcom achieves the best outcomes when addressing these issues it is vital that it works closely with other relevant regulators, such as the Advertising Standards Authority to ensure alignment and consistency and that desired outcomes in the communications sector are not undermined by interventions made by other regulators.

Three believes there is an excellent case for Ofcom to look again at the General Conditions it imposes on the Communications Providers. It is now 10 years since Ofcom was first established, it should use this milestone as reason to look at the General Conditions and assess which are still relevant and necessary. In effect, three asks that Ofcom spring cleans the obligations it imposes on providers. It is also time that Ofcom looks again at how it regulates across the value chain, and may be seek to include other influential and significant Communication Service Providers in the regulation rather than as now the originating CSP.

Each of the programmes of work identified above, while important to Three, fit well with Ofcom's stated strategic objectives and wider proposed programmes of work. We firmly believe that concentrating on the bigger ticket regulatory interventions, particularly in relation to competition, will make it much less likely that Ofcom will need to make specific interventions to remedy specific consumer harms. This will be key to delivering not only Ofcom's objectives around consumer protections but will enable the future development of the market.

We would of course be happy to discuss any of the matters raised further, if that would be of assistance.

Yours sincerely



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