

Introduction and summary

1. BT believes Ofcom's Annual Plan is an important document that enables all stakeholders to understand Ofcom's high-level plans for the year ahead.

2. In terms of the broad strategic approach, we reiterate a key comment made in our response to last year's Ofcom draft plan consultation that regulation must be able to keep pace with the rapid technological and market developments and ensure that any new bottlenecks, for example, in relation to TV content and spectrum, are adequately addressed in a timely manner and that any regulation no longer needed is removed.

3. We broadly support the objectives and priorities set out in Ofcom's draft annual plan and believe it identifies the major programmes for the year ahead. However, there are some additional projects that we believe Ofcom should address, as well as areas where Ofcom should take a more pro-active approach

4. We have set out our detailed comments further below and summarise four major concerns:

Pay TV - our view is that there is a significant issue with lack of effective competition in Pay TV and that Ofcom should proactively address these issues sooner rather than later.

Review of the Communications Act - given the magnitude of changes that have occurred in the communications markets since the Communications Act came into force nearly 10 years ago, this is a key opportunity for a fundamental review of communications legislation. We believe Ofcom should take a lead role, engaging with both end-users of communications services and with industry players.

Consumer Switching - we believe to achieve Ofcom's objectives of not causing harm to the competitive process, it is essential that cable customers should be brought into the process as soon as possible.

Ofcom's timescales for publication - it is important that Ofcom is able to give stakeholders clarity and reasonable certainty over timescales for its publications. Whilst this may seem like a process point, Ofcom's broad and wide agenda means that it is important for stakeholders to be able to plan effectively if they are to be able to respond properly of Ofcom's consultations and reviews.

Detailed comments

5. Pay TV

We welcome Ofcom's willingness to support the government's review of telecoms regulation and to help with the development of any relevant legislation in the pay TV arena. However, at the same time, we would like Ofcom to be far more proactive in the Pay TV area (in line with Ofcom's general duty "to further the interests of consumers in relevant markets, where appropriate by promoting competition") in order to address the continuing problems for both consumers and competitors in Pay TV markets. We believe that simply continuing "to monitor developments in the market . . . to establish whether further action may be required" is not enough.

Our view is that there is a significant issue with lack of effective competition in Pay TV. Serious detriments are still faced by consumers as a result of an on-going lack of effective competition across pay TV markets and these problems are being further exacerbated by the increased prevalence of triple play products where an uneven playing field between content and telecoms wholesale markets leads to further competitive distortions across wider communications markets. These issues need to be proactively addressed sooner rather than later.

BT's view is supported by the fact that the Competition Commission (CC) found that there is a lack of effective competition in the retail Pay TV market it defined. BT also notes that since the CC's conclusion that there was no adverse effect on competition in relation to the retailing of premium Pay TV movies in the first subscription window, Sky has continued to win the rights of the major Hollywood studios as they come up for renewal. On 19 September 2012, Sky signed a multi-year deal with Warner Bros for the exclusive first window rights in both the UK and Ireland. Similarly on 6 November 2012, Sky announced another multi-year deal with NBC Universal for First Subscription Pay TV Window (FSPTW) rights. In addition Sky has won the rights of Disney and Sony, meaning that Sky continues to retain its stranglehold on FSPTW rights. BT's comments at the time of the CC's final decision that the CC's decision was misjudged have therefore been shown to be correct. As well as Ofcom's general competition law powers, as Ofcom itself notes the Competition Appeal Tribunal (CAT) has upheld the fact that Ofcom has the power to impose an ex ante remedy, such as the Wholesale Must Offer (WMO), to ensure fair and effective competition.

6. Review of the Communications Act

There is mention of contributing to the government's review of the Communications Act in the Draft Plan but we would have expected it to be a much more significant project for Ofcom than it appears to be. Given the magnitude of changes that have occurred in the communications markets since the Communications Act came into force nearly 10 years ago, and in particular the substantial convergence in the fixed, mobile and pay TV markets, this is a key opportunity for a fundamental review of communications legislation. We would have expected Ofcom to have included this work in its priority objectives for the year ahead, and to have set out its key objectives for changes to ensure communications legislation is fit for purpose over the next 10 years. We believe that if Ofcom does not take a lead role here, engaging with both end-users of communications services and with industry players, we may lose the opportunity to gain clarity and consensus on what will be, in the mid-term, in the best interests of all parties and in terms of the competitiveness of UK markets generally – with the additional aim of seeking to ensure that the UK is the place where companies want to do business due to the high quality of its communications services.

7. Consumer Switching

One of Ofcom's required outcomes (fig 4, page 41) is that there should be no harm to the competitive process as a result of switching processes and we believe to achieve this, cable customers should be brought into the process as soon as possible. At para 4.17 there is mention of the fact that Ofcom will consider whether to review switching processes in other related markets (by which we assume Ofcom means mobile and pay TV markets) once the proposed review of fixed voice and broadband has been completed. However, Ofcom has previously stated its intention to also review switching between fixed voice and broadband services based upon Openreach's copper network and cable. Consumers moving from an Openreach-based service to Virgin cable are not "switching" in the strict sense, because a different network is used to provide their service (so it is a cease and provide) rather than the Openreach "assets" being switched between CPs. However to the consumer, it is no different and they expect to be able to follow the same process rather than different processes depending on underlying networks and technologies. In addition to consumer confusion, this also prevents a level playing field between CPs in these very competitive markets. We believe all CPs should be given the same opportunity to "save" their customers – currently Virgin can do this but where the customer is moving to and from WLR/MPF providers, it is a gaining provider-led process and

save activity is prohibited. There should be a level playing field and we would like to see switching to and from cable brought into the process as soon as possible.

8. Mobile networks

We believe Ofcom should launch a new review of the mobile sector to analyse the effects of the consolidation on the level of competition not only in the mobile market per se but also in the convergent fixed-mobile market. Ofcom last completed a review of the mobile market in 2009. Since then, competing with mobile operators has become increasingly difficult as the market has experienced strong consolidation, most notably the merger between T-Mobile and Orange, and the network sharing agreement between Vodafone and O2. This trend toward consolidation and network sharing agreements shows that the market is becoming less competitive than was previously the case. This affects the choice and availability of wholesale mobile services for mobile virtual network operators (MVNOs) seeking to provide mobile services in the retail market.

There is an increasing trend, especially in the business market, to buy fixed and mobile services as part of the same contract. Yet, the lack of regulated access to the necessary wholesale mobile services does not put fixed operators and mobile network operators on a level of playing field. Whereas mobile network operators (MNOs) can obtain the necessary wholesale inputs for fixed voice and data services from BT on regulated terms, MVNOs rely on MNOs to make available their network at prices and under conditions negotiated between the parties. Moreover, where spectrum is an increasingly scarce resource, MNOs' willingness to share capacity on their spectrum with MVNOs may be limited, in particular where they may compete directly with them for consumers or business customers. The reduced incentive to offer wholesale access appears to be reflected in the European Commission's decision in relation to H3G/Orange Austria, as it concluded that it was necessary to require commitment to provide wholesale access¹.

¹ Case COMP/M.64/97 Hutchison 3G Austria/Orange Austria, press release IP/12/1361 of 12 December 2012, http://europa.eu/rapid/press-release_IP-12-1361_en.htm. See also the recent Opinion of the French Competition Authority (Opinion 13-A-02 of 21 January 2013 on the position of mobile virtual network operators (MVNOs) in the French mobile telephony market), as summarised in the press release of 21 January 2013 http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=483&id_article=2030

Taking all of these factors into account, we believe that another review of this sector is now overdue.

9. Timescales for publication

We recognise that Ofcom has a significant programme of work to deliver and believe it vital that Ofcom has sufficient resources and time to review and consider evidence before reaching conclusions. However, there have been a number of major reviews and decisions where Ofcom's timescales for publication have either slipped or been announced with very little notice. We also need to plan our finite resources to deal with the significant regulatory workloads and feel it important that Ofcom are able to give stakeholders both clarity and reasonable certainty on timescales.

10. Traffic management practices of mobile operators

We are disappointed that Ofcom does not intend to intervene in the traffic management practices of mobile operators that block access to VoIP services. We believe these traffic management practices are not in compliance with the net neutrality principle and should not be allowed to continue and we therefore invite Ofcom to reconsider its decision in this regard. BEREC stated in its report '*Differentiation practices and related competition issues in the scope of net neutrality*', adopted in November 2012, that VoIP blocking is mainly motivated

by the protection of existing business from vertically integrated operators. Even in the absence of SMP, as long as those practices are widespread, there may be competition concerns as they do not only reduce customers' choice but also negatively affect innovation. Transparency and effective switching procedures may reduce the negative impact of blocking; however in the UK mobile market switching is difficult because the minimum length of the contracts is typically 2 years, and particularly in the corporate market, the barriers to switching are even higher because of the difficulties to change large numbers of SIM cards while ensuring continuity of service.

Under the revised EU framework (Article 22.3 of the Universal Service Directive), NRAs have the power to intervene imposing minimum quality requirements independently of SMP status. We believe Ofcom could use these powers to stop those discriminating practices and to ensure end-to-end connectivity.

Alternatively, given the restrictions that the blocking practices cause to the interoperability of services and networks, Article 5.1 of the Access Directive might also be invoked. The latter in fact gives NRAs the power to impose obligations on undertakings that control access to end-users, independently from their market power, to ensure end-to-end connectivity.

Given that these options do exist to address the problem that we have identified, we invite Ofcom to give this issue a higher priority and to put it on its agenda for the coming year.

11. Universal Service Obligation (USO)

There are a number of USO conditions that we believe are now out-of-date and the market, behaviours and needs of consumers have changed markedly since the current obligations were set. For example, BT is obliged under the USO to provide free itemised billing, yet no other CP is obliged to do so. We believe itemised billing has to be either a consumer right, or not a consumer right, but we should not have a situation where it is only a consumer right for BT customers.

Another example is payphones. When the USO on payphones was created there was not the high level of mobile ownership there is now, nor was this envisaged at the time, and payphone use continues to decline.

We would like to see Ofcom review the USO in its entirety and would be happy to provide more detailed information on specific areas where we believe change is most needed.

12. Non Geographic Call Services (NGCS)

Ofcom is carrying out a review of NGCS. The main thrust of the original NGCS review was to reduce consumer confusion by creating transparency on charging by introducing two-part charging for these calls. A separate issue is the review of charging for higher rate 09 numbers that has now been brought into the wider NGCS review. Charges to 09 numbers are capped but not equally across CPs due to the asymmetry in the way mobile operators have a much higher price cap for charging 09x calls. The NGCS review has been running for a number of years and we are concerned that any further delays will also delay creating a level playing field charging structure for the 09 calls. We would therefore like to see the 09 call charge issue split out from the wider NGCS review if there are to be any further delays.

13. Directories review

We understood that Ofcom was considering carrying out a review of Directory Information in 2012/13, which we supported. However, this was not shown as a project in the Draft Plan last year and we raised our concerns in our response to last year's Draft Annual Plan. We remain concerned by the continuing lack of clarity in the directory information market following the Court of Appeal finding in June 2011 that USC7 was unlawful.

In the Draft Plan for 2013/14, again there is no review of Directory Information. Ofcom last carried out a review of this market in 2008 and we agreed with its proposals. However, Ofcom never issued a statement nor implemented the proposals. Such a vacuum is causing uncertainty for the industry. In light of this we would urge Ofcom to undertake this review at the earliest opportunity.

14. Review of regulatory reporting framework

We believe the review of the regulatory reporting framework is an important project. Regulatory reporting incurs a major cost and is a significant undertaking for BT. Our view is that the current level of reporting goes far beyond what is proportionate in light of the defined purpose of regulatory reporting. Therefore, a full and proper consideration and review of the data and reporting is required. We are therefore surprised that it has not been categorised as a priority for the year ahead and would ask Ofcom to give the project sufficient priority to complete the review in good time.

15. BEREC

We strongly support Ofcom's work to contribute to the consistency of communication regulation in Europe through BEREC and the ERG (paras 5.7- 5.8), in particular as the recently published ECTA commissioned study 'Business communications, economic growth and the competitive challenge'² has shown a clear fragmentation within the Single European Market in the supply of telecommunications services to pan-European businesses. We believe a much greater degree of consistency in regulation is very important for consumers and businesses throughout the EU and we would urge Ofcom to ensure there is continued focus on the availability of access services at regulated and non-discriminatory terms across Europe.

In addition, Ofcom itself inputs papers and responses to BEREC and we believe it would be beneficial if these were publicly available so that stakeholders could better understand Ofcom's positions on key issues.

16. Cost orientation

Ofcom had planned to publish either a consultation or guidelines on cost orientation in late 2012/13. Should it be a consultation, it is unlikely that the work will be concluded until next year. We would welcome confirmation that if this issue is not resolved this year, it will be carried over and form part of Ofcom's programme for 2013/14.

End

² <http://www.ectaportal.com/en/REPORTS/WIK-Studies/WIK-Report-Business-Communications-Jan-2013/>