



Ofcom's Draft Annual Plan 2014/15

EE's response to the consultation

February 2014

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1. Introduction and Summary

EE welcomes the opportunity to comment on Ofcom's draft Annual Plan. While we considered the Invitation to Comment a good step in Ofcom's Annual Plan cycle, we were disappointed that the responses to it were merely listed, and that the draft Plan failed to provide clarity on if and how Ofcom had taken account of stakeholders' responses. In order for this step to add value, we would expect Ofcom to comment on the responses, similar to any other consultation.

In summary:

- Ofcom should take due account of the wider context when considering any individual piece of regulation and consider the cumulative impact of regulation on competition, investment and the sectors it regulates as a whole; in addition Ofcom should undertake comprehensive assessments before initiating monitoring and enforcement programmes;
- Ofcom should commit to considering issues in a timely way; and
- Ofcom should provide greater clarity on the criteria it uses to prioritise more discretionary work streams.

While there are a number of areas where Ofcom has a requirement to finish or undertake specific projects (for example market reviews), EE considers that Ofcom should also initiate a specific project on reviewing the General Conditions (including, but not limited to, rationalising the requirements to provide information to consumers) to ensure that they are coherent, up to date and relevant and remove any duplication with existing general law.

2. Ofcom's overall approach and strategy

Ofcom's strategy, as articulated in the draft Annual Plan essentially provides a summary of the key statutory duties. Clearly, Ofcom must adhere to the duties and objectives set out in the Communications Act 2003 (the "Act"). A statement of Ofcom's strategy has most value for communications providers where it provides an indication of how Ofcom plans, over the coming year, to balance the various statutory requirements placed upon it and how it prioritises different claims on its resources in meeting these objectives. While it is not clear how the overarching statement of Ofcom's strategy adds to Ofcom's duties as set out in Part 1 of the Act, it is important for Ofcom clearly to enunciate its priorities for the coming year such that communications providers can understand which areas are high priority for Ofcom, as provided in paragraphs 1.16 to 1.20 and in Figure 2 of the draft Annual Plan.

While we agree that the broad areas, as summarised in Figure 2, remain important and appropriate, the specific areas which are covered under these headings need to be reviewed. We comment below in relation to the specific projects and priorities under each of the main headings. Before turning to these specific projects and work items, we believe that there are at least the following

areas where Ofcom could and should provide more general on-going clarity around how it will organise and prioritise its work.

First, in considering how individual pieces of proposed regulation will impact the industry and consumers, Ofcom should commit to taking a wider view.

Increasingly, we consider that each piece of proposed regulation is considered in isolation without taking a more considered view of how various regulatory measures interact. The combined impact of these measures is starting to restrict the ability of communications providers to recover efficiently incurred costs in a competitive market. While it is possible that many of the individual regulatory constraints on their own do not have this impact, the combined effect is greater than the sum of the individual parts and Ofcom should undertake impact assessments within the wider context that recognises the way in which different regulatory measures have the potential to interact with each other.

For example, Ofcom's current proposals in relation to Annual Licence Fees for 1800 MHz and 900 MHz will lead to a significant increase in the annual costs of mobile networks. Ofcom should take account of the wider implications of setting such fees at the upper end of the feasible range required by the Direction it is under to set such fees at "full market value" by carrying out a thorough Impact Assessment. A number of other on-going or recent projects have also constrained the ability of mobile networks to compete freely and recover efficiently incurred costs. Cumulatively the overall impact of such regulation will not be in the long run interests of consumers or the UK economy. Mobile networks are currently in the process of undertaking significant investment in 4G infrastructure [and investment in LTE-Advanced is also on the horizon]. Regulation curtailing the return which can be made on such investments below reasonable levels will simply lead to roll out of this critical infrastructure being slowed down or becoming uneconomic in some geographic areas.

Second, it would be beneficial if Ofcom made a general commitment to act in a timely manner, in the way it intends to achieve its aims (the way in which it states it will behave in furthering the consumer and citizen interest). There are a number of important projects which remain on-going and which EE considers need more urgent resolution. These include, for example, the completion of the review of fixed switching and Ofcom's policy in relation to the Donor Conveyance Charge. We welcome the steps forward Ofcom has made on both of these projects recently, but consider that final resolution of these issues is overdue. Delays on such issues can have a significant impact on competition and consumer interests. In general, it would also be helpful for our planning, if Ofcom made firm commitments on the timing of milestones for its major projects, such as for example when we can expect a statement on Annual Licence Fees or when to expect a further consultation on the VULA margin.

Finally, we consider it would be useful if the next Annual Plan could be more explicit on setting out the criteria by which more "discretionary" work streams are taken forward. Clearly there are a number of key projects (for example in relation to undertaking market reviews) which Ofcom has a requirement to take forward. However, there are a number of projects which can take up significant regulatory resource (both for communications providers and Ofcom itself) where the criteria being used to prioritise are not clear. Many of these fall under the broad headings of consumer information or protecting consumers from harm. We provide comments below on the specifics in relation to the

areas, but as a point of general principle EE considers that Ofcom needs to be more explicit and specific on the criteria by which such projects are chosen to be taken forward.

3. Strategic purposes

EE welcomes the detail under each of the purposes and the interim and final outcomes for each of the priorities. However, a number of outcomes are defined in rather qualitative terms and it would be helpful if Ofcom were to set out how they would measure progress.

Promoting effective competition and informed choice

Under this heading EE fully agrees that, on what Ofcom terms “supply-side competition policy”, the focus needs to be on enduring economic bottlenecks. That is, Ofcom should focus regulatory intervention on measures which will create and sustain on-going competition and investment. Protecting and promoting competition should be a key priority for Ofcom, but one which recognises and takes account of the already vigorous competition which exists in many parts of the UK communications landscape. Regulation must also be applied in way which ensures a level playing field and care must be taken that differing regulatory requirements are not in themselves the cause of competitive distortions.

The priorities identified by Ofcom in this category are ensuring effective competition and investment in both current and superfast broadband, promoting effective choice for consumers by ensuring that clear and relevant information is readily available and develop and implement policies that will improve the ease of switching.

In the context of promoting effective choice by ensuring that clear and relevant information is readily available, Ofcom mentions the Mobile Quality of Experience and the Mobile Broadband Speeds projects. EE notes that it is hard to provide useful quality of service information to consumers in a user friendly format. On previous occasions, Ofcom has not always been successful, as evidenced by the TopNet and Topcom initiatives. Whilst EE recognises the need for consumers to have information about a number of service parameters, we do question Ofcom’s approach in these areas. There are a number of third parties who already provide accurate, detailed and granular quality of service information to consumers. We question why Ofcom, in the case of the Mobile Broadband Speed measurement project, has decided to carry out the research themselves, rather than relying on third parties who are set up to carry out testing and publish results in a consumer friendly way.

On the current mobile Quality of Experience project, again, Ofcom could rely on third parties rather than sending out onerous information requests, which would result in operator specific information, which will be hard to compare.

More generally, EE urges Ofcom to assess the current consumer information requirements in the General Conditions, which have built up over time and to

develop a more holistic view of consumer information, required at the different stages of a customer's life cycle. We believe it would be sensible for there to be a commitment in the next annual plan to have a project to remove duplicate requirements, check the relevance of current requirements to provide consumer information (to ensure that this is actually requiring the provision of information which can be shown to further consumer interests) and compare these requirements against those in existing consumer law. On the latter point, telecoms sector specific regulation requiring the provision of information should only be imposed where it can be demonstrated that there is a specific need for additional information, to protect competition or consumer interests, to that which would be required by more general legislation because of particular characteristics of the telecoms market.

On traffic management, EE believes that effective transparency is key for those end-users who are interested in this. EE continues to work with Ofcom to ensure that accurate information is available for those end-users who seek it, but notes that such information will only be relevant to a certain group of customers, depending on the nature of their internet usage.

On switching, EE welcomes that Ofcom finally published its statement on fixed switching over the Openreach copper network. We urge Ofcom to focus on implementing the proposed changes, which will end the competitive disadvantage in the market and will also address a number of consumer issues. However, this will only partly solve the fixed switching issues. EE expects Ofcom swiftly to move on to other issues in the fixed telecoms market, which currently cause consumer harm, such as Erroneous Line Transfers.

Secure optimal use of spectrum

To manage the ever growing demand for mobile data within the UK, it is essential that network operators have access to low-cost, high performance and highly scalable mobile backhaul, fixed and wireless. EE considers that Ofcom should also focus on wireless backhaul in the 2014/15 period. Given the release of 78% more access spectrum in 2013, now is a good time to assess whether Ofcom could do more to facilitate the availability of cost-optimised wireless backhaul. This is not necessarily about finding more spectrum for backhaul but about understanding whether the regulatory regime in the UK and across Europe support the best use of spectrum for wireless backhaul to produce cost-effective backhaul solutions. Specific questions which Ofcom should ensure are covered by priority work streams include:

- Can the regulatory regime for fixed links benefit from more European harmonisation to create a single market for microwave equipment – which would be similar to the single market which broadly exists for handsets (and where there are significant benefits from such harmonisation)?
- How can the wireless backhaul regime properly support and enable the developing use of small cells? Spectrum management needs to enable and promote more cost effective solutions to facilitate small cell roll out (which could be based on WiFi or licensed spectrum 3G/4G access solutions). This will be an important part of alleviating the capacity constraints in relation to access spectrum and as such deserves

prioritisation in the same way Ofcom has, and plans to, prioritise enabling new access spectrum releases.

Protect consumers from harm

As regards the non-geographic numbering reform, Ofcom and industry have started the implementation phase. This phase is highly complex in terms of project management. EE urges Ofcom to carry out a detailed risk assessment in order to minimise issues further down the line. We have identified the following risks:

- Details on the mechanics of Ofcom's pricing database, which will hold all the Service Charges;
- The number of price points for Service Charges; and
- More generally, the engagement with Service Providers. Ofcom expects this engagement to take place through Communications Providers, but we consider that more needs to be done to inform this community and make them aware of the changes. This community is highly dispersed, and is made up of a high number of small outfits, which may lack the resources or the expertise to equip themselves with the relevant information.

Maintaining audience confidence in broadcast content

In terms of the 5th strategic purpose, maintaining audience confidence in broadcast content, EE would like to comment on the common framework for media standards and the report on approaches to protecting the safety of children online.

Work to develop a common framework for media standards

EE notes that the DCMS strategy paper 'Connectivity, Content and Consumers' asked Ofcom to work with industry towards a consistent approach to media standards regulation. The UK mobile operators have led the way in setting a common standard for 18 content on mobile devices by appointing an independent mobile classification body to develop the 18 rating that applies across all commercial content and which is also used as the basis for setting operators' internet filters. This collective approach has been in place since 2005 and last year the BBFC took over as the independent classification body and undertook a review into the 18 mobile standard based on existing standards in other media to ensure it still represented public opinion.

However the strategy paper talks about a range of issues that require a set of media standards. This is far wider than child protection and also includes a range of consumer protection issues such as financial harm, health and medical risks and misleading content. We wish to make clear that there should be no presumption that operators' filters which are designed to protect children from viewing age inappropriate content, should now filter out content which is not illegal or age inappropriate but maybe unpalatable.

For EE there are practical and policy concerns with extending blocking into other areas. The challenge comes in areas where there is no consensus on the appropriate role of providers. Asking ISPs to block content that is offensive to some people but is clearly legal, places ISPs as arbiters in deciding what customers can access. We believe it is ultimately for Parliament, not ISPs, to take a view on unpalatable content and to determine what is illegal or whether the legislative framework requires revision.

Report on approaches to protecting the safety of children online

We understand that the Government has asked Ofcom to provide a report on the take-up, parental awareness and confidence in available parental controls. We urge Ofcom not to view the effectiveness of technical e-safety tools in isolation as the best way to protect children from accessing inappropriate content is by a combination of parental controls and education. Blocking websites maybe sufficient protection for a young child but it will not deal with the needs of young teenagers who will use social media and other personal communications. Teenagers in particular will always try and find material that their parents or teachers would rather they did not see, and it's the industry's role is to provide educational material, as well as the tools, to ensure children and parents are well equipped to make informed choices.

The DCMS strategy paper states that it expects companies across the internet value chain to ensure that all internet enabled devices are supplied with safety tools as standard. We would go further in that content providers, browsers, search providers, device manufacturers and Wifi providers all have a significant part to play in child safety if network controls are to remain effective.

Government should be ensuring that the responsibility for child protection applies across the wider value chain not just with ISPs. Not only will this provide more channels to market for child safety messages and products but it will also ensure there is a level playing field in terms of implementation costs and responsibility and ensure that network filtering remains effective particularly as encryption techniques become more prevalent.

Contribute to and implement public policy

EE urges Ofcom to continue its work on the European Commission's Connected Continent proposals. EE has particular concerns about the speed of the legislative timetable and the absence of formal industry consultation from the European Commission, in relation to this package. In this context, EE considers that Ofcom has a critical role to play in lending its technical expertise to the European Parliament and Council, such that any legislative intervention will take better account of the practical and technical realities faced by operators.

4. Major work areas

Promote effective competition and informed choice

EE notes that Ofcom will be undertaking significant work on two major market reviews during 2014/15 (on mobile call termination and business connectivity / leased lines). Such market reviews are key areas where we consider that it is important that Ofcom also takes account of impact of regulation in the round and that the broad effect of regulation is considered (including the impact in conjunction with other pieces of related regulation) as discussed above.

In relation to the next Business Connectivity Market Review, EE fully agrees that this will take time and should be initiated in the next year. This will need to focus on the extent to which BT retains bottleneck control over key areas of the markets. The important areas which EE considers this review will need to cover are whether physical infrastructure access should be introduced alongside active remedies to promote longer term competition in the relevant markets (this is likely to need to be considered in some detail regardless of the outcome of Colt's current appeal) and the extent to which there is competition in the provision of mobile backhaul products and the consequent regulation. In relation to the latter point EE considers that there are significant areas where there remains no effective choice to purchasing backhaul from BT and that, in the context of continuing 4G investment requiring greater backhaul capacity, this requires regulation in relation to price and the service quality/technological evolution offered.

In relation to net neutrality, EE supports Ofcom's view that there is no case for regulatory intervention in the UK, and urges it to continue to engage at an EU-level, in order to impress this point. In particular, it is critical that regulatory intervention does not stifle the development of innovative business models, based on specialised services that could bring significant benefits to consumers, without having a material impact upon general internet access.

Secure optimal use of spectrum

We agree that Ofcom should work to find a solution for PMSE spectrum users. This must be a solution that is not overly draconian for other spectrum users. For example, the current proposal from APWPT to use the duplex gap of mobile bands against a requirement for MNOs to install small cells inside concert venues and theatres is clearly unacceptable for MNOs.

Regarding M2M, we encourage Ofcom to avoid taking an interventionist approach but rather wait and see whether a solution can be found amongst market participants. M2M services are already provided by several operators. For example, we understand that Neul has rejected TVWS spectrum for their 'Weightless' standard in favour of licensed sub-1 GHz spectrum. There are several options for Neul to engage with licensees and negotiate access to sub-1 GHz spectrum and we believe it is important for Ofcom to allow the secondary spectrum market an opportunity to provide solution by not creating an early

impression that Ofcom will intervene to make spectrum available specifically for M2M.

Promote opportunities to participate

The major work areas identified by Ofcom are:

- Understand and promote the interests of vulnerable consumers and citizens;
- Continue to promote the provision of better mobile coverage and service information to inform both consumers and policy decision;
- Work in collaboration with government and industry to promote widespread availability of fixed and mobile superfast broadband; and
- Complete an evaluation of, and report on, the affordability of core electronic communications services.

Regarding coverage, we would strongly encourage Ofcom to not only focus on the role of mobile networks in providing coverage but also to look at the antenna performance of handsets, in particular smartphones. The coverage experienced by consumers depend on the strength of the mobile signals in a given location but it clearly also depends on the ability of their phone to pick up this signal. Studies have shown that the RF performance of handsets, in particular smartphones, varies significantly with some popular phones performing relatively badly. We would argue that it is difficult for consumers to find available information on the relative performance of different handsets when deciding which handset to purchase. We therefore encourage Ofcom to work with other European regulators to consider whether a pan-European labelling regime could be put in place, for example a tick-mark to show that a handset had a certain minimum performance. This may in turn also encourage manufacturers of handsets to produce handsets with good RF performance.

A focus on the performance of phones and the promotion of consumer information about that performance would also be in consistent with the activity identified under Ofcom's strategic purpose 2 (spectrum) to "Understand the impact and role of receivers on efficient spectrum use"; receiver performance is important not just to minimise co-existence issues but also to ensure that users have good experience of the core wireless service they wish to receive.

We have set out our comments on the provision of mobile service information under 'Promoting effective competition and informed choice' above. Whilst we can see how providing the right type of quality of service information in the right format to consumers could help inform choice, we consider the link to 'Promoting opportunities to participate' more tenuous. If anything, it shows Ofcom's ambivalence about the purpose of these work areas. We urge Ofcom to provide clarity as to the objective of each workstream.

In terms of Ofcom's evaluation of, and report on, the affordability of core electronic communications services we encourage Ofcom to carry out this analysis in the context of the current telecommunications market and make comparisons with other industries, where appropriate. Ofcom recently published

its Consumer Experience report, which contains a wealth of information around price developments of baskets of services, take-up numbers and an international price comparison.

In terms of availability, Ofcom's Consumer Experience report states the following:

- **Fixed line, broadband and digital broadcasting are available to nearly all consumers, with varying degrees of mobile coverage across the UK.** In 2013, using data taken from network operators planning tools, we estimated that 99.6% of premises had an outdoor mobile signal from at least one 2G operator and 99.1% by at least one 3G mobile operator.

On spend:

- **Average UK household spend on communications services fell in real terms in 2012.**
- **The premium price for superfast broadband services is falling.**
- **UK mobile prices fell for most of the usage profiles used in our analysis in 2013.**

Ofcom's analysis of the tariffs available from the largest retail communications service providers shows across eight mobile connections of varying use that the total 'weighted average' price of these eight connections, calculated using the tariffs available from the UK's three largest mobile providers (EE, O2 and Vodafone) fell by just under a quarter (22.6%) in real terms in the year to July 2013.

Ofcom's international price comparison shows that the UK ranks cheapest, or second cheapest, compared to the US and 5 EU countries (Italy, Germany, France and Spain) for most mixed baskets of communications services.

We also encourage Ofcom to look at the availability of services for people on low incomes, such as prepay phones.

Protect consumers from harm

In terms of consumer protection, the areas specified by Ofcom are nuisance calls and unexpectedly high bills. We note that nuisance calls still generate by far the highest numbers of complaints into Ofcom. We appreciate this is a difficult area but we also note that since January 2012 Ofcom has only fined 3 companies. In terms of priorities, it would be good to gain more insight into the activities Ofcom are carrying out to combat nuisance calls, and to assess the effectiveness of the measures taken.

More generally, EE considers Ofcom should provide greater detail and clarity on how it sets administrative priorities in the area of protecting consumers from harm. The draft plan merely states that Ofcom will focus on key areas of consumer harm identified through Ofcom's monitoring and enforcement programmes. Such a statement somewhat begs the question and provides little clarity to communications providers on the actual criteria which will be applied

and what evidence is used in order to ascertain whether a particular area warrants further investigation by Ofcom.

The same holds for opening or extending compliance monitoring programmes. Again, it would be beneficial for industry to be provided with the reasons for opening or extending a monitoring programme, based on an assessment of (alleged) consumer harm.

Related to the above comments, but as a separate issue, EE also believes that a wider review of the General Conditions themselves is overdue. This is a project which has been discussed several times in the past but which should now become a priority. The General Condition framework has been built up over the last decade, often in a rather piecemeal way responding to specific individual issues which have arisen. Combined with the legislative and technological changes and a range of individual transpositions of EU requirements, over the same ten years, this has now led to a regime which is complex to understand, which contains numerous duplications and compliance with which is unnecessarily costly. EE therefore considers that the overall General Conditions framework should now be reviewed, with a view to making it clearer, more coherent and relevant. Such a project could also usefully review Ofcom's guidance notes on regulatory compliance, many of which are now significantly out of date.

In the past year, EE notes that there have been a number of instances of Ofcom, for consumer protection reasons, starting projects, sending out onerous information requests or Calls for Input without providing concrete evidence as to the consumer harm which it considers is arising or needs to be addressed. Specific recent examples include the information requests on Bad Debt management processes by CPs, on Call Barring Facilities, and on SIM unlocking. Despite the significant resources that have been taken up by these investigations, none of these initiatives contained an analysis of consumer harm and, so far, none of them have been progressed by Ofcom.

On the subject of using resources, we noticed Ofcom issued a number of consultations without any real policy issues for consideration in the past year. Examples are a consultation on shared spectrum use and the mobile data strategy. We consider Ofcom should only issue consultations with real policy questions and spend its and our resources on valid issues.

Contribute to and implement public policy defined by Parliament

We encourage Ofcom to engage heavily with the government on its telecommunications policy. Ofcom has the expertise and evidence on many issues set out by the government. In order for government to fully benefit from this, Ofcom should pro-actively share information, and indicate which areas Ofcom are already looking into, and based on an analysis of harm, determine priorities and a way forward.

We also urge Ofcom to feed into government's policy work where there is an overlap or an impact on Ofcom's work and vice versa. An example is the Consumer Rights Directive, in particular the Basic Rate regulation, and Ofcom's

decision on Non-geographical calls, where there appears to be a disjoint between the work streams. A further example is the Telecommunications Action Plan, pushed for by DCMS, which raises questions about whether government is an additional regulator of the sector with significant considerations of double jeopardy and undermining regulatory certainty.

Programmatic work and services to stakeholders

Although not set out separately in Ofcom's draft Annual Plan, EE would like to comment on the way Ofcom fulfils its duty under section 134A of the Communications Act to produce a report on infrastructure.

EE accepts that Ofcom has an obligation to provide an updated report to the Secretary of State in the event of "significant change", such as the introduction of 4G, however Ofcom seems to be publishing full reports every year with the process taking up around six months (March to October).

Ofcom must have regard to the principle of proportionality which requires that any action by Ofcom shall not go beyond what is appropriate and reasonably necessary to achieve its stated objectives. Ofcom must also have reasonable grounds for believing that the provision of the information is both necessary to achieve its statutory objectives and the least onerous measure that will achieve those aims. The impact of Ofcom's current approach involves considerable resource and involves disproportionate costs and effort on EE's part for very little gain.

We encourage Ofcom to adopt a pragmatic approach to the fulfilment of its duty and limit the scope of the annual updates to what is relevant and useful and necessary to answer specific questions or inform discrete policy areas. We welcome Ofcom's intention for 2014 to have a more focused approach and collect information which would inform a number of policy areas. We hope this intention will get translated into a more focused information request.

5. Administrative Fees

As Ofcom is aware there was some industry concern around the increase in Ofcom's administrative fees for operators in the Network and Services sector for 2013/14. In particular, the significant annual increase and the specific allocation of Ofcom's costs between sectors were not known until the final announcement (which provided no notice of these changes). We therefore consider it is important, as part of this process, for Ofcom to consider now what can be done to ensure that a similar situation is not repeated this year.

We do consider that Ofcom needs to provide greater and earlier transparency around the calculation of its fees and are disappointed that the consultation on charging principles appears to have been delayed (and will therefore be too late to impact on next years' fees) and will now occur in the last quarter of the current financial year (i.e. in the first quarter of 2014).

Given the current situation EE urges Ofcom to ensure that the fee announcement this year does not again contain significant surprises for the sector. While we appreciate the constraints Ofcom is under in relation to due process and audit requirements, greater transparency about any potentially significant re-allocations of either work streams or Ofcom's major cost items should be possible to provide network operators with at least some indications which can be taken into account in individual corporate budgeting processes .