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Dear Ms Campbell

DTI/HMT Review on Concurrent Competition Powers in Sectoral Regulation

The DTI/HMT Review on Concurrent Competition Powers in Sectoral Regulation (the “Review”) provides a timely opportunity for all those concerned with regulation to take a fresh look at concurrency – how effective is it?, how efficient is it?, and how can it be improved?

Ofcom welcomes an opportunity to comment on the Review and participate in the debate on concurrency. A joint response by the Office of Fair Trading and the sectoral regulators with concurrent powers has been prepared separately on the recommendations made in the report which relate to the Concurrency Working Party (“CWP”). Ofcom is a signatory to that response and continues to work with the CWP on these issues.

Ofcom's remit covers a wide range of different communications markets including radio, broadcasting, broadband, data services and mobile and fixed line telephony. These markets are continuing to change rapidly – new technologies, new services, and new business models mean that the sector is in a constant state of flux. Moreover the boundaries of these markets are overlapping and shifting (indeed, this characteristic of communications markets was part of the rationale for establishing Ofcom as a “converged regulator” covering all of these inter-related markets). Ofcom has made considerable progress in developing markets and competition in radio spectrum. In particular, the auctioning of spectrum on a technology neutral basis, the introduction of spectrum trading and Ofcom's policy to liberalise spectrum licence conditions will enable more efficient and flexible use of spectrum which is a finite resource.

Fundamentally, Ofcom believes that it is well placed to meet its Competition Act responsibilities efficiently and effectively in respect of the communications sector. In particular given that:

- the broadcasting and telecommunications sectors are subject to complex industry or market-specific regulation, often set by Ofcom and with respect to which Ofcom has a deep understanding and experience.
- Ofcom has the technical, economic and financial expertise to investigate complex and technical markets or forms of conduct that require specialist industry knowledge to place in context or recognise as anti-competitive; and

- As a result of its sectoral duties, Ofcom is close to, and aware of, many of the competition issues across all of the markets Ofcom regulates.

Ofcom's response to the Review is set out as follows:

- Firstly, we set out Ofcom's views on the benefits of providing sectoral regulators with Competition Act powers.
- Secondly, we set out Ofcom's experience of applying its Competition Act powers in practice.
- Thirdly, we provide our summary comments in relation to the key findings of the review and its seven recommendations.

The benefits to consumers of providing a sector regulator such as Ofcom with Competition Act powers

Ofcom's powers under the Competition Act are a critical part of Ofcom's approach to fulfilling its duties to promote competition in communications markets. The enforcement of competition law forms one component in an overall strategy to deliver Ofcom's principal duty to further the interests of citizens and consumers in the UK in relation to communications markets.

Ofcom has a specific statutory duty under Section 6 of the Communications Act 2003 to keep under review the carrying out of its functions with a view to ensuring regulation does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary. This duty is reflected in Ofcom's published regulatory principles which state that Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.

As competition develops, Ofcom seeks to replace detailed sectoral rules with the operation of competition law. This process is already underway in a number of markets where Ofcom has been able to remove sectoral rules or price controls. It is clear that Ofcom's ability successfully to withdraw from specific sectoral regulation is dependent on Ofcom's having an effective *ex post* regime within its powers. We need to have the ability to deal with any abuses engaged in by firms with market power.

It is widely recognised that communications markets bring together a wide range of rapidly evolving technologies in an ever changing competitive landscape, making the sector a complex area to apply good regulatory practice in the interests of consumers. Ofcom's economists, financial analysts, lawyers and technologists are experienced in understanding these complex markets and are uniquely well placed to apply competition law to them. In Ofcom's view it would be inefficient and costly for the regulation and competition law enforcement of the communications market to be divided across two organisations.

Ofcom's experience of concurrency

Ofcom has set out its approach to enforcing competition law in its Draft Enforcement Guidelines published in July 2006.¹ These build on Ofcom's existing enforcement Guidelines² to reflect Ofcom's experience in the area. These set out disciplined administrative practice in all our investigations, including those under the Competition Act.

It is important to note that Ofcom also has statutory powers to investigate certain disputes between communication providers which it must accept and deal with within a short statutory timeframe (four months). Ofcom's dispute resolution powers carry with them the ability of Ofcom to require payment of historic over or underpayments. As a result, a significant number of issues which otherwise might be submitted to Ofcom to consider under competition law are in fact brought to Ofcom to deal with under its dispute resolution powers.

Where Ofcom is asked to use its competition powers, it will assess effectively and expeditiously the merits of the complaint before deciding whether to investigate. Since 2004 Ofcom has opened enquiries into approximately 60³ cases which could potentially have been considered under competition law and opened 10 Competition Act investigations. Of these seven have been closed – one on administrative priority; one because it was referred to another agency and five which resulted in substantive non-infringement decisions following a full investigation. In addition, Ofcom has closed a further six Competition Act investigations which were opened by Oftel. Three cases are currently being pursued, one of which has resulted in the issuance of statements of objections.

The average duration for all closed cases is a little over 9 months. In Ofcom's view this average indicates that Ofcom is capable of completing a relatively large number of investigations in an expeditious manner. The three current cases have been open for significantly longer than this average duration, reflecting the difficult and complex nature of these cases.

In addition, Ofcom has carried out a significant market investigation into telecommunications markets and has negotiated and accepted a complex series of undertakings from BT in lieu of a reference to the Competition Commission. The undertakings have redefined the emphasis and extent of the need for the application of *ex ante* sectoral powers and provide the basis upon which Ofcom now operates its *ex ante* telecommunications powers under the European framework. Having such a set of powers has allowed Ofcom to set out a new path for telecoms regulation in Europe. Many other European communications regulators do not have concurrent competition powers and so would have been unable to take the steps that Ofcom has taken under its market investigation; many of them greatly wish they were able to do so.

¹ <http://www.ofcom.org.uk/consult/condocs/enforcement/summary/>

² http://www.ofcom.org.uk/bulletins/eu_directives/guidelines.pdf

³ During the period Ofcom opened a total of 200 enquiries

This market investigation was undertaken in part because it was a more appropriate way of dealing with significant competition concerns across a series of related vertically integrated markets than undertaking a number of separate investigations under Competition Act powers.

Ofcom's comments on the Report's findings and recommendations

Generally, Ofcom welcomes the report and its proposals to stimulate cooperation between the sectoral regulators and the OFT and the promotion of best practice in Competition Act enforcement.

Ofcom's specific comments on the reports' recommendations are as follow:

Recommendations 1, 2 and 7

Recommendation 1: Under the direction of the Joint Regulators Group, the Concurrency Working Party should:

- (a) undertake a programme of work to determine the precise differences in the practical approaches taken by sectoral regulators and the OFT in competition investigations; and
- (b) set out the steps necessary to ensure that best practice and expertise is shared between regulators and the OFT and that a consistent approach is followed.

Recommendation 2: The regulators are currently working well together in allocating responsibility for dealing with particular complaints. The CWP should, however, coordinate all concurrent functions of the regulators and the OFT with a view to ensuring that the application of all of these functions is consistent and reflects best practice.

Recommendation 7: Sectoral regulators and the OFT should consider whether inquiries undertaken under general competition law would be best conducted by a joint team drawn from both the sectoral regulator and the OFT in relevant cases. Decisions on which body would lead the case would, of course, need to be taken on a case-by-case basis.

These recommendations relate to how the sectoral regulators and the OFT can improve cooperation and share best practice. A joint response on these recommendations has been submitted from the regulators and the OFT. Ofcom fully supports that response and is a signatory to the response.

Recommendation 3: The OFT should take an overall view about whether competition law is being applied consistently and proactively across all sectors of the economy and report to the Joint Regulators Group.

This is for the OFT to respond to.

Recommendation 4: While in many cases it may be appropriate to exercise sectoral powers, regulators should carefully consider the grounds for deciding on the use of either competition or regulatory powers in economic regulation and give clear explanations for their decisions.

Ofcom is committed to using the Competition Act where appropriate. As noted above, Ofcom considers that it is in the interests of citizens and consumers that regulation be kept to a minimum and that the costs saved by removing additional or unnecessary regulation are passed back to consumers in the form of lower prices or better services, as a result of competition.

Section 317 of the Communications Act prescribes the approach Ofcom must take in using the Broadcasting Act powers rather than the Competition Act in relation broadcasting matters:

“Before exercising any of their Broadcasting Act powers for a competition purpose, Ofcom must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998.

If Ofcom decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.

If Ofcom have decided to exercise any of their Broadcasting Act powers for a competition purpose, they must, on or before doing so, give a notification of their decision”.

Accordingly, Ofcom considers whether to use the Broadcasting Act or the Competition Act in investigations involving broadcasting on each occasion. I can confirm that the policy remains in place and is an effective prompt to ensure that opportunities to explore the use of the Competition Act are not overlooked in relation to broadcasting matters.

Ofcom has adopted the same approach in relation to electronic communications networks and services and use of the Communications Act or the Competition Act as it is required to do in relation to broadcasting. On each occasion before using its powers under the Communications Act for competition purposes, Ofcom considers whether a more appropriate way of proceeding would be under the Competition Act, and will proceed under the Competition Act if it considers that it is more appropriate to do so. These commitments are published in our enforcement guidelines.

For every case opened, Ofcom publishes a Competition Bulletin entry on its website which states what legal instrument Ofcom is using. This sets a benchmark for transparency, providing all those affected or potentially affected by Ofcom’s investigations with a clear sense of the scope and nature of our investigations, and (when read together with our published Guidelines) a clear sense of when we expect to publish our conclusions.

Recommendation 5: Sectoral regulators should consider the ways in which they are preparing to withdraw from economic sectoral regulation wherever practicable and permissible in legislation and especially in sectors where competition has developed, and should include an assessment of progress in their annual report, as, for example, Ofcom does.

As already set out above, Ofcom has a specific statutory duty under Section 6 of the Communications Act 2003 to keep under review the carrying out of its functions with a view to securing regulation does not involve the imposition of burdens which are unnecessary or the maintenance of burdens which have become unnecessary. This duty is reflected in Ofcom's published regulatory principles which state that Ofcom will operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively when required.

Ofcom's annual report also includes a summary of the key regulatory initiatives during the previous year, which includes steps taken towards de-regulation/liberalisation.⁴

Ofcom has recently carried out a series of strategic reviews, in relation to telecommunications, spectrum, radio and public service broadcasting, which have involved a fundamental re-examination of the role of regulation within these areas and in particular the scope of withdrawing from/reducing regulation. These strategic reviews have led Ofcom to make some quite bold moves towards increased liberalisation/de-regulation, for example, in relation to the management of the radio spectrum, by introducing spectrum trading.⁵

Furthermore, in the electronic communications sector, Ofcom's powers are governed by harmonising EU legislation. Under the new EU Communications Directives, Ofcom is required to carry out reviews of competition in communications markets to ensure that regulation remains appropriate and proportionate in the light of changing market conditions.

As a result of such market reviews, Ofcom has already reduced the regulatory burden in a number of markets and will continue to keep the situation under review in the future. In particular, Ofcom has removed regulation in relation to mobile access and origination⁶, unmetered narrowband internet access⁷, inter-tandem conveyance and transit⁸ and certain international services⁹. In July 2006 Ofcom announced the removal of retail price controls which were first imposed 22 years ago to limit increases in the price of line rental and calls for BT customers. This significant withdrawal of regulation reflects the growth of competition and continued reductions in the cost of phone services for customers. Ofcom is also

⁴ http://www.ofcom.org.uk/about/accoun/reports_plans/annrep0405/full.pdf

⁵ http://www.ofcom.org.uk/consult/condocs/spec_trad/statement/sts.pdf

⁶ http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/discon1103.pdf

⁷ http://www.ofcom.org.uk/consult/condocs/narrowband_mkt_rvw/internet_term_uk_ex_hull.pdf

⁸ <http://www.ofcom.org.uk/consult/condocs/charge/statement/>

⁹ http://www.ofcom.org.uk/static/archive/oftel/publications/eu_directives/2003/wis1103.pdf

currently considering the possibility of reducing regulation in relation to BT's large business pricing.¹⁰ In all of these market sectors, Ofcom will be reliant on the use of its competition law powers rather than ex-ante regulation in future. In general in all retail markets and some key wholesale markets, such as wholesale broadband, Ofcom no longer operates ex-ante price controls, but rather relies on competition law.

Whilst Ofcom is taking steps to reduce regulation wherever possible, it is also important to recognise that it may not always be appropriate to withdraw from regulation altogether. In exercising its functions, Ofcom is required to take into account a number of different public policy objectives, of which the promotion of competition is only one. In many cases, it may be inconsistent with the achievement of one or more of those objectives to withdraw from regulation, whether or not the market concerned is deemed effectively competitive.

Furthermore, under the EU Communications Directives, if Ofcom determines that an undertaking has significant market power in a particular market, Ofcom is obliged to impose at least one regulatory remedy on that undertaking.¹¹

Recommendation 6: Sectoral regulators should consider reviewing their licence conditions, with a particular focus on proving the necessity of retaining any specific licence condition in the context of the application of general competition law.

Ofcom notes that under the European Framework, the telecoms regime is already based on a general authorisation regime rather than a licensing regime. Ofcom also notes its commitment to withdrawing from regulation as set out above in its response to Recommendation 5. We have in our work programme for 2007/08 a review of all the general conditions. Part of this will be a review to make sure there are no conditions that are unnecessary.

Recommendation 8: We would encourage the regulators to think about whether they can be more proactive in using competition law, including the use of market investigation references.

As set out in our response to Recommendation 4, it is Ofcom's policy to use competition law in preference to other regulatory solutions wherever it is appropriate to do so.

As the report acknowledges, Ofcom has recently accepted undertakings from BT in lieu of a reference to the Competition Commission under the Enterprise Act 2002 following an investigation of BT's position across a number of related markets. Ofcom will, of course, continue to use market investigation and references where appropriate.

¹⁰ http://www.ofcom.org.uk/consult/condocs/bt_retail/bt_retail.pdf

¹¹ See paragraph 21 and 114 of the European Commission's Guidelines on market analysis and the assessment of significant market power under the Community regulatory framework for electronic communications networks and services, OJ (2002) C165/6.

In summary, Ofcom continues to be committed to using its competition powers proactively and effectively, including using market investigation references where appropriate, and welcomes the efforts on the part of the DTI and Treasury to improve the operation of concurrency.

Yours sincerely

David Stewart