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10th March 2015

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Dear Ed,

Hutchison 3G UK Limited (Three) response to Ofcom's Annual Plan for 2015/2016

This is Three's response to Ofcom's draft Annual Plan for 2015/2016. We welcome the opportunity to respond to Ofcom's proposed programme of work for 2015/2016.

The publication of Ofcom's Annual Plan and the consultation process that underpins it, are important, as they enable operators and service providers to allocate the necessary resources to address Ofcom priorities in an effective and timely manner. The Annual Plan and associated processes not only support operators and the regulator in its work, but facilitates better outcomes through more effective implementation of regulatory decisions.

This response sets out Three's views on Ofcom's key workstreams. It focusses on how promoting fair and open competition particularly at wholesale level will lead to better outcomes for the UK mobile sector as well as consumers. This response will also address the more general principles on how Ofcom could engage more effectively with the industry.

We welcome the fact that Ofcom has made progress on a number of issues over the past year, not least by working with industry to bring forward proposals on non-geographic numbers, as well as early stage progress on switching reform. Three hopes that this response can help Ofcom continue this delivery of positive outcomes for consumers.

Summary of Response.

Our response will cover a number of areas of particular relevance to Three. These are:

- Principles of reform.
- Consumer policy areas:
 - *Switching: the need to introduce Gaining Provider Led across the communication sectors.*
 - *Appeals: a strong regulator is needed to promote the interests of consumers.*
- Competition issues:
 - *Leased lines.*
 - *International Roaming.*
 - *Mobile spectrum: ensuring fair and open competition.*
- Ways of working:
 - *Procedural improvements to the Annual Plan.*
 - *Reviewing the General Conditions of entitlement.*
 - *Improving Ofcom reporting.*

Principles of reform.

Ahead of commenting on the detail of the plan, we think it is important to set out what we believe should be the three key principles that Ofcom should pursue in its decision making and programme delivery if they are to ensure the continued functioning of a mobile market that delivers for the wider economy and UK consumers. We believe these should be:

1. To not interfere in areas where competition is functioning and delivering innovation and enhanced offerings which benefit consumers. Competition in the mobile market to date has seen UK consumers enjoy some of the best value mobile services in Europe, as well as encouraging innovation and continued coverage improvements. Ofcom should continue to avoid interventions that would suppress this.
2. To guard against potential regulatory interventions which could compromise these benefits. Ofcom should continue to monitor and make representations at every possible level to prevent unnecessary interventions with undesirable consequences for consumers.
3. Where there are market failures and where the regulator has the ability to make timely and desirable interventions to ensure fair and open competition, particularly at wholesale level – it should do so. Ofcom has identified a number of

key workstreams, including reform of switching processes and appeals, and has established a compelling body of evidence supporting both the case for consumer harm and the benefits of reform. In such areas Ofcom needs to have the conviction to pursue delivery and effective implementation.

Consumer policy areas.

It is Three's ambition to make the mobile market better. As such, Three has been aligned with Ofcom on key, consumer facing, regulatory issues such as Mobile Termination Rates and non-geographic numbers. Similarly, Three has been the first and only operator to introduce a customer liability cap for usage on lost and stolen devices, and to introduce a comprehensive roam like home package at no additional cost to the consumer.

Three's ability to deliver market changing innovations and additional protections for consumers has been contingent on the presence of a favourable regulatory climate that supports open and fair competition as well as an effective regulator to champion consumer and competitive interest. However this also means that our ability to challenge the market through innovative consumer propositions is hampered by a failure to tackle ongoing regulatory bottlenecks which stifle competition.

1. Switching: the need to introduce Gaining Provider Led across the communication sectors.

We welcome Ofcom's renewed commitment in the Draft Annual Plan for 2015/2016 to reform on switching and believe the introduction of Gaining Provider Led (GPL) switching must be a priority, not least when the consumer harm is acute and the case for reform is so clear. Three has long supported the introduction of simpler switching as a means of empowering consumers to hold their service providers to account and drive deeper and broader competition.

Ofcom's own research has highlighted that of the 9 million UK customers who enter the switching process every year, as many as 1.2 million end up being double billed or losing service altogether.¹ This not only directly harms the affected consumers but acts as a disincentive for many more to switch. Additionally, the current mobile switching process enables operators to engage in poor retention practices which increase prices and make it difficult for consumers to compare deals across the market.

Consumers have already benefited from switching reforms in other key sectors, most notably in banking and energy. Although some progress has been made in certain market segments of the communications sector, more needs to be done to ensure that

¹ Ofcom's 2013 Consumer Retention Survey

all switching processes are Gaining Provider Led. We welcome Ofcom's ambition in this regard.

We would also note that while there is alignment between Government and the regulator on the need for reform, there have been occasions over the past 12 months where there has been disagreement on the powers needed by Ofcom to implement Gaining Provider Led switching. We would suggest that such stalemates should be resolved in order that Ofcom can focus on the delivery of this key policy area in its 2015/2016 Annual Plan.

2. Appeals: a strong regulator is needed to promote the interests of consumers.

As Ofcom has commented on a number of occasions, the system of appeals that applies to its decision making slows down and even prevents important decisions from being made. Three believes that a robust regulator is necessary to ensure that effective interventions in this direction continue.

As CEO of Ofcom, Ed Richards reported to the Lords Communications Committee in November that Ofcom at any given point in time is in the process of litigation on up to 10 decisions, highlighting the impact this has on the regulator, not just in terms of allocation of resource but the lost appetite for intervention.²

Ofcom has to be clear that reform is required if it is to make effective interventions in the interest of consumers, and should continue to press Government to streamline the appeals process.

Competition in the market

We are concerned that Ofcom is too focused on engineering specific market outcomes rather than addressing inherent market flaws which led to them. This approach inhibits the ability of operators to differentiate, which in turn limits the ability of challengers to drive competition through innovative new offers.

For example Three, through consumer propositions such as all-you-can-eat data, Feel at Home, 4G at no extra cost and free calls to 0800 numbers, has identified and addressed consumer harms such as bill shock. This is how the market should work, without recourse to regulatory interventions to dictate consumer outcomes. If left unchecked, such interventions

² One-off evidence session with Ed Richards, Lords Communications Committee, November 2014:
http://www.parliament.uk/documents/lords-committees/communications/Ed_Richards_181114/ucCommsEv181114OfcomRichards.pdf

could lead to a situation such as that in the energy market, where there is limited consumer choice in terms of differing offerings.

Instead, Three believes that Ofcom should spend greater resource on addressing the remaining underlying issues that hinder competition in order to drive further a fair, competitive and open market. In consequence, many of the consumer issues that Ofcom seek to resolve through regulatory intervention would be addressed through positive differentiation in a competitive market. Below we have addressed the key bottlenecks we believe need reform.

1. Leased lines: competition is urgently needed to help support the UK's data demand.

BT is the dominant provider of leased lines. Other providers such as Virgin have a much smaller reach. According to Ofcom there is a choice of two or more leased line providers in only 20% of postcodes, with choice concentrated in large urban areas. Our concern is that this fundamental lack of competition in this market is failing to deliver best value, putting the ability of networks to meet the future data needs of customers at risk.

Three has sought to address this by seeking out new and innovative partnerships with alternative providers where possible. Our recent agreement with CityFibre will see the UK's first dark fibre connections to mobile masts rolled out in the Kingston-Upon-Hull area.³ Again though, there are limitations to our ability to innovate in this area, in particular the absence of alternative providers to BT in the provision of mobile backhaul.

Ofcom's ongoing Business Connectivity Market Review has highlighted the challenge this poses to communications providers, however Ofcom needs to be ambitious in its response to the challenges of the leased line market in the year ahead. Ofcom's main objective should be to promote competition in the market, to offset BT Wholesale's cost and reach advantage. By imposing regulated access to Openreach's physical network - both through dark fibre and ducts ('passive remedies') Ofcom can foster effective competition in backhaul provision.

Greater competition, through such passive remedies, would increase innovation by allowing communication providers to configure and deploy their own equipment to better suit their customer's needs. The availability of better quality products in the market may also put pressure on all operators (including BT Openreach) to innovate, driving greater dynamic efficiency, and helping to deliver the best value and service to consumers.

2. International Roaming: addressing wholesale data roaming rates.

³ Three invests £4.8 million in network upgrade project in Hull, Press Release, Three, December 2014, <http://www.threemediacentre.co.uk/Press-Releases/Three-invests-4-8-million-in-network-upgrade-project-in-Hull-375.aspx>

Through Feel at Home, Three has scrapped roaming charges in 16 international destinations, with a further two announced for early 2015⁴. This means 65% of all our customer's international visits will be from roaming charges.

Three has made clear to Ofcom that we support the ambition of the European Commission in this area. However, we remain concerned that the current draft regulations do not meaningfully address reform of wholesale roaming charges. Without this, the Commission will be handing a significant advantage to incumbent operators.

This is a real problem for challenger networks like Three, who have only a small number of sister or potential partner networks and are less able to access the European wide volume discounts open to the other operators. Additionally, we and other challenger operators do not benefit from the same on-net opportunities as other pan-European operators. Therefore failure to tackle wholesale rates will mean that challenger operators will have no means of controlling what networks charge us when our customers use their phones abroad.

We urge Ofcom to continue to work with providers, Government, as well as with European bodies to ensure that the impacts of these measures are fully understood. Ofcom must continue to press for wholesale roaming reform as a priority for its Annual Plan in 2015/2016, to ensure that the broader competitive environment is not distorted by retail reform.

3. Mobile spectrum: ensuring fair and open competition.

Spectrum is a valuable and finite national resource, necessary for the transmission of mobile data, as well as other key services that underpin the UK's digital economy.

Ofcom has done good work bringing spectrum efficiently to market and ensuring that auction design has supported competition between operators. However following the imposition of only limited caps in the 2014 auction, the UK now has a very uneven distribution of overall spectrum capacity.

To ensure that UK consumers continue to enjoy the benefits that have flowed from competition, we ask that Ofcom prioritises in 2015/2016 its commitment to maintain fair and open competition in future spectrum sales.

If the imbalance in spectrum holdings is not addressed via caps in future spectrum sales there is a risk that one or two operators could have an unmatchable advantage in terms of speed and capacity, which would undermine competition and increase consumer harm.

⁴ Current destinations include: Australia, Austria, Denmark, Finland, France, Hong Kong, Indonesia, Israel, Italy, Macau, Norway, Republic of Ireland, Spain, Sri Lanka, Sweden, Switzerland, United States of America, with Spain and New Zealand from 1st April 2015

Ofcom must make a renewed commitment to fair and open competition in the spectrum market, by capping allocations of spectrum below 3GHz, including in the upcoming sales of spectrum from Qualcomm, and the auction of spectrum held by the Ministry of Defence.

We also ask that Ofcom should continue to engage constructively with industry on releases of spectrum, to better understand network's needs and the prioritisation of releases in future. Doing so will ensure not only the efficient allocation of spectrum but the continued benefits of competition in the spectrum market for consumers.

Ways of working.

Up to this point we have set out areas of specific policy interventions and priorities at Ofcom's disposal. The Annual Plan 2015/2016 should go beyond this, with Ofcom considering its role, behaviours and practices as a regulator, including the impact of the burden of regulation on operators and consumers. In particular Ofcom needs to ensure that the regulatory framework is fit for purpose:

1. Procedural improvements to the Annual Plan.

While the Annual Plan already plays a role in delivering this, there remains continuing procedural omissions in its development that need to be addressed.

Two issues stand out in particular; the **absence of review** of the previous Plans, and the **absence of specificity** in provisions for the year ahead.

Ofcom's Annual Plan 2014/2015 contained a number of clear and desirable proposals to improve outcomes for consumers. Yet one year on many of these workstreams, most notably the introduction of simpler provider switching, have been carried over to the Annual Plan in 2015/2016. While we recognise and welcome that switching will be a priority workstream for Ofcom over the next year, the process of introducing reform has been long and challenging, highlighting the need to review past delivery in order to learn lessons to improve the implementation of future decisions.

While the Annual Plan and the associated consultation process itself is a welcome step towards improved regulator accountability, this process of reviewing past Plans would ensure that Ofcom is held to a higher level of scrutiny which can only be to the advantage of all parties, while also ensuring the effective delivery of key consumer facing reforms, some of which (including switching) have been on Ofcom's agenda for nearly a decade.

In addition, greater specificity in the Annual Plan would help secure enhanced accountability and improved delivery. While the Annual Plan in many respects needs to set out a top line view of the communications markets, greater specificity in relation to timings and objectives would help facilitate the delivery of the many desirable outcomes contained in both draft and final Annual Plans.

Three has highlighted this concern in a number of previous responses. Crucially we do so not only because these specific timelines would ensure industry and policy-makers can hold Ofcom to account, but because they will support consumers through the delivery of the necessary reforms we discuss in our response.

2. Review General Conditions of entitlement which apply to networks and communications providers.

As an immediate priority, Ofcom should address the need to review and update the 'General Conditions' that communications providers are subject to, under the 2003 Communications Act. These are in need of substantial reform, to reflect not only the substantial changes in technologies and their usage in recent years, but to ensure that they function effectively to represent the interests of consumers. Regular review of the General Conditions would represent good practice, and ensure that regulation in the sector remains fit for purpose.

General Condition 14: complaints handling

We believe that in certain cases a lack of clarity around General Conditions has resulted in regulatory investigations, even where operators act in good faith to comply with regulations. General Condition 14, which addresses operator obligations on customer complaints and has been a subject of regulatory focus, needs attention as it still lacks clarity as to the difference between a customer contacting an operator about a typical service issue and a customer feeling the need to make a complaint. In particular, these need to be defined so as to link the outcomes of regulations with their intended purpose.

The broad and all encompassing definition has led to operators implementing differing processes for assessing and handling customer complaints, with the result being that meaningful comparisons of complaints data across networks is exceptionally difficult. In practice this can often mean negative outcomes for consumers, resulting either from the unnecessary escalation of their complaint, or the diversion of operator resources from outcomes to the creation outputs which are simply not in the interest of consumers.

We are also concerned that the General Conditions do not offer comparable protections to customers using Over The Top (OTT) services, even when those services are indistinguishable from our own in key respects. Three has welcomed the use of such services and the technological innovation associated with them, but we also believe that an absence of

regulation for these providers distorts the market, making the case further for root and branch reform of the General Conditions, to make them fit for purpose and to level the playing field for providers.

Making reforms on the clarity, scope and definition of General Conditions should be a priority for the Annual Plan 2015/2016, with close involvement from industry stakeholders, would help ensure that resources are diverted to positive consumer outcomes rather than procedural compliance.

3. Improving Ofcom reporting: the need for a strategic approach and agreed methodology on industry data.

Accurate, timely and relevant data is fundamental to the Ofcom's regulatory functions. We recognise that the industry data that Ofcom collects and compiles allows for decision makers to make informed, effective decisions on key aspects of policy in the sector. For consumers, this helps them to make informed decisions about their choice of provider, while adding an additional level of scrutiny for the services that operators provide.

In many respects Ofcom's work in compiling this information has been commendable and highly beneficial for consumers. However, we have concerns around the use of inconsistent industry data across incomparable dates. Without agreed definitions and methodology on many core pieces of data, Ofcom has on occasion released information into the public domain which is incomplete or not comparable. Doing so has the potential to mislead, rather than empower or inform consumers. The publishing of inappropriate or incomplete data, can create false impressions of many aspects of the services that networks provide – on complaint numbers, coverage or speed of data services for example.

This should be priority for Ofcom in its Annual Plan 2015/2016. 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.

The simplest means of achieving this would be to change the approach to how Ofcom collects information. Key to this will be more engagement, earlier engagement and at times more informal engagement with operators to understand what data is available, and to support operators in compiling information in a relevant way for Ofcom. This would support Ofcom in finding the information it needs to inform consumers, rather than information for its own sake.

4. Strengthening Ofcom's accountability on the cost of big projects.

One final point that we wish to address is the need to strengthen Ofcom's accountability to its key stakeholders. In particular we would raise concern around lack of scrutiny of the cost of Ofcom activities. The absence of transparency around these costs makes it

challenging to offer more detailed comment, however this does sit alongside a lack of scrutiny in other areas – most notably in Parliament.

Ofcom's Chief Executive currently only appears at the Culture, Media and Sport Select Committee once every year. While these Committee meetings do provide an opportunity for lawmakers to ask important questions of the industry regulator, we believe this is insufficient for one of the largest regulators with responsibilities spanning across the communications sectors.

Summary: a need for strategic vision.

Three welcomes Ofcom's Annual Plan for 2015/2016, and while this response has highlighted a number of key priorities that need to be addressed, relating both to consumer, wholesale and Ofcom itself, in general Ofcom continues to identify the right policy priorities and acts as a welcome champion for consumer interest.

Our few criticisms largely are concerned mostly with delivery, rather than the principle of reform that Ofcom has pursued to date. In general, there has been a tendency for Ofcom's approach to the market to be too reactive and responding to single isolated harms, without stating clearly and explicitly the overarching goals they wish to achieve.

This would give network operators a clear framework in which to plan and operate. This certainty would also support operators in hastening the development of key innovations which have benefitted consumers, with propositions like Feel at Home and all-you-can-eat data being prime examples of this.

This requires Ofcom to address and make clear in its Annual Plans and other key policy documents not just policy on specific issues, but the overarching objectives behind them. This alongside the development of a longer (five year) plan with clear timelines and delivery objectives would be one of the simplest and most effective means of delivering better outcomes for consumers by allowing operators to plan ahead and bring forward innovative propositions to market more quickly.

Yours sincerely,

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