A short note on the work plan of the Office of Communications for 2015-16

Introduction
The practice of inviting comments on the annual work programme of OFCOM is to be welcomed and encouraged. Some of the co- and self-regulatory bodies might usefully follow its example.

The issue of international mobile roaming (IMR) continues to feature in the work plan of OFCOM. It is in danger of becoming a permanent feature, disproportionate to the scale of the problem. Two issues arise that are of concern, the lack of transparency of the work by BEREC and the need to consider plans for an exit from the Roaming Regulation.

One surprising aspect of the work plan is the lack of attention to rural telecommunications, which has been the subject of inquiries by three committees of the House of Commons, attracting considerable interest from MPs. The dynamics of rural markets appear to be insufficiently understood, in part because of the lack of data on availability at the necessary level of granularity. It is unclear that the full range of interventions been explained to MPs and explored by OFCOM. It is clear that, at least, the PAC will return to the matter in the next parliament. Given the statement that the last five per cent of premises are in 75 per cent of land area, the challenges remain formidable.

The issues raised in the following sections concerns roaming, open data, devolution, prospective exit from the European Union and the ITU-R.

International mobile roaming
The issue of international mobile roaming (IMR) is one that was first raised with the European Commission (EC) in early 1999. Consequently, it is surprising that the matter of excessive prices has yet to be resolved and even more remarkable that the causes remain so very poorly explained. The EC made its most recent legislative proposal two years ago. Since then, it has been considered by the European Parliament and the Council of Ministers. The Italian presidency failed to make any progress and the Latvian presidency seems intent on delaying the abolition of IMR surcharges by several years.

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1 Ewan Sutherland (2001) “International roaming charges: over-charging and competition law” Telecommunications Policy 25 (1-2) pp 5-20, doi: 10.1016/S0308-5961(00)00084-7
Interestingly, BEREC, a body of which OFCOM is a member, concluded that the EC proposal could not be delivered. This was a singularly unhelpful conclusion and one that failed, *prima facie*, to meet the obligations on OFCOM to promote the interests of citizen-consumers. The obscure procedures of BEREC mean that it is all but impossible to determine how BEREC reached its conclusion, whether OFCOM concurred and how the decision might be reversed or modified. One improvement would be for BEREC to publish detailed minutes, including voting records. Unlike COCOM, RSC, and RSPG its meetings are held in camera, for which there is no obvious justification.

IMR has been an excellent justification for many international meetings of regulatory officials, generating a substantial emission of greenhouse gases (GHG), for which I accept a degree of personal culpability. It is time to kill the issue and move on to other more contemporary matters, even though it is the only activity of BEREC comprehensible to the average or even well-informed EU citizen.

**Open data**

In 2012, ministers from the Cabinet Office and the then Department for Business, Innovation & Skills (BIS) announced that the Chairman of the Data Strategy Board would lead an independent review of public sector information (PSI), a commitment made in the open data white paper. In 2013, HMG responded to the Shakespeare Review by introducing the National Information Infrastructure (NII), as a way to help prioritise the release of its key data. The NII was to include data held by HMG and likely to have significant economic and social benefits if made accessible beyond government. It called for departments to identify and to document data they held but that had not yet been published. This was to help build a more complete picture of availability and non-availability, as part of an inventory of government data, documented on a data portal (see, for example, Table 1).

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8 [http://data.gov.uk/](http://data.gov.uk/)
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Table 1  Open data on telecommunications available from HMG

<table>
<thead>
<tr>
<th>Subject</th>
<th>Agency</th>
<th>Description</th>
<th>Format</th>
</tr>
</thead>
<tbody>
<tr>
<td>Broadband coverage</td>
<td>OFCOM</td>
<td>Information on broadband take-up, speeds and availability. Contains data provided by communications providers</td>
<td>CSV, HTML</td>
</tr>
<tr>
<td>Superconnected cities broadband</td>
<td>Leeds City Council</td>
<td>Leeds City Council and City of Bradford MDC are working together on a variety of digital projects under the ‘Superconnected Cities’ banner</td>
<td>CSV</td>
</tr>
<tr>
<td>Fixed Broadband Speeds (unpublished)</td>
<td>OFCOM</td>
<td>Average download and upload speeds, web browsing speed, latency, packet loss, DNS resolution, DNS failure, and jitter</td>
<td>n/a</td>
</tr>
<tr>
<td>Telecommunications market data tables (Unpublished)</td>
<td>OFCOM</td>
<td>Aggregated call revenues, connections, call volumes, and subscribers for fixed and mobile telecoms markets.</td>
<td>PDF*</td>
</tr>
<tr>
<td>Broadband Performance Indicators Quarterly Publication</td>
<td>DCMS</td>
<td>Number of premises covered per £million of broadband delivery programme expenditure.</td>
<td>PDF*</td>
</tr>
<tr>
<td>Internet Access</td>
<td>ONS</td>
<td>Explores the use of the Internet by adults in Great Britain and draws attention to how households connected to the Internet.</td>
<td>PDF*</td>
</tr>
</tbody>
</table>

* This is not an open data format.

Similarly, the European Commission has created its own data portal.9,10 Currently 37 data sets are available on broadband, notably those from the Digital Agenda Scorecard covering the period from 2001 to 2014, including the implementation reports.11 The EC is also working on the second phase of ISA (Interoperability Solutions for European public administrations), to enable seamless electronic cross-border and cross-sector interaction between public administrations.12 Moreover, it has provided funding for research on open data.13

HMG was a founding member of the Open Government Partnership (OGP).14 This initiative was launched in 2011 as an international platform for domestic reformers committed to making their governments:

- Open;
- Accountable; and
- Responsive to citizens.

OGP has grown from eight to 65 countries. The United Kingdom has committed to a second substantial action plan.15 One major step has been to open the data held by Companies House on the beneficial ownership of firms registered in the United Kingdom.16

While OFCOM publishes significant quantities of data it does not do so systematically in open data formats, with much of the material still presented as PDF files or charts within documents. Some of these are very large, making it time-consuming to convert the data into

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14 http://www.opengovpartnership.org/
16 http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-01-15/HCWS188/
usable formats.\textsuperscript{17} To comply with the commitments made by HMG, all data must be made available in open data formats and should contain identifiers to allow easy links to be made to other sources. For example, links to the data now available from Companies House on beneficial ownership.

By doing so OFCOM could set an example to Commonwealth countries by ensuring its data are all available in open formats. Some of this work could be pursued through the Commonwealth Telecommunications Organisation (CTO) and the Department for International Development (DfID), for example, in designing common formats for data sets and transfer of expertise.

In addition to any data held by OFCOM, it is important that it works with the co- and self-regulatory bodies that it oversees and recognises, to ensure that they adopt the same principles and practices. It may be that some smaller bodies would need support from OFCOM, the Cabinet Office or the Government Digital Service (GDS), to ensure such data are made available.

These bodies include:

- Advertising Standards Authority (ASA);
- Authority for Television on Demand (ATVOD);
- BT Openreach;
- Communications and Internet Services Adjudication Scheme (CISAS);
- Office of the Telecommunications Administrator (OTA\textsuperscript{2});
- Phonepay Plus; and
- Telephone Preference Service (TPS).

Additionally, some bodies have been in receipt of funds from HMG or OFCOM and their data ought also to be available in the same way. For example:

- Sam Knows; and
- U-Switch.

OFCOM needs to consider how it can catch up with the rest of government and especially how it can bring the co- and self-regulatory bodies with it. Ideally, it should work with the EC and BEREC members to develop common standards for data, which could benefit data users in the United Kingdom and other Commonwealth countries.

**Public consultations**

OFCOM conducts large numbers of consultations each year on a wide variety of subjects. It is time that it reviewed the overall pattern of the submissions it receives in terms of the various regions of the United Kingdom and the various groups, for example, disabled, small businesses and young people. At the consultation meeting in Edinburgh it became clear that there had been no regional breakdown of responses. It should now be possible to take a ten year view of responses, in particular identifying gaps.

\textsuperscript{17} The following is a particularly excessive example http://stakeholders.ofcom.org.uk/market-data-research/statistics/stats14/
It should be possible to identify measures to increase the level of responses, for example, by warning individuals and groups well in advance of relevant consultations and by offering training in responding to consultations. OFCOM could also work with a range of bodies to encourage them to respond, such as local authorities and charities. A register of interested parties, similar to the EU Register of Lobbyists, would be a useful measure, allowing alerts to be sent out might be a useful start.

The Smith Commission

In the final days of the campaign for the Scottish referendum, a ‘vow’ was made by the leaders of the three Unionist parties, leading to the appointment of the Smith Commission. It ignored the issue of the independence of regulators and any attempt at the systematic reconciliation of the devolved state and the regulatory state. Instead, it offered the following political fixes:

- Scottish Ministers approve the appointment of a director of OFCOM;
- OFCOM table its annual report to the Scottish Parliament (which it already does);
- Scottish Ministers approve OFCOM appointments to the board of MG Alba; and
- Scottish Ministers to be involved in setting the priorities of OFCOM in Scotland.

The plausibility of these proposals dissolves on closer examination, since broadcasting, posts and telecommunications would remain reserved powers and are thus ultra vires for the Scottish Government and Parliament. Moreover it proposes to duplicate functions performed by HMG and MPs, at additional cost to the taxpayer. The Smith Commission gave neither reasons nor any expected benefits from its proposals. Bizarrely, it proposed that Scottish directors be appointed only to:

- Maritime and Coastguard Agency (MCA);
- Northern Lighthouse Board (NLB); and
- OFCOM.

The Smith Commission did not propose appointees for other regulatory bodies (e.g., CMA or OFGEM), or the Monetary Policy Committee (MPC) of the Bank of England. The choice of the three exceptions was unexplained.

Equity would require that the three other nations appoint directors to OFCOM. The people of England might feel they need more than one representative (e.g., the ‘Northern powerhouse’ or the rural areas).

The report was quickly turned into draft clauses for a future Scotland Bill. As the White Paper notes, the proposal that Scottish Ministers be involved in setting the priorities of OFCOM is impossible, since HMG is not involved, these being matters for OFCOM. All the Scottish Government is offered, like everyone else, is the opportunity to respond to the consultation on the annual work plan, which merely highlights the failure to reconcile the devolved and regulatory states.

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The obligation for regulatory independence is stronger than HMG states, since it is based on EU directives.\textsuperscript{20} Indeed, the Court of Justice of the European Union (CJEU) has held that a government cannot direct a regulatory authority to prioritise amongst the various objectives set out in the Framework Directive.\textsuperscript{21} There are also extensive obligations requiring the independence of media regulators.

OFCOM is to lay its annual reports before the Scottish Parliament and officials are to be questioned,\textsuperscript{22} while the BBC is to do likewise, neither ATVOD nor the British Board of Film Classification (BBFC) are to do so. While the relevant committee could read the reports and ask questions of officials, there is no mechanism for it to direct OFCOM any more than it could direct the BBC.

The implication is that OFCOM would also lay reports before the Cardiff and Stormont Assemblies, though logically all four reports should go to the four legislatures.

Decisions by OFCOM are frequently, some claim too frequently, contested before the Competition Appeal Tribunal (CAT), where the opinions of a Scottish director would hold little, if any, sway. In reaching a decision OFCOM must carefully interpret statutes, prepare an impact assessment and respond to the views and data provided in its consultations, being reasoned and transparent in both process and outcome consider various networks. Many decisions are subject to approval by the EC and other EU regulators under the ‘Article 7 procedure’. There is little, if any, scope for a political push or nudge in favour of special interests in one region or nation.

OFCOM needs to give thought as to how it might adjust to a set of directors with geographic appointments and how it might better engage with the cities and devolved legislatures of the United Kingdom. An obvious question is what OFCOM might reasonably do if confronted by four (or more) different policy expectations from four (or more) administrations.

**BREXIT**

There are proposals by the Conservative Party and the United Kingdom Independence Party (UKIP) for an “in/out” referendum concerning membership of the European Union. Other political parties are content with the European Union Act 2011, which invokes a referendum in the event in a substantive fresh transfer of powers.

It is an entirely plausible scenario that such a referendum could take place in 2016 or 2017, followed by the invocation of Article 49 of the Treaty of Lisbon. The consequences of which could be considerable, not least for the legal and regulatory frameworks and the governance networks for broadcasting, posts and telecommunications, something to which OFCOM ought to give preliminary thought and analysis.

\textsuperscript{20} Article 3(2) of 2002/21/EC and Article 3a of 2009/140/EC.
\textsuperscript{21} EC v Federal Republic of Germany, C-424/07. Court of Justice of the European Union, 3\textsuperscript{rd} December 2009.
\textsuperscript{22} This is already the practice.
While OFCOM could continue to attend CEPT, IRG, ITU, UPU, and the OECD, it would be barred from:

- Body of European Regulators of Electronic Commerce (BEREC);
- Communications Committee (COCOM);
- European Regulators Group for Audiovisual Media Services;
- Radio Spectrum Committee (RSC); and
- Radio Spectrum Policy Group (RSPG).

Consequently, there would be a loss of exposure to developments in the EU and of best practice, plus exclusion from EU inputs to CEPT, ITU-R and UPU. OFCOM would have to look for alternative mechanisms to remain fully informed of and new ways to contribute to developments.

One obvious concern is exclusion from Roaming Regulation III, which applies only to MSs of the EU and the EEA.\(^2\) Once outside the EU and the EEA, mobile operators would cease to have automatic access to regulated wholesale prices and consumers would cease to have the protection of the retail caps. Consequently, it would be possible that the roaming rates for customers visiting the EU would increase steeply, with similar changes for visitors from the EU. The Roaming Regulations have been shown to be non-extensible and non-reproducible, therefore there is no simple alternative mechanism.

If the UK remained within the EU regional trade agreement, operators might be able to obtain similar wholesale rates as those in EU MSs, on the basis of most favoured nation (MFN) under the General Agreement on Trade in Services (GATS). Alternatively, since the operators have networks in other parts of the EU, they could dynamically assign each roaming device an EU-MS IMSI, which would give them the wholesale regulated rate. In either case it would fall to OFCOM to ensure the lower prices were passed on to retail customers. At worst, OFCOM would have to ensure the transition to higher rates was well managed and customers fully informed.

HMG would no longer be subject to the TFEU state aid rules. Potentially, OFCOM or the Competition and Markets Authority (CMA) might provide similar guidance, or it might be left to HMG and the courts, assuming there was a legal provision similar to Article 107 TFEU (formerly Art. 87 TEC). Similarly, draft decisions that are subject to review by the EC under the Article 7 procedure, would be left to OFCOM and the Competition Appeal Tribunal (CAT). Further analysis of such issues would seem essential.

If the United Kingdom remained in the EEA, then it would be subject to the bulk of the current directives and any subsequent changes. Like Norway and Iceland, it would be bound by the directives and regulations adopted by the European Parliament and Council of Ministers, but without representation.

In the event that a government emerges from the May 2015 general election that intends to proceed with a referendum, it would be necessary for OFCOM to undertake the necessary technical evaluations of a ‘Brexit’, i.e., a British exit from the EU.

World Radiocommunication Conference – WRC15

In the normal course of events the International Telecommunication Union (ITU) operates at a sedate pace, devoid of surprises. For a variety of reasons WRC-12 was hijacked by the African and Arab states to force through changes to the use of the UHF Band. Interestingly, none of the countries concerned had conducted an impact assessment or public consultation on the measures they proposed. Many are formally autocratic, others are just undemocratic in practice, with votes being for decoration or being bought by politicians, consequently their governments are not held to account. Any diminution of diversity and plurality as a result of switching spectrum away from broadcasters to mobile Internet providers is advantageous to such regimes, not least since Internet access can be filtered through a national “gateway”.

The problems at the ITU and WRC require a change in its governance arrangements in order to eliminate options of democratic and well-governed states being shanghaied by groups of autocracies. One option would be to split Region 1 in order to exclude those states not engaging in good practice (e.g., consultations, impact assessments).

Conclusion

The issue of open data is one that OFCOM can no longer be avoided, given its responsibilities for the sector, even if some of the data are from third parties. In order to comply with the open data policies of HMG and to enable evidence-based policy, much more data needs to be made available.

Similarly, a truly open consultation system requires periodic reviews to determine its effectiveness. It must be possible to improve the level and diversity of responses to the many consultations held by OFCOM.

24 The regulatory authority in the United Arab Emirates had consulted operators and manufacturers, but not broadcasters, citizens or NGOs (if there are any).