

Three  
Star House  
20 Grenfell Road  
Maidenhead  
SL6 1EH  
United Kingdom

T +44(0)1628 765000  
F +44(0)1628 765001  
Three.co.uk



Puja Kalaria  
Strategy Team  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

**NON-CONFIDENTIAL**

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Dear Puja

**Hutchinson 3G UK Limited (Three) response to Ofcom's Call for Inputs to its Annual Plan for 2014/2015**

Three warmly welcomes this opportunity to comment on the strategic objectives and approaches set out by Ofcom in its annual plan for 2013 and 2014, as well as to propose areas of work that should form Ofcom's priorities for 2014 and 2015.

Three believes that real and significant benefits can only be brought both to the regulator and to the sector, if Ofcom more frequently sought the views of stakeholders on the value of its strategic priorities. This will help to ensure that its future workstreams and plans are informed by expert inputs from the industry and other informed stakeholders.

In addition, Three believes that providing for such early engagement in the policy development cycle not only allows the regulator to ensure that its initiatives are grounded in economic and social realities but also enables Three as a business to better plan and allocate resource accordingly.

**Regulatory Accountability**

Three has previously expressed concern that Ofcom does not engage with the industry enough when setting its strategic objectives for coming years and that its priorities are not informed by the intelligence, insight and expertise that only the industry can provide. This invitation to comment both on the strategic objectives for this current year as well as

future workstreams is a very welcome step and will go some way to ensuring that Ofcom's work plans are more fully informed by the needs of the sector and consumers.

Three hopes that this will be the first stage of a much wider programme of strategic engagement and consultation on the key issues facing the sector. Three is absolutely clear that Increased engagement at this strategic level can only be a good thing.

However, we remain concerned at what we believe is at times a lack of transparency around Ofcom processes and decision making that undermines the efficacy of the regulator's decisions and its interventions. We understand that this concern is shared across the industry. We believe that greater engagement with stakeholders and, in particular, the regulated industry will address some of these concerns and help open up policy development processes to fuller scrutiny.

Currently, Ofcom is accountable to Parliament through a requirement to place its annual report before Parliament as well as to report once each year to Parliament. We do not believe that this provides adequate opportunity for scrutiny of Ofcom's decision making, progress against its annual plans and other workstreams, or questioning of the regulator's business priorities and chosen method of intervention. Early engagement on strategic issues can help address industry concerns at that level of scrutiny

In this same vein, we note that beyond formal consultation processes, Ofcom is not subject to any mechanism to gauge current industry trends and views, in contrast to the processes and structures that enable it to draw on consumer views. This lessens the ability of industry and other informed stakeholders to inform strategic decision making and influence its learning.

Ofcom's decisions not only have significant costs for individual business but shape the entire sector: reaching decisions from a buttressed and defensive position only increases the likelihood of bad regulation and legal challenges. For these reasons, this early strategic engagement is to be hugely welcomed.

We recognise of course that Ofcom must remain independent. However, outside the formal process of consultation, it too often engages only through what have become increasingly burdensome information requests. However, it is our firm belief that engaging positively and constructively with industry could be done professionally without creating bias or a lack of independence. Again, we therefore welcome this opportunity to engage.

### **Comments on the Annual Plan for 2013/2014**

Three welcomed some of the broad strategic objectives set out in Ofcom's Annual Plan for 2013/2014. We made clear that we that we agreed with Ofcom that effective competition and the securing of the optimal use of spectrum are fundamental to ensuring not only the on-going success of the UK communications sector. This remains the case. It is also still our view that many of the proposals contained in the Ofcom Draft Annual Plan for 2013/2104 intervened unnecessarily in market outcomes rather than corrected the market flaws that led to those outcomes.

This seems to Three to be the continuation of a trend that has seen an unwillingness to progress big decisions and instead a growing focus on the reactive micro-management of issues as they arise, despite the very real scope for delay built into this method.

The Ofcom Annual plan for 2013/14 continued this trend. It set out plans to consider interventions in relation to:

- mid-contract price changes;
- bill shock;
- additional charges;
- services for disabled; and
- mobile “quality of experience”.

While Three recognises that it is entirely valid for the regulator to consider the issues above and that, in some cases, specific regulatory interventions may be necessary, these should not come at the expense of decisions necessary to improve competition and ensure the future health of the market. Indeed, there are real and unanswered questions as to whether regulatory intervention is in each case the best means of achieving those outcomes or whether the right correct of intervention was chosen.

As an additional point, Three notes that in many cases these interventions are not light touch. They are often heavy handed and disproportionate as well as subject to penalties of up to £2m. This is resource that might otherwise have been used to better deliver those policy outcomes.

Three has long argued that Ofcom could deliver better outcome for consumers through earlier engagement with the industry. As a principle, Ofcom should set high-level objectives and work together with the industry to deliver on these objectives. Such an approach would help Ofcom better meet obligations around the promotion of self-regulatory approaches to issues. Three has no doubt that the market could deliver solutions to consumer issues at less cost than what are expensive regulatory interventions, and do so sooner.

We acknowledge of course the responsibility of industry in this, but it seems plain to Three that a clear mutual understanding (if not always immediate agreement) rather than arms-length mistrust and formal consultation would be a better platform through which to pursue such outcomes.

Three asks Ofcom to consider the following factors:

- 1) If the market were more competitive it is unimaginable that many of these outcomes would not be achieved as a consequence of competitive force or consumer demands.
- 2) Placing additional obligations on mobile and fixed line providers, restricts the ability of providers to plan and invest. More significantly, it impacts the ability of UK based providers to compete effectively with OTT operators based outside of the UK and without those regulatory obligations.

- 3) Such interventions might achieve desired market outcomes in the short term, however in the long term they will expose consumers to unregulated services and content provided by over the top providers or by means that circumvent formal regulation – which inevitably becomes outmoded.
- 4) Greater scrutiny might improve the speed of regulatory delivery, drive efficiencies in the regulator's decision making and help the regulator focus resource better on strategic priorities.

Again, this is not to suggest that there are not areas where Three does not believe that regulatory intervention is necessary. However, such interventions should be restricted to those areas where improved competition alone will not bring about effective solutions or help ensure a wider good.

There are a number of areas in which Three would support targeted regulatory intervention. These are in relation to:

- Coverage advertising where the use of similarly different measures may mean that consumers are unable to properly compare options and subsequently make fully informed purchasing decisions.
- The complaints metrics used by different Communications Providers: these vary significantly between providers and can lead to potentially misleading interpretations of the quality of service offered to consumers by providers. It should not be the case that honesty should lead to unfair penalisation.
- Provision of DQ services to consumers and in particular those with disabilities. There is a lack of competition in relation to the provision of these services that means they are expensive and deliver little value to end users.

### **Areas for regulatory intervention to ensure a competitive market**

When we responded to Ofcom's Call for Inputs on the Draft Annual Plan for 2013/2014, we made clear our view that Ofcom's strategic objectives do not meet what we consider to be the real and pressing needs of the sector. We want to take this opportunity to reiterate that view and urge Ofcom to look to address the competitive bottlenecks holding back the sector.

It is Three's view that improving competition across the sector should be the prime driver of Ofcom's strategic objectives. For too long now, addressing restraints on competition does not appear to have been a priority for Ofcom. Three believes that were Ofcom to spend greater resource on ensuring a fair, competitive and open market, then many of the consumer issues that Ofcom is currently seeking to resolve through regulatory intervention would be addressed through positive differentiation in the market.

Three believes that there are a number of big ticket proactive interventions in relation to the deployment of networks, the management of spectrum and the wholesale market

that the Ofcom should make as a matter of urgency through 2014 and 2015. Interventions in these areas should help to create a fairer and more level playing field. In turn, this will enable providers to compete more vigorously and effectively with each other, and deliver benefits to consumers. In some cases, Ofcom has recently announced action. This is to be welcomed but it should be recognised that such action in long overdue and must be executed as quickly as possible if real outcomes to the benefit of sector are to be achieved.

Specifically, Three believes that Ofcom should act to encourage more efficient and low cost network deployment. In part, this must be about the timely release of future tranches of spectrum. However, there is more that the regulator can do to facilitate the future role out of physical networks both through revisions to code powers – it has been almost two years since the appropriate powers were granted to the regulator by Government – and the regulation of BT's backhaul pricing (see below).

Three believes that there are a number of further specific interventions that Ofcom should make in 2014 and 2015 to ensure that the wholesale costs do not distort the market. These include:

1. Supporting EU objectives in driving further reductions in the wholesale costs of roaming and work to ensure that the current EU draft regulations for a consolidated single market do lead to outcomes that are discriminatory or undermine competition.
  - i. Initiate the next Business Connectivity Market Review as this will be a long and arduous process and change in this market is urgently needed. The review must focus on the extent to which BT retains bottleneck control over key areas of certain markets. Three considers that the key areas for the review to cover if it is deliver improved competition across markets are: Whether physical infrastructure access should be introduced together with other active remedies to promote longer term competition in the relevant markets (this is likely to need to be considered in some detail regardless of the outcome of Colt's current appeal), and
  - ii. The extent to which there is competition in the provision of mobile backhaul products and the consequent regulation.

In relation to this latter point, it is the view of Three that there are significant areas where operators have no choice but to purchase backhaul from BT. In the context of on-going 4G rollout and other investments requiring greater backhaul capacity, this requires regulation, specifically in regard to price and the service quality and technological evolution offered.

2. Continuing to take action in relation to the reduction in Donor Conveyance Charges. These are currently significantly above costs and penalise growing companies and new market entrants. DCC also represents a significant barrier/cost for MVNOs seeking to switch network. Three has faced significant resistance to proposed reductions in DCCs by other MNOs who benefit from the

current DCC rate. Further action in this area is needed and urgently to ensure a fair and competitive market.

Three firmly believes that Ofcom were to tackle these long standing and intrinsic regulatory priorities the result would be a far more competitive market.

## **Switching**

When we commented on the draft annual plan for 2012/2013 we made clear that we were pleased that it included an objective a commitment to develop and implement policies that will improve the ease of switching between Communications Providers.

However, we were concerned that:

- Ofcom's proposals in the plan relate only to fixed line switching; and
- Ofcom has made no progress substantial in achieving reform since first including switching in the annual plan for 2008/09.

We therefore urge Ofcom to look again at switching both across the sector and in the mobile market more specifically in 2014 and 2015, taking account of the draft European Commission Regulation for a Consolidated Single Market in Telecommunications and new provisions in that draft Regulation.

Ofcom will only succeed in promoting effective competition if consumers can switch from one communication provider to another without the undue hassle and delay. Until this happens, consumers will still face unnecessary barriers when trying to move between providers and real competition in the market will continue to be impeded. Switching is intrinsic to the exercise of consumer choice and Ofcom must improve these processes if it is to achieve its wider policy aims.

## **A level playing field in future**

Although tackling these issues is necessary to secure the short-term health of the sector, these alone will not secure the longer term health of the communications market. Therefore, Three strongly urges Ofcom to start, as a matter of urgency on a programme of horizon scanning, consultation and engagement with the industry and other informed stakeholders and to put in place the necessary regulatory changes to safeguard a dynamic, open and competitive communications market for the UK going forward.

Specifically, Three requests that Ofcom look at the burden of regulation across Communication Service Providers and, in particular, network operators, and Over The Top providers, who in many instances are not bound by UK or European regulation, despite providing services that, in many cases, are identical to the consumers as those provided by traditional Communication Service Providers.

Whilst Three welcomes the disruptive innovation that such services may bring, the distortion to competition caused by differing levels of regulation is less healthy. Moreover, current and growing disparity in consumer protection will ultimately lead to consumer harm and detriment.

Three also urges Ofcom to give thought to the market paradox that such development has caused. Mobile Network Operators are investing record amounts in communications infrastructure. This investment is crucial if the UK is to remain a dynamic, knowledge-based economy and consumers are to access increasingly sophisticated and bandwidth heavy data services. This investment has taken place despite unprecedented revenue and margin squeeze and the introduction and growth of competing OTT services.

However, it is unimaginable that this investment can continue if MNOs and other ISPs continue to bear both the cost of carrying OTT services, as well as the cost of regulation intended to bite on such content services, and the compliance costs of the General Conditions of Entitlement. Ofcom needs to finally grapple with the regulation of aspects of Over The Top provision, not only to keep consumers safe from harm, but also to ensure the viability of the UK communications market in future.

Three believes that as part of this work Ofcom needs to look again at the General Conditions of Entitlement. It is now 10 years since Ofcom was first established, and high time Ofcom considered the General Conditions in the round and assessed which are still relevant and necessary. It is also time that Ofcom look again at how it regulates across the value chain, and seek to include other influential and significant Communication Service Providers in the regulation rather than as now the originating CSP.

## **Ofcom Duties**

Three questions whether Ofcom's current approach to the regulation of the communications sector is the most effective means of meeting its statutory duties. In particular we ask whether Ofcom should not place a greater emphasis on its duty to promote effective competition as the key means of meeting the interests of consumers and the citizens. Three notes that where Ofcom has acted determinedly to improve competition in the market and address incumbent and legacy advantage, the benefits to consumers and citizens alike has been considerable. We therefore urge Ofcom to target greater resource at tackling longstanding competition issues.

Further, we also question whether the current approach to spectrum liberalisation has done enough to secure the optimum use of spectrum for wireless telegraphy services. To date, the release of spectrum, though welcome has been slow. We ask that Ofcom adopt a more ambitious and expeditious approach to the sale of the 2300MHz and 3400MHz ranges released by the Ministry of Defence.

In the view of Three, it is the expeditious utilisation of spectrum to both support existing and future demand as well as enable the launch of new and innovative services that best secures the optimal use of our limited spectrum resource. As part of this, Ofcom must consider the need for spectrum floors and caps in order to continue to preserve a four player market.

Lastly, it goes without saying that if Ofcom is to achieve the best outcomes when addressing these issues, it is vital that it works closely with other relevant regulators, such as the Advertising Standards Authority to ensure alignment and consistency and that desired outcomes in the communications sector are not undermined by interventions made by other regulators. Too often this has not been the case.

We would of course be happy to discuss any of the matters raised further, if that would be of assistance.

Yours sincerely

Xavier Mooyaart  
Head of Legal – Regulatory and Competition