Ofcom Response to the UK Government Review of the Balance of Competences Between the United Kingdom and the European Union

Introduction

Ofcom welcomes the opportunity to submit evidence to the Government's Review of the Balance of Competences between the United Kingdom and the European Union. As the United Kingdom's independent regulator for the communications sector, Ofcom is the appointed National Regulatory Authority (NRA) for the purposes of the relevant EU frameworks in telecoms, audiovisual services, and post, with concurrent consumer and competition powers. We are also the UK's spectrum management authority and represent the UK in international spectrum discussions under a direction from HMG. We are therefore closely involved in the operation of the existing rules in these sectors, a large part of which derive from European law.

In fulfilling our functions it is important to highlight that Ofcom's principal duty, set out in section 3(1) of the Communications Act 2003 is:

- to further the interests of citizens in relation to communications matters; and
- to further the interests of consumers in relevant markets, where appropriate, by promoting competition.

The existing European regulatory frameworks in the areas over which Ofcom has regulatory oversight are broadly speaking designed to promote competition and the development of the single market in telecommunications, radio frequency management, audiovisual and postal services, while protecting the interests of EU consumers and citizens.

In both its legislative and its implementation work, the European Commission continues to push for greater regulatory consistency across the continent, and to work towards the "completion" of the single market with a view to promoting European competitiveness in an increasingly globalised world.

In this response we consider how both the current EU framework and the activities and structures in place to implement it are delivering for UK citizens and consumers.

Key messages

- Ofcom believes that, to date, **the EU regulatory frameworks in the communications and postal sector have delivered significant benefits** in terms of growth, innovation and competitiveness, both for the EU as a whole and for the UK in particular. Consumers have also benefitted from increased competition in these markets, enjoying greater quality and variety of communications services, at consistently low prices, while innovation and indeed investment have continued apace.

- **The specific balance of EU vs. national competence within each of our sectors varies**. In some cases (e.g., telecommunications), we largely operate under a maximum harmonisation

framework common to all EU Member States and with limited scope for departure, whereas in others (e.g., audiovisual and to some extent post), the EU has set only minimum rules, allowing Member States to introduce stricter requirements, if they so wish (as indeed the UK has done). Spectrum remains a national resource predominately managed at national level; however, a certain degree of coordination and technical harmonisation are needed to enable the exploitation of European economies of scale, and by extension EU global competitiveness.

- **We believe that the current balance is broadly right**. While in some cases EU-level action will be necessary to achieve the desired policy outcomes, it is important for the EU to continue to acknowledge that certain decisions are best taken locally, in a way that takes account of specific national circumstances, and to recognise the need to preserve a degree of national discretion, including for regulators to innovate in the design of regulatory solutions.

- Whether or not there is a need for **EU oversight or intervention is something that will need to be considered on a case-by-case basis**, and the added value of action at EU level will need to be justified on the basis of evidence. In considering such action it is important to adopt a principles-based approach which builds in appropriate examination of key considerations. For example, in considering the case for EU level action it is important to examine the existence of benefits from economies of scale, the value of promoting transnational markets and the need for coordination to avoid technical interference and ensure co-existence of spectrum services. These then need to be weighed against domestic concerns and other national policy considerations, as well as to recognise the distinctiveness of national markets and local knowledge in the design of remedies. We elaborate on this below through some specific examples in relation to each of the sectors that we regulate.

- Over time, **the role of NRAs has been acknowledged and embedded by EU legislation**, including through the strengthening of their independence (with respect to national governments and regulated entities) and capacity, and through the creation of networks of NRAs charged with exchanging regulatory best practice and advising the European institutions in the performance of their functions.

    - In relation to telecoms, BEREC (the Body of European Regulators in Electronic Communications) is a network of NRAs created by European regulation and given a statutory role to advise the European institutions and assist in the implementation of the regulatory framework.

    - In the area of spectrum, the Radio Spectrum Policy Group (RSPG) brings together Member State representatives responsible for spectrum to promote the harmonisation and coordination of spectrum management across the EU.

    - In the area of post, the European Regulators' Group for Post (ERGP) was similarly created as an expert advisory group to the Commission that also exchanges information between members and promotes best practice.

    - In the audiovisual field, the Commission has recently announced its intention to convene Europe's audiovisual regulators in order to draw upon their collective expertise in the development of European policy in this area.

    - In relation to consumer protection, the Consumer Protection Cooperation (CPC) Network links consumer law enforcers across the EU to help promote information sharing and coordination of cross border enforcement activities under the CPC Regulation.

- Ofcom participates in all of these networks, maintaining strong working relationships with our European counterparts in each of the sectors we regulate. Such **regulatory coordination** at the European level has been, and will continue to be an important tool to exploit the benefits of the single market, allowing us to both share best practice and learn from others, while providing mechanisms to enhance the consistency of regulatory approaches across the continent, without the need for top-down EU action.

Telecommunications

Compared with some other economic sectors, the telecommunications sector is now largely 'open' and direct barriers to cross-border trade and market entry have been removed throughout the EU. Following privatisation of national telecommunication operators, European directives were promulgated in the late 90s setting out a framework for competition ("open networks") in national markets. The promotion of competition has since remained the *fil rouge* of the European telecoms regulatory framework, including through soft law instruments promulgated by the European Commission.

Since 2002, the telecoms regulatory framework has also focused on harmonising regulatory approaches across the EU, with a view to raising the quality and effectiveness of regulation across Europe and improving conditions for the full exploitation of the single market.

In this area, the Commission and NRAs have shared responsibilities for regulatory policy: while it is the role of the Commission to determine the overall European policy direction, it is the role of NRAs (working in cooperation with their respective governments), once policy proposals have been duly considered and amended by both the European Parliament and Council through the legislative process and subsequently transposed nationally, to adapt and implement the rules in their national markets. It is also the role of NRAs (individually and working collectively within BEREC) to alert the European Commission and European legislators to the practical impact that EU policy initiatives and legislation are likely to have "on the ground".

One recent example of this dynamic is when NRAs argued against the Commission's initial plans (in late 2011) to increase the price of **wholesale access to copper networks** in areas where operators had made a commitment to invest in new fibre infrastructure. The Commission's approach was intended to incentivise network operators to undertake these new (and expensive) investments by providing some of the required funds. However, this proposal was not without unintended consequences. Firstly, it would have meant alternative operators relying on wholesale access to incumbents' copper networks facing increased charges, which they would have needed to pass onto their consumers. This would, in turn, have led to price increases for consumers using current generation broadband services (in effect, resulting in today's consumers subsidising tomorrow's consumers). Secondly, there was scepticism as to whether such an approach would have indeed incentivised incumbents to invest in the new fibre infrastructures as the Commission had originally intended, while the business case (i.e. consumer demand) was not proven. Finally, the proposed approach was at odds with Ofcom's policy of ensuring that consumers are not worse off as a result of a change in the underlying network technology. Ofcom and BEREC brought the unintended consequences of this approach to the attention of the Commission. This led the Commission to reverse its original position, focusing instead on predictability of copper prices rather than on their deliberate suppression.

In some cases, EU-level action has been critical to unblocking difficulties (whether practical or political) and to secure coordinated action for the collective benefit of all European consumers. The most notable recent example of this is in relation to **international roaming**, where NRAs themselves

– including Ofcom - recommended that the Commission introduce European legislation to regulate the (very high) charges faced by mobile phone users travelling abroad within Europe. Given the cross-border dimension of the issue, no single NRA could address the problem alone, and in order to ensure coordinated action on the same terms across Europe, a directly-effective EU Regulation was found to be the appropriate solution.

In other cases, an extension of EU competence may not be warranted. This is the case, for example, in the **design of regulatory remedies**. The Commission has in the past (in 2002 and again in 2009) sought to gain a power to veto the specific remedies that national regulatory authorities are able to impose on operators following a finding of significant market power. The Commission has justified such an extension of power as the best way to address what they see as an inconsistent application of the regulatory framework across Member States, which in turn creates fragmentation that hinders the further development of the single market. We have never been convinced of such an argument. Firstly, NRAs have the practical, on-the-ground knowledge and the best understanding of their local markets. They are therefore best placed to design the most appropriate remedies to effectively address competition problems, particularly in fast-moving market environments such as these. Secondly, with its overarching objective to promote the single market, the Commission has been wary of taking risks (reluctant to set precedents) and can therefore be resistant to regulatory innovation.

Ofcom has been at the forefront of such regulatory innovation in the past, something that would not have been possible if the regulation of national markets had been wholly or mainly controlled out of Brussels. By way of example:

- When Ofcom originally proposed to use the "functional separation"[1] of BT to increase competition in the UK telecoms market, the European Commission expressed serious reservations over what was seen at the time as a radical regulatory remedy, and sought to persuade Ofcom to abandon the idea. In the end, Ofcom went ahead despite these reservations (using its legal powers as a concurrent competition authority, therefore outside the Commission's control). This approach was ultimately acknowledged as a success, so much so that the European Commission subsequently made functional separation a remedy explicitly available to all NRAs (Articles 13a and 13b of the Access Directive, as amended in 2009).

- A key component of the functional separation remedy in the UK is a particular form of non-discrimination obligation known as "equivalence of input" (EOI) – that is, ensuring that BT's wholesale customers are able to use exactly the same set of regulated wholesale services, at the same prices and using the same systems and transactional processes, as BT's own retail activities. Once again, the experience of EOI in the UK has been successful, leading the Commission to formally recommend that NRAs should give preference to this approach when considering non-discrimination remedies in their national markets.

- Another example from the UK – when Ofcom reviewed the UK market for wholesale line access (WLA) in 2010, it imposed a form of bitstream (network) access remedy known as "virtual unbundled local access" (VULA). The European Commission had long expressed a strong preference for physical access (which theoretically gives the access seeker more control of the line than VULA, but which also requires a significant investment from the access seeker). Ofcom engaged in intensive and protracted negotiations to persuade the European Commission of the

[1] The principle underpinning Functional Separation is that the natural monopoly parts of the incumbent business should be placed in an organisationally separate entity subject to its own governance arrangements. This then reduces both the incentive and ability of the incumbent to discriminate in favour of its own downstream business.

merits of our approach (noting that the preference for physical access was enshrined in a European Commission recommendation on NGA). Since then, a handful of other NRAs have also pursued the VULA route. VULA is now seen to be so successful that the European Commission recently proposed that (a standardised form of) VULA be mandatory across Europe, in preference to physical access (see the draft Regulation on "Connected Continent: Building a Telecoms Single Market").

Finally, over the last ten years the Commission has on several occasions socialised the idea of establishing a centralised "Euro-regulator" to replace NRAs – an idea that Ofcom has consistently resisted. The fact is that national markets have legitimate and immutable differences (e.g. in relation to network topology, prevailing network technology, historical investment cycles, consumer demand patterns, market structure, demographics, economics). These, sometimes substantial, differences will exist to some degree whatever the institutional design, and cannot be eliminated by regulatory fiat. Indeed, even in a hypothetical world made up exclusively of consolidated pan-EU operators benefiting from a single EU authorisation, NRAs would still have an important role to play, given the enduring (and "un-harmonisable") differences between national markets which would require continued "sub-regional" regulatory attention. The current regulatory system recognises the important role that NRAs (on their own and working collectively through BEREC) play.

Audiovisual

Audiovisual media is primarily a national matter, intrinsically linked with national cultural and public interest concerns and for which the Member States remain exclusively competent. However, insofar as the provision of audiovisual media constitutes a commercial service, the EU must ensure that there are no barriers to cross-border exchanges of audiovisual material.

The major EU instrument in this area is the Audiovisual Media Services" (AVMS) Directive, adopted back in 1989 and most recently reviewed in 2007, which coordinates national rules relating to the provision of broadcasting and video on demand services. These include establishment criteria, advertising, sponsorship, tele-shopping, protection of minors, public order, right of reply, and the promotion of European programmes. Member States are required to ensure that television broadcasters under their jurisdiction comply with the minimum programme standards set out in the Directive, although they can also impose additional domestic requirements.

The Directive introduced a "country of origin" (COO) principle, whereby broadcasters need to be licensed in only one Member State (and are subject only to that Member State's broadcasting standards) but can broadcast across the rest of Europe. The COO principle is a key instrument in the promotion of the digital single market for audiovisual services, lowering the regulatory and administrative burdens on industry and thereby encouraging the availability of pan-European (broadcast and video on demand) content.

The UK is home to over half of the channels licensed in Europe, including many US companies that have an EU-wide reach, and half of these broadcast outside of the UK (either exclusively or in addition to UK broadcasts). The presence of these companies has greatly contributed to our economy and cultural diversity in the UK.

However, the effect of the COO principle is that a Member State and its regulatory authority might not be able to enforce national content standards over all of the content viewed by its citizens (i.e. citizens might be exposed to content licensed in another Member State and subject to the standards

applicable in that jurisdiction, which might be lower/different than those that apply at home). The current framework of harmonised minimum standards is intended to mitigate such concerns.

The current AVMS Directive, we believe, strikes the right balance between the (industrial policy) aim of ensuring broadcasters do not need 28 licences, and the (social/democratic) aim of respecting cultural diversity among Member States and the ability of their respective regulatory authorities to protect their citizens accordingly. However, we also recognise that there are remaining and inherent tensions in the current design and that some of the coordination mechanisms which are currently provided in order to ensure that the country to which programmes are being broadcast can enforce local norms could be improved. This is an issue we believe may benefit from increased coordination at EU level, particularly as we move towards an increasingly converged and online distribution model for audiovisual content.

Spectrum

Decisions taken at European, regional and global level drive the way in which spectrum is allocated and used in the UK. This notwithstanding, Member States remain responsible for management of spectrum in their own territories and for co-ordination with neighbouring countries on cross-border interference issues.

The EU plays a key role in terms of harmonising technical conditions to ensure that key spectrum bands are made available on the same basis across the EU. This is vital to deliver economies of scale and interoperability and brings significant benefits to UK and European consumers. The EU has also aimed to encourage further market liberalisation, spectrum sharing and secondary trading – goals that the UK would share. We certainly recognise the importance of international and European coordination to enable efficient use of spectrum and deliver the benefits of harmonisation.

For example, where spectrum bands are subject to European technical harmonising measures Ofcom considers it generally appropriate for the Commission to set timescales and ensure the release of new spectrum by stated deadlines. This is the case with the bands used for mobile telephony, including the recently released 800MHz and 2.6GHz bands, which are already subject to such harmonising measures. However, it is important to retain a degree of national flexibility, for example to resolve any coexistence issues that are best addressed at national level or in terms of obligations attached to licences to meet national requirements.

Ofcom would generally be concerned if the Commission aimed to harmonise beyond technical conditions, for example if they sought, as currently proposed in the Connected Continent Regulation, to have a greater role in deciding the timing and form of spectrum auctions and assignments. This would in our view constitute an unwarranted transfer of substantive responsibilities for spectrum management to Europe

Post

The current EU postal regulatory framework has established, via three postal directives, common rules and minimum provisions concerning the key elements of postal regulation including: the provision of the universal postal service for letters and standard parcels up to 10kgs and its basic requirements; the conditions governing the provision of postal services; cross-border quality of service standards; mechanisms for the financing of universal services where these are seen as an unfair burden on the universal service provider(s); the gradual and controlled abolition of the universal postal service monopoly between 1997 and 2012; tariff principles and accounting

transparency; minimum consumer protection measures including complaint handling procedures; and the existence of independent national regulatory authorities.

In some of the above areas, Member States have discretion: for example, the Member State has discretion to decide which of three ways it uses to ensure universal service provision, comprising a tender, designation of one or more providers or allowing market forces to deliver it. Another example concerns the ability of the Member States decide of their own accord whether to introduce a funding mechanisms for the universal service where it has determined that the universal service obligation represents an "unfair financial burden" on the universal service provider.

Moreover, in several respects, the UK framework goes beyond the minimum standards set in the Postal Directive, for example in respect the specification of the universal postal service in the UK and in respect of quality of service standards. In these areas, the UK has a six-day minimum collection and delivery requirement (rather than a collection and delivery every working day as required by the Directive). Furthermore this includes a requirement for a next day service and a range of supplementary quality of service targets, including for next day and second-class delivery, which the universal service provider is required to fulfil.

Overall, Ofcom considers that the EU postal regulatory framework allows Member States sufficient latitude to take account of national differences and supports the efforts of European Regulators' Group for Post (ERGP) to undertake over time a review of regulatory practice to ensure that the principles in the Directive are appropriately developed and put into effect across all Member States.

Conclusion

Ofcom's work is underpinned by our principal duty to further the interests of UK citizens and consumers, where appropriate through the promotion of competition. With moves to broaden and deepen the single market it is essential that this is not at the expense of consumer protection and empowerment. As we set out in our response to the Commission's consultation on its post i2010 strategy, Ofcom believes that people, whether as consumers or citizens, need to be at the centre of the Digital Agenda, both in the UK and in Europe. This means a shift in emphasis away from simply creating the conditions for market-based competition to take place – although this is of course still critically important. Our own experience to date clearly shows that promoting open and competitive markets is not always sufficient on its own to ensure that consumers' and citizens' interests are secured.

Indeed, when the European Commission has published proposals which Ofcom has believed not to be in the UK's best interests, we have engaged with decision-makers in Brussels to make our case and seek appropriate modifications. The UK and Ofcom have a good track record of successfully championing changes to both legislative and non-legislative Commission proposals, as well as identifying and cultivating alliances to help realise our shared objectives. The current system, providing such opportunities for dialogue with the EU institutions and our European counterparts, works well.

It is worth noting that even once European legislation has been negotiated and is adopted, decisions taken by Member States on *how* European law is implemented at the national level can also have an impact on the ability of national decision-makers to exercise their discretion effectively. For example, taking an area of particular concern to Ofcom at the moment, the gold-plated UK implementation (in 2003) of European regulatory requirements on appeals of NRA decisions has

inadvertently cultivated a culture of litigation in our sector, resulting in regulatory delays and high regulatory costs, ultimately to the detriment of UK citizens and consumers.

In conclusion, as we have described above, the basis of the current "co-regulatory" system operating in the communications sector is balance. There is often a tension between the European Commission's broader single market agenda and NRAs' preferences based on their "on the ground" operational and market expertise. In our view this is a desirable and potentially "creative" tension, and one which helps ensure that both the Commission and the national regulators are disciplined in their interactions with each other. Indeed, the operation of the EU machinery, as set out under the Lisbon Treaty, has embedded this creative tension within the European legislative process, as well as enhancing the role of national parliaments.

As BEREC, the RSPG, the ERGP and the new expert group of audiovisual regulators evolve and mature, we believe this "balance" can and must continue to be developed and maintained. The best outcomes for UK consumers and citizens (and indeed for EU consumers and citizens) are likely to come from the dynamic push-and-pull between Europe and its Member States, continually synthesising the goals and benefits of a properly functioning single market, on the one hand, and the imperatives of national subsidiarity, on the other. Any push for the further centralisation of power in the sectors we regulate should therefore be approached with great caution.

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