



BT's response to Ofcom's consultation on its Draft Annual Plan 2015/16

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Introduction

1. BT believes Ofcom's Annual Plan is an important document, enabling all stakeholders to understand Ofcom's high-level plans for the year ahead. BT also recognises this year's plan is more concise, clear and digestible for stakeholders' than in previous years, albeit, as of yet it does not describe those additional work streams that may flow from Ofcom's Strategic Review of Digital Communications (DCR). In particular we find the work plan and milestones set out in Annex 1 helpful in enabling us to allocate resources and prepare for engagements with Ofcom.
2. BT supports Ofcom's goals as detailed in the plan "*to promote competition and ensure that markets work effectively for consumers; to secure standards and improve quality; and to protect consumers from harm.*"
3. 2016/17 is a crucial year for Ofcom in ensuring that the foundations for meeting these goals are laid down, particularly in progressing its strategy outlined in DCR published yesterday. Over the past decade the communications sector has seen positive results in promoting competition and improving services for customers. In terms of price, choice, coverage and many other factors, the UK performs extremely well¹; the UK leads Western Europe and the US on most performance measures used by Ofcom. This has been facilitated in part due to regulation that has promoted investment and competition in these sectors.
4. However, there is the notable exception of Pay-TV, where such regulation as currently exists has not facilitated competition and therefore we have seen increases in prices for consumers as strong competition to Sky has failed to emerge. Additionally, BT is concerned that it is not clear how and when Ofcom will undertake the market monitoring work it has committed to carry out in respect of the Pay-TV market and wider value chain, despite Ofcom's assurances in its last Review of the pay TV wholesale must-offer obligation Statement² and more recently in the DCR³ that it would do so.⁴ BT considers that Ofcom should set out its proposed monitoring activities in greater detail.
5. BT is extremely disappointed that Ofcom has not looked to address this disparity in its DCR and are worried that once again Pay-TV is being left until last when it comes to considering customers' needs and the regulatory approach that might help achieve them. Indeed where regulation has existed in the form of the Wholesale Must Offer obligation on Sky Sports 1 and 2, Ofcom has removed this obligation rather than looking to improve it despite their conclusion that Sky could have the incentive to restrict supply of key content to their competitors to prevent fair and effective competition⁵ and Ofcom's research showing that Sky has in excess of 50% of Pay-TV retail revenues⁶ which would indicate that fair and effective competition does not exist.
6. Moreover, as a result of the increased prevalence of bundled communications services, the competition problems in pay TV are now spilling out into broadband and telephony markets, creating further competitive distortions which will have negative consequences for consumers in the medium term in terms of higher prices, lower quality, less choice and less innovation in wider telecommunications services. We believe it is more important than ever for Ofcom to take decisive action on Pay-TV if they want to achieve

¹ Source: Ofcom, International Communications Market, December 2014

² Dated 19 November 2015

³ DCR, paras 9.19-9.20.

⁴ See paragraphs 1.21, 1.25, 1.36, 5.68, and 7.15 of the Statement

⁵ 19 November 2015, Review of the pay TV wholesale must-offer obligation 2015 statement, paragraphs 6.23, 6.29

⁶ 19 November 2015, Review of the pay TV wholesale must-offer obligation 2015 statement, paragraph 5.45.

their goals as detailed in the plan, and that this should go beyond just monitoring. Pay-TV and bundled customers should be able to enjoy the same benefits of choice and pricing that the ex-ante framework has created in fixed telecoms.

7. Whilst BT supports Ofcom's goals as laid out, the process by which they are achieved is also important and we do have concerns that there is a tendency to move away from objective criteria for assessing the need for intervention. Ofcom's approach to consumer regulation has become increasingly interventionist and focussed on discretionary consumer related issues, without consistently applying its own regulatory principles on intervention or considering the cumulative effect of its interventions. BT considers that Ofcom's regulatory principles and Better Policy Making Guidance should form the basis of any criteria developed by Ofcom. Applying criteria along these lines will improve consistency and transparency in Ofcom's decision making, and minimise the risk that Ofcom's interventions have a negative impact on investment and innovation in the communications markets.
8. Ofcom's proposed programme of work into monitoring price increases is an example of its overly interventionist or "belts and braces" approach to consumer regulation, given that Ofcom already regulates the implementation of price increases and protects the rights of consumers through General Condition 9.6. BT fully supports Ofcom's outcome of empowered consumers, and acknowledges the importance of safeguards for consumers when things go wrong, however Ofcom should still assess the costs of introducing further monitoring, against objective criteria before deciding whether intervention is necessary, or risk introducing duplication of work, increasing regulatory burden, undermining its own GC's and adding to the growing list of interventions, the cumulative effect of which dampens incentives to invest.
9. The bias towards intervention, additional monitoring, surveying and reporting activities suggest a "mission creep", away from Ofcom's sound, considered and directional principles of regulation. We look to Ofcom to reflect on these principles and apply them consistently both in its final decisions and the choices it makes in deciding what work is properly in-scope and what is not.

Detailed Comments

Broadband and mobile coverage

10. Ofcom has committed support to the government throughout the consultation process on the broadband USO and any work required in its implementation. BT has for many years been working with the government on achieving their aspiration of superfast coverage for 95% of the population and this goal is now within reach. In order to push superfast services beyond this level and to ensure a good service for all in address the final 5% Ofcom should encourage government to work with industry to incentivise investment and ensure that the requirements of any possible USO reflect the available evidence with the intention of providing sufficient a suitable quality service to the hardest to reach places in a commercially viable or Government funded manner.
11. Similarly Ofcom should take an evidence based approach in order to work to better understand the nature and source of "poor" mobile coverage and consumers preferences for extending coverage. There is a perception that "poor" coverage is limited to rural areas, and is purely due to low network performance or lack of network presence. However the problem is more complex than that. "Poor" coverage may not be limited to remote rural areas, and may not always be due to network related factors (e.g. in some cases the cause(s) could be low quality or faulty handsets). Moreover, in order to maximise consumer benefits of extending coverage, more needs to be done to understand consumers' preferences for mobile coverage. Without this there is a risk that

policy measures aimed at extending coverage (e.g. coverage obligations) lead to the extension of coverage into remote areas that brings limited or no consumer benefit. A better understanding of the nature and source of “poor” coverage as well as consumers preferences will allow Ofcom and MNOs to make more informed decisions to address “poor” coverage (e.g. prioritising areas of “poor” coverage that bring greatest consumer benefit and adopting effective tools that address the specific source of the coverage problem). We propose that Ofcom commissions a study that looks into these issues.

12. Electronic Communications Code (ECC) and planning rules – with reforms to the ECC and planning rules expected during the course of Ofcom’s annual plan period we consider that Ofcom can play a greater role in advising Government on the best way to reform the ECC (for example by explaining the benefit of allowing the automatic upgrading of equipment and greater access for repairs) and planning rules (for example by creating greater scope for higher mobile masts). Ofcom can also assist in raising public awareness of the benefits of such reforms in terms of improved mobile coverage, reducing the lag times of urban and rural coverage, faster resolution of technical problems and more resilient networks. BT sees support for ECC and planning reform as being a key way in which Ofcom can effectively and efficiently deploy its resources in ensuring the right up-stream conditions to enable huge downstream benefits to be delivered to UK consumers in the form of extended network coverage at lower costs. More generally we see a need for greater co-ordination between the regulator and government including individual government departments both nationally and also on a local level to ensure the success and efficiency of a range of objectives and projects.
13. Ofcom’s approach to information provision needs to be reconsidered. We support Ofcom publishing data where it is relevant and accurate however Ofcom has published information, which on several occasions has been inaccurate or misleading. We have serious concerns about Ofcom’s ability to provide mobile broadband speed information and question the accuracy of Ofcom’s coverage checker. Ofcom’s recent work on Mobile Broadband Speed measurements failed to use current devices capable of experiencing the capability of EE’s LTE Advanced network, resulting in an under-reporting of speeds in areas where EE deploy LTE Advanced. Ofcom’s own coverage checker uses thresholds which have not been agreed with industry, and which, depending on technology used, either underestimate or overestimate EE’s coverage. This misinformation has the potential to distort competition in the market and dampen incentives to invest in improving mobile coverage. We strongly suggest that Ofcom works with MNOs and third parties, which have the required experience and expertise in this specialised area of research, to improve the accuracy and transparency of its Mobile Broadband Speed publication.

Spectrum

14. BT notes that there is no mention of the PSSR spectrum auction within the Ofcom annual plan, or indeed any ongoing work more generally with Government on their commitment to release or share further Government spectrum. We understand that the start of the 2.3/3.4 GHz spectrum auction process is delayed for reasons of good public administration, pending a conclusion of the proposed Three/O2 merger. However, an indication of the revised timetable within the final version of the annual plan would be helpful.
15. For the WRC-19 conference preparations, in addition to the proposed study of the candidate millimetre wave spectrum bands for a component of future 5G mobile, we also consider that the review of the 5GHz band is an important item and would encourage Ofcom to undertake studies and appropriate consultations in preparation of a UK position on this issue for international discussions.

16. Publication of Ofcom's statement on The Wireless Telegraphy (Control of Interference from Apparatus) Regulations 2015 is overdue and should be high on Ofcom's enforcement teams' priority list. The existing regulations have not kept pace with technical developments and referenced technical standards have been superseded. Ofcom published a consultation on new updated draft regulations in January 2015, but is yet to publish a statement, nearly 12 months after receiving stakeholder responses to the consultation. In the absence of new regulations Ofcom appears unable in some cases to enforce action against external source of interference with operators' networks, which is to the detriment of consumers.

Business Connectivity Market Review

17. Under Ofcom's current timetable, the 2016 BCMR will be essentially concluded before the period covered by this Annual Plan. We note Ofcom's planned work item to establish a new Ethernet quality of service monitoring and compliance framework in the first quarter of this period which follows the approach taken to monitoring quality of service requirements in the Fixed Access Markets. We would expect the exact timing of this work will need to take account of any further delays in publication of the final BCMR statement, if any. The implementation of the proposed new Dark Fibre Access remedy is also likely to involve further work over the period of this Annual Plan and we think it would be useful for Ofcom to have an identified project and lead for this (although we appreciate that no specific publication or Ofcom output can be identified for this work).

Future voice

18. Ofcom's Annual Plan recognises that there is considerable investment in new network technologies happening now and over the next few years. However, there appears to be no specific plan to ensure that the regulatory framework operates to support efficient investment. In paragraph 3.26, Ofcom says that concerns have been raised about a number of issues, including "the application of legacy regulations to fibre". This is an area of particular concern as BT and others are currently making significant investment decisions in relation to fibre-based services.
19. In particular, BT is concerned that the current rules on battery back-up of customer equipment are not appropriate in the context of an IP-based, voice over broadband service using fibre. We believe Ofcom should urgently review the guidelines on the interpretation of General Condition 3 in this respect.
20. A wider-ranging review of GC.3 and s.105A-D of the Communications Act would also need to be undertaken, but this should not lead to delays in resolving the question of battery back-up.

Number charging pilot scheme

21. Ofcom instigated a number charging pilot in 2013 and indicated that it would review the success of the scheme after two years. We are now approaching three full years of this pilot scheme being in place and Ofcom are yet to consult on the effectiveness of the scheme. BT has been led to believe that Ofcom are reviewing the scheme internally and will be consulting on their findings in due course. In the meantime industry will be hit with another bill for the allocation of numbers. These charges when aggregated introduce an unnecessary cost onto industry, and the burden of complying with the scheme and applying for relevant discounts is not insignificant, and will ultimately be passed on to consumers. BT does not believe that the proposed benefits of the scheme have been realised, therefore the whole pilot scheme simply creates administrative and financial costs for both industry and Ofcom. We urge Ofcom to complete their review early within 2015/16, which depending on the outcome would give sufficient time to implement any improvements to the scheme prior to another round of charging.

Specific areas for deregulation or simplification

General Conditions framework review

22. We welcome Ofcom's plans to set out opportunities for deregulation. In particular we are encouraged by Ofcom's plans to review the General Conditions (GCs) framework with a view to removing or modifying elements of the GCs that are no longer appropriate. The current GCs are overly complex, too interrelated with each other, and with the USO conditions. Changing the existing GCs could reduce the regulatory burden on CPs and make compliance easier to implement and monitor.

The statutory information requests process

23. BT is currently engaged with Ofcom in their review of their statutory information requests process. It has become apparent during consultation with Ofcom that the increased demands for information from Ofcom are industry wide and are placing a strain on all industry. BT looks forward to working further with Ofcom to improve and streamline this process and encourages Ofcom to treat the review as a priority that merits significant consideration in order to ensure the regulatory burden on both industry and Ofcom is reduced.

The dispute resolution process

24. BT has conducted a review of disputes over the past few years where BT has been a party to the dispute. Following this review, BT believes there are various areas of the dispute resolution process which could be improved, either by a more consistent approach to dealing with disputes or by improved guidance around certain issues that come up repeatedly in disputes. In some cases, changes to the Communications Act 2003 itself or the CRF may be needed to instigate more fundamental change. BT would welcome the opportunity to speak to Ofcom about the dispute resolution process to set out its suggestions for improving the process.

Ofcom's annual plan process

25. Finally BT also notes the short timeframe between Ofcom's deadline for receiving responses to the Consultation, which is 26 February, and publishing the final Annual Plan in March 2016. This timeframe leaves Ofcom with little more than four weeks to consider all the responses and take into account views and concerns raised by stakeholders. Ofcom are open to the accusation that it has made a pre-determined decision on the Annual Plan. In order to avoid this we suggest that Ofcom respond to the views expressed by stakeholders by explaining the reasons it has or has not taken into account stakeholders' views, to provide stakeholders with confidence that their views have been properly considered by Ofcom.