



Hutchison 3G UK Limited (Three) response to Ofcom's Annual Plan for 2016/17.

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Introduction.

1. This is Three's (Hutchison 3G UK Limited) response to Ofcom's Annual Plan consultation for 2016/17. The Annual Plan is a key opportunity for Ofcom to set out its strategic objectives for the year ahead, helping communications providers like Three better understand its priorities.
2. Three is the UK's most reliable mobile network, as well as the largest carrier of mobile data. Our network carries 42% of the UK's mobile data traffic and we currently offer 3G and 4G mobile data services to 98% of the UK population.¹ Three enables our customers to make the most of their data through market-leading and innovative propositions such as 4G at-no-extra-cost and Feel at Home.²
3. This response includes Three's views on the objectives Ofcom have set out for its work in 2016/17.
4. Three broadly welcomes the principles based approach of this year's Annual Plan. In previous responses, we have urged Ofcom to adopt a clear strategic framework for its workstreams. We were also concerned that Ofcom appeared to focus on determining specific consumer outcomes, rather than addressing market flaws that produce them.
5. This new approach, focussing on promoting competition, securing standards and protecting consumers from harm, is simpler, and should prove more effective. We hope it will continue in future. We also hope this more focussed approach characterises Ofcom's work throughout 2016/17.

¹ Enders Analysis of UK mobile data traffic carried in the 12 months to September 2015.

² Feel at Home allows our customers to use their calls, text and mobile data allowance in 18 destinations and no-extra cost, including Australia, Austria, Denmark, Finland, France, Hong Kong, Indonesia, Israel, Italy, Macau, New Zealand, Norway, Republic of Ireland, Spain, Sri Lanka, Sweden, Switzerland and the United States of America.

Summary of Response.

Our response raises a number of issues with particular relevance to Three, each of which addresses one or more of the overarching strategic objectives that Ofcom identified in its Draft Annual Plan for 2016/17. A summary of the contents of our response, structured around these those three objectives, is included below.

1. Promote competition and ensure that markets work effectively for consumers.

- Strategic Review of Digital Communications.
- European Regulatory Frameworks and the Digital Single Market.
 - Reducing the costs of roaming abroad.
 - Implementation of Net Neutrality.
 - Over The Top (OTT) Services.
- Meeting the long-term spectrum needs of the communications market.
- Introducing Gaining Provider Led switching in mobile.

2. Secure standards and improve quality.

- Delivering a competitive leased line market.
- Infrastructure Upgrade and Reliability.

3. Protect consumers from harm.

- Empowering consumers and tackling misleading advertising.
- Reducing the volume of nuisance contact.
- Raising the bar for Ofcom Appeals.

4. How Ofcom works with us.

- Information Gathering.
- Information Publishing and Information Requests.

5. Conclusions

1. Promote competition and ensure that markets work effectively for consumers.

6. As Ofcom has noted in the Draft Annual Plan, communications markets are undergoing a period of rapid change. In addition to market consolidation, technological convergence between fixed, mobile and content distribution networks has blurred the boundaries between previously distinct subsectors of the overall communications market.
7. These distinctions are likely to be blurred further as adoption of bundled packages across fixed and mobile increases. In France converged offers already account for over 40% of broadband sales.³ Therefore any work Ofcom undertakes in this area must not only consider the competitive impacts on a single market, but across the communications market as a whole.
8. This section of our response considers the importance of Ofcom's Strategic Review of Digital Communications to competition, as well as the competitive implications of roaming, net neutrality and the disparity of regulation between conventional, and Over The Top telecoms providers.
9. Spectrum is fundamental to ensuring that operators can deliver quality and competitive services for consumers. Ofcom needs to ensure that the spectrum market enables all operators to meet their customers' needs and deliver competitive. We also set out the importance of introducing Gaining Provider Led switching in mobile and other market segments, which will be critical in ensuring competition delivers for consumers.
10. Additionally, Ofcom must do more to tackle the risks of misleading advertising to competition, not least as the full financial implications of bundled deals for consumers become less clear in a converged communications market. While this has the potential to distort competition, it also creates a risk of significant consumer harm. We address the issue in more depth in paragraphs 45-49 of our response.

Strategic Review of Digital Communications.

11. Three recognises that many of Ofcom's Annual Plan workstreams cannot be finalised until the Strategic Review of Digital Communications is published. In our response to the Review we identified three priority issues that required regulatory intervention. These were structural separation of BT, spectrum reform, and the regulatory implications of the trend towards convergence and bundled services.
12. Three believes that the case for Structural Separation of BT Openreach is increasingly clear. The current model of functional separation has not been

³ Analysis Mason, Fixed-mobile bundling has taken France and Spain by storm: European multi-play forecasts reveal the impact, February 2013, <http://www.analysysmason.com/About-Us/News/Insight/Fixedmobile-bundling-Feb2013/>.

successful in delivering good quality of service to BT's wholesale customers (discussed later in our response, in paragraphs 36-41) while Ofcom has found it difficult to detect and constrain BT's ability to discriminate in its favour in the provision of wholesale access to its network. These problems will only become more acute in the future, given BT's expansion into other markets (such as mobile and pay TV) and the trend towards fixed/mobile convergence.

13. Issues relating to spectrum reform are also discussed later in this section, in paragraphs 24-28, and the consumer harms of misleading advertising of bundled services in paragraphs 45-49.

European Regulatory Frameworks and the Digital Single Market.

14. The other key legislative consideration for Ofcom's competition workstream will be the Digital Single Market review. Broadly speaking, Three has supported progress on roaming costs and net neutrality, while calling for greater clarity around implementation. More generally action is needed to ensure that the next Framework Review delivers technology neutral regulation, in order to ensure that all communications providers, including Over The Top (OTT) services compete on a truly level playing field.
15. Each of these concerns are set out in further detail below. While progress is being made through the Framework Review process, Ofcom should not rely on delivering changes which have benefits for UK consumers through European policymaking, especially in areas like OTT regulation where the regulator has the ability to act more immediately.

Reducing the costs of roaming abroad.

16. Three continues to support the principle that consumers should be able to make the most of their mobile services while they're abroad. As a network we already enable our customers to do this through 'Feel at Home'. As a result of this two thirds of our customers' journeys abroad are free from roaming charges altogether.
17. We have been supportive of efforts to reduce the costs of roaming in Europe, including the planned scrapping of consumer roaming rates in the EU from June 2017. However, we are concerned that such action will be undermined by the failure to significantly reduce wholesale rates. Any failure to deliver on wholesale rate reform, alongside retail rate reform risks distorting competition at a European level. This will particularly harm net outpayers; smaller operators and providers operating in countries with low Mobile Termination Rates, such as the UK.
18. Ofcom should make the case in Europe that lower rates in the wholesale market should be brought forward in parallel to reductions in retail rates. Failure to do this risks distorting the market and increasing costs for operators, particularly in the UK.

Implementation of Net Neutrality.

19. In addition to transitional changes to retail roaming rates due to be brought forward, operators will also be implementing net neutrality regulations in 2016. Yet there remain significant issues regarding implementation, exacerbated by unclear guidance from BEREC. Indeed BEREC are only due to publish their recommendations after the net neutrality provisions are implemented.
20. While the UK Government have previously indicated their preference for light-touch implementation we need further guidance as to whether current practices are appropriate. In particular we support the current framework of self-regulation, and believe that the BSG regime has worked well to secure transparency and the best possible experience for consumers. We call on Ofcom to ensure that the existing UK system, which has demonstrably worked, continues and forms the basis of the UK's implementation of the Regulation.

Over The Top (OTT) Services.

21. As we have mentioned in previous responses, ensuring fair competition and technology neutral regulation of communications providers will be a key priority for Ofcom to promote competition in 2016/17.
22. As a network, Three welcomes the innovation that OTT providers and VoIP services have brought to the market. Over the past year we have seen the uptake and usage of these services increase as they become established providers, particularly in mobile. 61% of VoIP users in 2015 said that they used a smartphone to make VoIP calls, the highest proportion for any device and a 20 percentage point increase on 2014.⁴
23. Ofcom needs to ensure that regulation of OTTs offers adequate protection for customers, and does not create competitive disadvantage for traditional service providers. There is a real need to deliver equivalence in regulation. Ofcom must as a matter of urgency bring forward regulatory proposals to tackle this anti-competitive disparity.

Meeting the long-term spectrum needs of the communications market.

24. Individual spectrum holdings set limits on any operator's potential network capacity. The release of additional spectrum then is necessary to meet customers' growing data demand, even if operators continue to improve the efficiency of their spectrum assets. Given that spectrum is essential to any MNO's ability to compete, the efficient release of spectrum by Ofcom in a manner that supports competition, is one of the most important of Ofcom's regulatory functions.
25. Particularly, Ofcom should protect competition by ensuring individual operators have sufficient spectrum to compete effectively. At individual awards, this would include measures to prevent disparities in holdings becoming so

⁴ Ofcom, Communications Market Report, August 2015, p234

extreme as to negatively affect the ability of one or more MNOs to compete, such as in the 2013 auction, where two of the four MNOs were together awarded only 30MHz of the 250MHz of mobile spectrum allocated.

26. Ofcom, working together with Government, must also deliver a comprehensive mobile data strategy, to ensure consumer demand can be met in the long term. Three accepts that it is difficult to specify the exact frequencies that can be made available and when. But in terms of prospective awards of spectrum for mobile, beyond the upcoming Public Sector Spectrum Release (PSSR) of the 2.3 GHz and 3.4 GHz bands, the release of the 700MHz band is the only one scheduled for the foreseeable future. Uncertainty about the future availability of mobile spectrum also has the potential to distort the outcome of individual awards.
27. The public sector will be an increasingly important source of spectrum for private sector use, and Ofcom will play a pivotal role in advising and enabling these releases. Ofcom should make clear in its advice to Government that the priority for release of spectrum must be those bands that best meet the needs of potential customers. This is particularly the case for public sector spectrum already harmonised for mobile.
28. Ofcom should also make the case to Government for greater transparency around the use of public sector spectrum, and the costs of clearance, both today and over time. This would make the task of identifying opportunities for economically beneficial spectrum release far easier. We would also reiterate that for the MNOs, the real value of spectrum licensing is certainty over access and the ability to use it almost exclusively. As such spectrum sharing should not become the default option for the public sector.

Introducing Gaining Provider Led switching in mobile.

29. The most effective measure that Ofcom can take to promote competition in mobile remains the delivery of a Gaining Provider Led switching process. We have made a number of representations to Ofcom on this issue and we remain of the view that a switching process that works for consumers is fundamental to a healthy and competitive market. As such we welcome the work undertaken by Ofcom in the last 12 months and the inclusion of switching as a key workstream for Ofcom in 2016/17.
30. However, progress in delivering reform remains slow. Mobile switching has been a workstream in several previous Annual Plans. Ofcom's work on switching in 2015/16 focussed on evidence gathering exercises, including through multiple Section 135 requests, rather than delivery of reform. This must be expedited in 2016/17.
31. The evidence base for Gaining Provider Led switching is well established and the consumer harms of Losing Provider Led switching are clear. Ofcom's most recent research into the consumer harms of switching, published in February 2016, found that more than half of those who had changed operators had difficulty with their existing provider trying to persuade them to stay, while 29%

of those who 'considered' switching but didn't named the switching process itself as an issue.⁵ Ofcom's own research shows that only 10% of mobile customers switched in 2015.⁶ The priority now must be to bring these changes forward, to minimise ongoing harm to consumers.

32. Ofcom should also take this opportunity to go further, ensuring consumers in mobile are able to make the most of the devices they own when they do change provider. As the first MNO in the UK to offer all our devices unlocked as standard, we fully support proposals from Government that operators should not be able restrict the ability of customers to use the devices they own on other networks. Ofcom will have an important role to play in helping Government deliver on this ambition.

2. Secure standards and improve quality.

33. Mobile services are more important to consumers and businesses than ever before. Ofcom's 2015 Communications Markets Report heralded the UK as a 'smartphone' society, with rapidly increasing device uptake and usage.⁷ Consumer expectations of what their mobile services can and should deliver have changed as well, posing a real challenge to operators around how to ensure their services continue to meet these expectations, particularly in terms of coverage and capacity.
34. The main challenge to delivering near ubiquitous coverage remains the economic, geographic and technological considerations that operators need to make when deploying their infrastructure. These include some unavoidable obstacles, like population density and the topography of the land. However Ofcom must address the competitive bottlenecks that are preventing operators from building the infrastructure needed to address these obstacles. This includes spectrum reform, as discussed in paragraphs 24-28, and stimulating competition in the backhaul and site rental markets.
35. Capacity is also a significant challenge due to the explosion in data usage. On average, our customers' monthly data usage has grown from 2.0GB in 2014 to 4.9GB in 2015. This will likely continue in 2016/17. While the release of 4G spectrum and development of new innovations such as Three InTouch have helped, securing new network capacity is an urgent requirement if we are continue to meet consumer expectations.

Delivering a competitive leased line market.

36. The widespread availability and choice of fibre backhaul products is essential for mobile operators to deliver the services and network capacity that consumers expect. Fibre (Ethernet) backhaul has been a key enabler in the

⁵ Ofcom, Mobile Switching Quantitative Research, February 2016, http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/mobile-switching/mobile_switching_quantitative_research_feb16.pdf

⁶ Ofcom, Mobile switching research 2015: Focus on switchers, 2015.

⁷ Ofcom, Communications Market Report, August 2015, p6

deployment of the latest mobile technologies, including 4G, and has allowed mobile operators to offer faster data speeds and higher quality products.

37. However, the market for these products is uncompetitive. BT is the dominant provider to mobile operators, with a market share in excess of 80%.⁸ According to Ofcom there is a choice of two or more leased line providers in only one in five postcodes, largely concentrated in urban areas.⁹ Our concern is that a fundamental lack of competition, especially in the provision of transmission coverage that mobile operators require, is failing to deliver best value and puts the ability of networks to meet the future data needs of customers at risk.
38. Ofcom recognised this in its Business Connectivity Market Review in May 2015, stating that “Mobile operators need to purchase access circuits across a very wide geographic footprint in order to provide national coverage. This geographic footprint is wider than for enterprise customers and incorporates areas where OCPs have little rival infrastructure. This makes it difficult for operators with a limited geographic reach to compete.”¹⁰
39. This is why any steps Ofcom can take to help develop this market will be vital. We welcomed proposals for “passive access” remedies, imposing regulated access to Openreach’s physical network. We understand this will be included in the BCMR to be published in April of this year, however we consider it vital that Ofcom follow up the implementation of a dark fibre remedy, and ensure BT offers dark fibre access on terms that are (a) in line with those intended in the BCMR, and (b) contractually and technically usable for mobile operators and other access seekers.
40. However Ofcom must be more ambitious in its approach, in particular in their support and implementation of the Civil Access directive. Access to duct infrastructure is a very important building block in developing a competitive and dynamic fibre transmission market. Yet we are concerned that the ambiguity and uncertainty in the directive’s approach to pricing of BT duct infrastructure will fail to develop this market.
41. Greater competition across the full scope of the backhaul market would increase innovation, allowing communication providers to configure and deploy their own equipment to better suit their customer’s needs.

Infrastructure Upgrade and Reliability

42. Three has focused on delivering reliability and are proud to have been named the UK’s most reliable network for the sixth quarter in a row.¹¹ However, our ability to provide a reliable service is undermined by competitive bottlenecks in the infrastructure market. This includes leased lines, as discussed above, but also accessing our sites for essential upgrade, maintenance and repair. One in

⁸ Ofcom, Business Connectivity Market Review, May 2015, Annex 11

⁹ Ofcom, Business Connectivity Market Review, April 2014

¹⁰ Ofcom, Business Connectivity Market Review, May 2015, Annex 11, Paragraph A11.34

¹¹ YouGov, SMIX Survey, December 2015

six of our scheduled site visits have to be postponed, or cancelled altogether, as a result of an access dispute. Routine upgrade and maintenance requests can also be a trigger for ransom rents. Any unnecessary obstacles to network improvement restrict our ability to offer a reliable and high quality service.

43. To tackle this, Government committed to reform the Electronic Communications Code as part of the 2014 Coverage Agreement. However progress has been slow to date and we are still awaiting legislation, following the Government's consultation on the issue in April. While this will ultimately require legislation, Ofcom have an essential role to play in advising the Government, ensuring that reform is brought forward quickly and effectively.

3. Protect consumers from harm.

44. We support Ofcom's continued focus on tackling identified consumer harm. We have previously expressed concerns that Ofcom pursues regulation that seeks to create a specific outcome rather than address the specific flaws in the market that cause of the consumer harm. The emphasis should be to prevent harm through fair competition, consumer empowerment and ensuring that where intervention is needed, the regulator does so effectively. Each of these is addressed in the issues we discuss below.

Empowering consumers and tackling misleading advertising.

45. Ofcom is right that the changing communications marketplace has some challenging implications for consumers. Technological convergence between fixed, mobile and content distribution networks has blurred the boundaries between previously distinct communications services. This has enabled converged operators to pursue a strategy of bundling of services.
46. One of the effects of convergence and consolidation will be an increase in the uptake of quad-play services. Quad-play is still in its infancy in the UK however it has been shown in other countries to grow very rapidly. This is particularly the case when led by fixed providers offering aggressive discounts on mobile.
47. In that context, Ofcom should adopt a framework for regulating quad-play services as soon as possible, to protect consumers and address the significant anti-competitive risks associated with the bundling of services. In particular, Ofcom should implement measures to:
- Prevent firms from leveraging their market power into neighbouring markets for individual services – for instance, by engaging in practices like cross-subsidisation and using bundling to exclude rivals from the mobile market;
 - Prohibit providers of bundled services from marketing retail bundles in a misleading way – by advertising unachievably low headline prices for popular services (such as mobile), whilst burying the much higher cost of less popular services in the small print (such as fixed line rentals).

- 48. We welcome Ofcom's support on these issues. Action must be taken in 2016/17 to ensure that consumers understand the full financial commitment they undertake to in a contract, and that providers do not advertise on the basis of cost for particular items in a bundle that could never be achievable in practice.
- 49. This has been prioritised by Government in its proposals for Reform of Consumer Markets. Ofcom also has an important contribution to make including in providing joined up technical and sectoral advice to the ASA to ensure that authority is able to take appropriate regulatory action.

Reducing the volume of nuisance contact.

- 50. We continue to support any measures from Ofcom that effectively tackle the frustration and hassle of nuisance calls for consumers and welcome that this will be an ongoing workstream. Nuisance calls are a cause of real consumer harm, especially for our most vulnerable customers, which is why Three is committed to working with Ofcom and the rest of the industry to tackle this issue.
- 51. We have already worked hard to minimise nuisance contact originating from our network. For example, a customer's account is automatically flagged if they send more than 100 texts to 100 unique telephone numbers within a 60 minute period. If the account responsible is Pay-As-You-Go it is suspended immediately, preventing any further texts from being sent. We currently suspend around 3,500 Pay-As-You-Go accounts each month for this reason.
- 52. However, tackling incoming nuisance calls remains a challenge, especially with the growing use of VoIP and virtual local phone numbers. While Ofcom is right to address nuisance calls as an issue, too much is expected from technical solutions that will not always capture nuisance contact.
- 53. This limited strategy, overemphasising the potential of technical solutions, has also lead to Ofcom having a heavy-handed approach towards communications providers who are already committed to tackling nuisance contact. Instead, Ofcom's focus should also be on long term solutions to empower and better protect consumers.
- 54. The Telephone Preference Service (TPS) will play a key role in this and we welcome any steps Ofcom might take to ensure that their services are more accessible and easier for consumers to subscribe to. Ofcom should also work more closely with its stakeholders to ensure consumers are aware of how their contact details are used, not just by service providers but by third parties. Doing so will help tackle many nuisance calls at source.

Raising the bar for Ofcom Appeals.

- 55. We recognise that in some areas of reform, such as switching, Ofcom has been hamstrung by the low threshold for appeal of its decisions. Three continues to believe that Ofcom should be brought in line with other economic

regulators' standard of appeal, to ensure the regulator is properly able to protect customers when intervention is clearly needed.

56. Of course, it is vital to the health of any market that the decisions of regulators can be challenged, to ensure that businesses have means of redress and that regulators make robust, effective and competent decisions. However the decisions of regulators in other key sectors, such as banking and energy, are challenged through Judicial Review. This means that their decision can only be overturned if unlawful, irrational, or made with substantive procedural impropriety.
57. Setting a higher standard for reviewing Ofcom decisions would not only scale back the time and cost of the legal process but also allow the regulator to implement decisions in the genuine interest of consumers. Three will continue to make this case to the UK Government.

4. How Ofcom works with us.

58. While we welcome the strategic objectives set out in the Annual Plan, we also believe the Plan should directly address Ofcom's ways of working. This must include ensuring Ofcom can work better and more effectively with the industry it regulates.

Information Gathering.

59. In a number of cases Ofcom's approach to information gathering and consulting with industry has been heavy-handed or unnecessarily formal. It is Three's view that the use of formal information gathering powers under Section 135 of the Communications Act has increased considerably, not least in 2015/16. Wide ranging requests were issued on a number of issues, including multiple requests on switching, a policy area where the evidence base for change has previously been well-established by Ofcom.
60. It is our view that in many circumstances, particularly in relation to coverage information for consumers, more informal (and earlier) engagement with operators would have been both more appropriate and effective. Similarly if communications providers have greater clarity about the purpose of a request, we may be able to find information better suited to Ofcom's needs.

Information Publishing.

61. We are also concerned at how the information we supply is used. Ofcom's work in compiling this information in many cases has been welcome and highly beneficial for consumers. We recognise that Ofcom's ability disseminate data is fundamental to its regulatory functions, helping inform policy interventions and ensuring consumers can make informed decisions about their choice of provider.
62. It is therefore imperative that any information made publically available is accurate, timely and relevant. However we have concerns around the

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inconsistencies, discrepancies and a lack of clarity around many aspects of industry data collection which hamper the ability of all stakeholders to efficiently provide information. Without industry agreed definitions and methodology on many core pieces of data, Ofcom has on occasion released information into the public domain which neither informs nor empowers consumers.

63. Below are some recent examples where we believe that Ofcom's publication practices have been to the detriment of competition and consumers.

Publication	Issues	Impact
Measuring mobile broadband performance in the UK (2014)	4G coverage added to the report, relying on operator data, but no standardised approach for coverage.	Three's 4G coverage not included in the report, giving a misleading and incomplete representation of 4G coverage
Consumer experience of mobile phone calls (2014)	Data in the report was not originally obtained for publication. No standardised approach for experience.	Ofcom was unable to use own data and instead re-reported a Rootmetrics report, without comparison to other reports, for example Opensignal.
Mobile Coverage Checker (2015)	No standardised approach to coverage. Lack of update of coverage maps during a period on ongoing coverage improvements across the MNOs.	Differing experience between Ofcom's and maps available on the MNOs websites. Consumers making decisions around network choice on Ofcom data that is updated less frequently with disputed parameters for coverage.

64. While all operators can potentially lose out from this, the greatest loss is to the customer. The publishing of inappropriate or incomplete data, from different sample frames or methodologies, can create false impressions of many aspects of the services that networks provide – on complaint numbers, on coverage or speed of data services for example.
65. This risk is amplified when media coverage of Ofcom publications, which may fail to pick up on the limitations of data published by the regulator, republish information without relevant context or provisos around its validity.
66. This is an issue that needs to be addressed in Ofcom's 2016/17 Annual Plan. We believe there should be an additional workstream which would review these discrepancies, and find a meaningful process of review to set rigorous, consistent industry data standards.

5. Conclusion.

67. While many of Ofcom's workstreams can only be confirmed once the full Strategic Review of Communications is published, we broadly welcome the principles based approach set out in the draft 2016/17 Annual Plan. Ofcom is also right to identify competition, standards, and protecting consumers as its three key priorities and we look forward to supporting the regulator in achieving each of these in the year ahead.
68. We believe that the priority issues we have identified, if addressed, will help Ofcom meet each of these three objectives. The priority in many respects though will be to ensure delivery, in particular on workstreams that have been ongoing for a number of years. This will be to the benefit of both competition and consumers during a period of change in the communications market.