

CWU RESPONSE TO OFCOM DRAFT ANNUAL PLAN 2011/12

Overview

1. The CWU is mindful of the need for Ofcom to meet the financial savings required from its operations as part of the Government's Spending Review. In this regard, while acknowledging that Ofcom must use its judgment in delivering value for money through effective and targeted regulation, Ofcom's statutory duties must not be marginalised or neglected as a consequence. Moreover, those duties are set to increase, for example in the areas of copyright infringement and postal services regulation and from May 2011 through the European Communications Framework.
2. The proposed financial savings targets over the next four years represent a significant reduction in Ofcom's spending which is already 27% lower than its predecessor organisations following six consecutive years of like-for-like real-terms budget reductions.
3. The CWU is very concerned that some of the proposals contained in the consultation paper are inconsistent with Ofcom's statutory duties as prescribed under the Communications Act 2003. Specifically the proposals contained in Paragraph 4.12 involving the reduction in the number of Ofcom governing bodies so that the Consumer Communications Panel and the Advisory Committee on Older and Disabled Consumers will cease to exist as distinct bodies. In addition the closure of the Advisory Committee for England is also proposed.
4. The CWU considers that these structural proposals, irrespective of the proposed legislative changes envisaged in the Public Bodies Bill currently before Parliament, conflict with Ofcom's statutory duties. Ofcom itself recognises this potential conflict in Paragraph 4.17 when it states that the changes in structure and approach "*are not without risk*". In particular the CWU believes that the proposals in the Consultation paper conflict with the following Sections of the Communications Act 2003, namely:

Section 3 - General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

...(h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;

(i) the needs of persons with disabilities, of the elderly and of those on low incomes;

(j) the desirability of preventing crime and disorder;

(k) the opinions of consumers in relevant markets and of members of the public generally;

(l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;

(14) In this section—

“citizens” means all members of the public in the United Kingdom;

Section 4 - Duties for the purpose of fulfilling Community obligations

(5) The third Community requirement is a requirement to promote the interests of all persons who are citizens of the European Union (within the meaning of Article 17 of the Treaty establishing the European Community).

Section 16 - Consumer consultation

(1) It shall be the duty of OFCOM to establish and maintain effective arrangements for consultation about the carrying out of their functions with—

(a) consumers in the markets for the services and facilities in relation to which OFCOM have functions;

(b) consumers in the markets for apparatus used in connection with any such services or facilities;

(c) consumers in the markets for directories capable of being used in connection with the use of an electronic communications network or electronic communications service.

(2) The arrangements must include the establishment and maintenance of a panel of persons (in this Act referred to as “the Consumer Panel”) with the function of advising both—

(a) OFCOM; and

(b) such other persons as the Panel think fit.

(3) The arrangements must secure that the matters about which the Consumer Panel are able to give advice include the interests of domestic and small business consumers...

Section 20 - Advisory committees for different parts of the United Kingdom

(1) It shall be the duty of OFCOM, in accordance with the following provisions of this section, to exercise their powers under paragraph 14 of the Schedule to the Office of Communications Act 2002 (c. 11) (committees of OFCOM) to establish and maintain a committee for each of the following parts of the United Kingdom—

(a) England;

(b) Wales;

(c) Scotland; and

(d) Northern Ireland.

Section 21 - Advisory committee on elderly and disabled persons

(1) It shall be the duty of OFCOM, in accordance with the following provisions of this section, to exercise their powers under paragraph 14 of the Schedule to the Office of Communications Act 2002 (c. 11) (committees of OFCOM) to establish and maintain a committee to provide the advice specified in this section.

Questions

i) What are your views on Ofcom’s proposed priorities for 2011/12?

Strategic Purpose 1: Promote effective and sustainable competition

5. In considering Paragraphs 5.3-5.6 the CWU welcomes Ofcom's March 2010 decision requiring Sky Sports 1 and 2 to be offered to retailers on platforms other than Sky at prices set by Ofcom. We also welcome further proposals that would extend consumer choice and the continued development and innovation of television platforms. However, there is a danger of prices being set prohibitively high for other communication providers to purchase. This may well also apply to premium film channels dependent on the outcome of the Competition Commission investigation referred to by Ofcom. The CWU supports this referral and is awaiting with interest the Competition Commission's decision.
6. The CWU actively supports the promotion of investment and competition in the delivery of superfast broadband, as outlined in Paragraphs 5.12-5.16, and Ofcom working with Broadband Delivery UK as long as competition does genuinely deliver investment. The CWU responded to Ofcom's 'Review of Wholesale Local Access' market review last year in which it quoted Ofcom's own statement that:

*"The business case for investment continues to be uncertain. There is still little evidence on how many customers will be prepared to pay for access to super-fast broadband services and how much they will pay. As a result, the potential rate of return for investors may need to be higher to encourage efficient investment. This uncertainty is compounded by questions on how far existing business models may be able to support the case for substantial investment in new networks."*¹

7. Ofcom's own comments were supported by further remarks made in July last year in the BIS Discussion Paper 'Superfast broadband deployment and sharing other utilities' infrastructure'. This paper stated that:

"...investment in superfast broadband involves higher costs, longer pay back periods and continuing uncertainty about consumer demand. These factors together may contribute to reduced incentives and willingness to carry out

¹ *'Delivering Super-fast Broadband in the UK'* Statement - page 23, Ofcom, 3rd March 2009

further investment, thus delaying further increases in the reach and coverage of superfast broadband to the rest of the country”.²

8. The CWU argued that if the present coalition government is serious about genuine social inclusion as part of its ‘Big Society’ agenda and is committed to the rapid roll out of superfast broadband, then it has to recognise that market investment alone will not reap sufficient commercial benefit to result in comprehensive roll-out of superfast broadband. Large swathes of the country will not be covered. Therefore the objective of a widespread superfast broadband network and digital inclusion will remain an unfilled aspiration unless the Government itself commits to public investment where there is market failure. Parts of the UK are already blighted now by the lack of provision of Broadband and these communities and the economy cannot wait to ponder upon what to do next after BT has closed its NGA rollout.
9. In its response to Ofcom’s ‘*Review of Wholesale Local Access*’ market review the CWU also emphasised the need for transparency of maintenance and quality of service standards. Without this standards could slip and impact negatively on BT’s utilization of performance management procedures. Specifically in this regard the CWU also argued that the proposed Reference Order (RO) should set high minimum standards. The CWU also argued that such minimum standards should also extend to safety standards and be reproduced in any future commercial arrangements, along with the publication of Key Performance Indicators (KPIs) for provisioning and fault repair.
10. The CWU considers that because of the continuing process of technological convergence in the telecommunications and broadcasting sectors across Europe there ought to be minimum service standards introduced to guarantee quality and universal application across the telecommunications industry. This is because there is both a danger of having a patchwork of national and local networks all operating under very different service levels, and poor standards if the work is progressively sub-contracted to untrained operatives. It is vital therefore that there is a legal requirement for employers in the telecommunications sector to provide properly certified training as the

² ‘*Superfast broadband deployment and sharing other utilities’ infrastructure*’ – page 6, BIS, July 2010

technologies continue to converge between the telecommunications and broadcasting sectors.

11. Separately in response to July's BIS Discussion Paper the CWU argued its case that the failure to build a universal broadband network for the United Kingdom in the short-term would create a greater threat to the nation's economy and the financial security of the communications sector than any risk posed to competition by public funding. The CWU cited the examples of our European neighbours as their Governments are pro-actively investing in their broadband networks (e.g. Portugal, France & Spain), and that there is a very real danger that our economic competitiveness will suffer if the UK Government does not follow likewise. The benefits of higher productivity, increased innovation, improved access to new markets and new business opportunities would all be lost. In addition it has been estimated by the London School of Economics and the Information Technology Innovation Foundation in their report 'The UK's Digital Road to Recovery', that the impact on employment from investment in superfast broadband is that 280,000 jobs would be created by investment in broadband network infrastructure.³
12. It is the CWU's opinion that all of the above should be incorporated in the further guidance for the telecommunications industry on the regulatory environment for investment in the next-generation access infrastructure to be produced as a result of the new provisions in the European Union regulatory framework that take effect from 26th May 2011.

Strategic Purpose 2: Promote the efficient use of public assets

13. The CWU supports the proposed the auction in the year 2011/12 (paragraphs 5.12-5.16) of the 800 MHz, 2.6 GHz spectrum bands, and the 600 MHz spectrum band and the auction for awarding the licences to use the 800 MHz and 2.6 GHz bands by the end of 2011/12 or early in 2012/13. Together with the associated consultation of Ofcom's assessment of future competition in mobile markets and its consequent proposals for the design of

³ 'The UK's Digital Road to Recovery' - London School of Economics and The Information Technology and Innovation Foundation, April 2009

the combined auction; Ofcom's publication of its final decisions on these matters; consultation on and issuing of Auction Regulations (secondary legislation) and Ofcom's publication of an information memorandum; and the finalisation of software to run the auction and the training of prospective bidders in its use.

14. The CWU supports the timely spectrum clearance as proposed by Ofcom in Paragraphs 5.17-5.20.
15. The CWU supports Ofcom's proposals to organise a full spectrum plan to deliver the Government's guarantee of wireless spectrum for the London 2012 Olympic and Paralympic Games as proposed in paragraphs 5.21-5.26.
16. The CWU further supports Ofcom in continuing to be guided by its vision to develop a medium-term spectrum policy work programme, taking account of market developments since publishing the '*Spectrum Framework Review*' and the '*Spectrum Framework Review: Implementation Plan*' in 2005 as proposed in Paragraphs 5.27-5.28.

Strategic Purpose 3: Help communications markets work for consumers

17. The CWU is mindful that Ofcom's "...*medium-term strategy and annual plan are based upon the needs of citizens and consumers*" as stated in paragraph 2.1. In this regard the CWU supports Ofcom in its attempts to ensure the effectiveness of switching procedures through the development and implementation of relevant policies as outlined in paragraphs 5.30-5.38. The CWU also supports Ofcom's concerns, in paragraphs 5.39-5.42, about the existence of automatically renewable contracts (ARCs or 'rollovers') to residential consumers as these contracts represent a potential contractual barrier to switching. The CWU agrees that ARCs are harmful to the competitive process and so to consumers as a whole and welcomes and continues to support Ofcom's work, in paragraphs 5.43-5.45, in reviewing additional charges in contracts for communications services (including non direct debit and early termination charges). The CWU supports Ofcom's proposal to initiate separate investigations of named fixed-line and broadband providers.

18. The CWU supports Ofcom's intent to ensure that communications providers deliver clear information so that broadband consumers can make informed choices as outlined in paragraphs 5.46-5.48.
19. However, we believe problems will arise in the future from two principal sources: firstly, the growth in content on the internet (and its varied nature); and secondly, increasing innovation in technological development (which adds greater diversity to the type and extent of application and service). In effect the huge volume of data to be conveyed will outgrow network capability. Therefore there is a very significant issue of network capacity and traffic management that needs to be seriously addressed.
20. The CWU considers that other forms of prioritisation by communications providers do take place apart from pricing mechanisms. This has primarily taken the form of restrictions placed upon an end user's ability to access certain internet applications such as slowing of download speeds for the streaming of video content and for content downloading between users, and on VoIP services offered by third parties. This has implications both for other providers and consumers in restricting access and content.
21. The CWU considers that if the problems around maintaining neutrality and internet openness are to be countered then minimum standards to preserve the 'end-to-end' principle should be enforced by governmental regulation through the European Communications Framework from May 2011. At the moment such issues are left to the market of operators and providers on the basis of their own 'best efforts' of monitoring and assessment to guarantee neutrality and openness. This simply isn't adequate with the increase in managed services. Instead what are required are steps that build upon the markets 'best efforts' principle through legislation that promotes minimum standards.
22. In addition, the CWU considers that transparency for consumers should consist of regular reports on each quality of service parameter made publicly available and easily accessible to citizens and consumers alike. The current standards should be reviewed on an annual basis to ensure they are still relevant and whether they can be improved.

Strategic Purpose 4: Provide appropriate assurance to audiences on standards

23. The CWU supports Ofcom's consultation on its proposed revisions as outlined in paragraphs 5.50-5.53 to its procedures for investigating breaches of broadcast licenses, investigating fairness and privacy complaints, and considering statutory sanctions. The CWU also supports Ofcom's review as outlined in paragraphs 5.54-5.55 of its wider regulatory approach to content regulation to ensure that it remains fit for purpose and that it continues to serve the interests of citizens, consumers and stakeholders.

Strategic Purpose 5: Contribute to and implement public policy defined by Parliament

24. The CWU is mindful of Ofcom's duties and responsibilities as defined by Parliament on a whole range public policy issues as stated in paragraph 5.56. The CWU is also aware that the provisions of the Public Bodies Bill currently before Parliament will impact upon Ofcom's role and structure once it is enacted. The CWU reiterates its opinion that in fulfilling its statutory responsibilities under the Communications Act 2003 Ofcom's proposals contained in paragraph 4.12 involving the reduction in the number of Ofcom governing bodies (including the Consumer Communications Panel and the Advisory Committee on Older and Disabled Consumers) actually conflicts with those very same statutory responsibilities.

25. In preparing for and fulfilling its future regulatory duties in relation to the postal service as outlined in paragraphs 5.57-5.60 the CWU would wish to highlight its concern with regard to the protection of consumers. Whereas Postcomm was explicitly charged under the Post Services Act 2000 to have regard to the interest of the disabled or chronically sick, individuals of pensionable age, individuals on low incomes, and those living in rural areas, the current Postal Services Bill no longer makes such explicit reference. The protection of vulnerable postal consumers will now be covered by the Communications Act 2003. We are deeply concerned that this change may

mean the watering down of the regulator's duties and be further exacerbated by Ofcom's proposed cutbacks in areas dealing with consumer protection.

26. It is essential that, on taking over regulatory responsibility for the postal sector, Ofcom moves swiftly to address the current imbalance in postal regulation. Postcomm's regulatory decisions have caused enormous damage to both Royal Mail and the wider postal industry. Downstream access arrangements, for example, have wiped out over half of Royal Mail's upstream mail traffic, forcing the company to subsidise its competitors by 2.5p per item and costing the company £160m a year. The Postal Services Bill does nothing to fundamentally address the problems of regulation in the postal industry. The responsibility will lie with Ofcom who must act rapidly to address these problems.
27. The CWU supports Ofcom's proposals as outlined in paragraphs 5.61-5.62 for implementing the online copyright infringement provisions of the Digital Economy Act 2010 (DEA). Specifically Ofcom's duty to make a code in accordance with the requirements of the DEA, and its consultation on a tariff for the processing of copyright infringement reports by ISPs and on establishing an independent body to hear subscribers' appeals against reports.
28. The CWU also supports Ofcom's proposal as outlined in paragraphs 5.63-5.65 to prepare a statutory report for the Government on the licensing arrangements for Channels 3 and 5 after 2014.

ii) What are your views on Ofcom's proposed work areas for 2011/12?

Strategic Purpose 1: Promote effective and sustainable competition

29. The CWU wishes to make a general observation in relation to Paragraphs 6.4-6.6. In its response to Ofcom's consultation paper *'Review of the Wholesale Broadband Access Markets'* in June last year, the CWU noted Ofcom's objective in Paragraph 1.11 of that paper to:

“...assess whether any CPs (Communications Providers) have a position of significant market power (“SMP”), which essentially means power to influence markets to a significant degree in a way that could harm consumers. Then, if any CPs has SMP, we assess the regulatory remedies that need to be imposed to address the SMP that exists”.

30. The CWU emphasised that this assessment should focus beyond BT and on Virgin Media’s cable network as it now covers just under half of the UK, and that there should be a requirement for Virgin Media and other communication providers to provide open access to their ducts if competition is not to be distorted in the market.

31. In paragraph 7.111 of Ofcom’s consultation paper ‘*Review of the Wholesale Local Access Market*’ of June 2010 it was also stated that:

“...there is a wider debate about the potential for infrastructure owned by other organizations to play a role, in enabling NGA network rollout”.

32. The CWU considers that in the meantime until the amendments to the European Union regulatory framework relating to infrastructure sharing have been incorporated into UK law by May 2011, Ofcom should be placing voluntary obligations upon Virgin Media for infrastructure sharing and indeed others such as COLT and KCOM.

Strategic Purpose 2: Promote the efficient use of public assets

33. The CWU supports Ofcom’s role in ensuring compliance with European Union policy objectives and areas of European Union spectrum policy where Ofcom does not have explicit delegated powers, as detailed in paragraphs 6.25-6.27. This includes the Radio Spectrum Policy Programme and the implementation of the spectrum provisions of the recently revised European Communications Framework.

34. However the CWU wishes to express its concerns that at a time of financial cutbacks across Government and particularly with Ofcom’s proposal to reduce the number of its governing bodies (as detailed above) that Ofcom has made no proposals to reduce its international travel and commitments.

While accepting Ofcom has to develop a stable international framework to support its spectrum agenda as outlined in paragraph 6.24 there is no proposal to reduce its participation in relevant *fora* at bilateral, European and international levels such as its activities in OECD, CEPT and ITU and its participation in the European Union preparations for the next World Radio Conference (to take place in Geneva in January 2012). This is a relevant concern not only because consumers will see the contradiction but also because some of Ofcom's international activities are not directed nor approved by the statutory duties of the Communications Act 2003.

Strategic Purpose 3: Help communications markets to work for consumers

35. The CWU is concerned that while aiming to ensure the adequate provision of services for consumers with hearing impairments, as outlined in Paragraph 6.29 Ofcom, is at the same time reducing the voice of such consumers through its proposal to abolish its Advisory Committee on Older and Disabled Consumers. This is a retrograde step and a false economy which will negatively impact on Ofcom's statutory duty to further the interest of citizens and consumers, and could be construed publicly as Ofcom lessening its commitment to equality issues.
36. The CWU is also concerned that while Ofcom acknowledges in Paragraph 6.35 that it is "...committed to evidence-based decision-making...through a comprehensive programme of market research..." it is at the very same time reducing the budget for such market research. This appears to be contradictory and perilous to the high standard of research required in such a technologically fast-moving industrial sector as telecommunications. The CWU wishes to register its objection to such a false economy as the necessity for in-depth and extensive market research will increase due to the increased role of private investment in the roll-out of superfast broadband.
37. In relation to paragraphs 6.36-6.41 the CWU refers Ofcom to its response to Ofcom's consultation paper '*Review of the Wholesale Broadband Access Markets*' in June last year. In its response the CWU fully supported the statement in paragraph 1.11 of that paper which read:

“...the specific characteristics of the UK markets and the need for regulatory certainty to incentivise investment justify a four year forward look.”

38. Specifically the CWU is concerned that the content of the Government's proposals for investment in the new high-speed broadband internet structure and mobile phone 'not-spots' assumes high levels of private investment in the roll-out of the Next Generation Access (NGA) for which there is no guarantee that this will be achieved.
39. This is why the CWU proposes that mobile operators and content providers should also make a financial contribution to the proposed roll-out of the NGA through a charge on the profits from their revenue streams. This is because mobile operators will gain significant operational benefits through increased back-haul capacity and content providers stand to gain significant business opportunities and revenues through the roll-out of the Next Generation Access fibre networks to the 'Final Third'. This charge should be on top of the contribution they are already making to broadband through 3rd generation spectrum licences, so that they are not 'piggy-backing' on the existing network operators. In most cases such mobile operators and content providers will be the first ones to benefit initially with the least capital lay-out cost from the roll-out and may well be the only ones to make significant profits in the short to medium terms.

Strategic Purpose 4: Provide appropriate assurance to audiences on standards

40. The CWU supports all sections of strategic purpose 4, particularly ensuring efficient and effective programme standards enforcement primarily in relation to the protection of minors.

Strategic Purpose 5: Contribute to and implement public policy defined by Parliament

41. The CWU supports Ofcom's role in implementing new regulatory responsibilities including those arising from the revised European

Communications Framework and engaging with the European Union and wider international policy development as detailed in paragraphs 6.52-6.58.

42. However, the CWU wishes to reiterate its concerns that at a time of financial cutbacks across Government and particularly with Ofcom's proposal to reduce the number of its governing bodies (as detailed above) that Ofcom has made no proposals to reduce its international travel and commitments. While accepting Ofcom has to develop a stable international framework to support its telecoms and spectrum agenda there is no proposal to reduce its participation in relevant *fora* at bilateral, European and international levels such as its activities in OECD, CEPT and ITU and its participation in the European Union preparations for the next World Radio Conference (to take place in Geneva in January 2012). This is a relevant concern not only because consumers will see the contradiction but also because some of Ofcom's international activities are not directed nor approved by the statutory duties of the Communications Act 2003.

43. The CWU notes Ofcom's stated objective in paragraph 6.64 that:

"We will continue to work towards promoting greater availability and more effective use of communications services for consumers across the UK."

44. However, the CWU considers this objective to be at variance with Ofcom's proposal in paragraph 4.12 to close the Advisory Committee for England while leaving the advisory committees for the other nations intact. In addition there is no mention within the Draft Annual Plan 2011-12 of where the responsibilities of the Advisory Committee for England will be subsumed or reallocated. This is a major omission which will cause consumer concern in England and fear that consumer interests will not be as effectively represented or protected. The CWU understands that Ofcom may be calling a new merged committee the 'Advisory Committee for the Nations and Communities'. If this proposal is correct then the CWU suggests that Ofcom should make explicit its intentions in this regard for such a Committee's responsibilities and functions.

45. The CWU also wishes to reiterate its concerns in relation to Ofcom pursuing its duties in the representation of older and disabled consumers as outlined in

paragraph 6.66, because at the same time Ofcom is reducing the voice of such consumers through its proposal to abolish its Advisory Committee on Older and Disabled Consumers. This is a retrograde step and a false economy which will negatively impact on Ofcom's statutory duty to further the interest of citizens and consumers, and could be construed publicly as Ofcom lessening its commitment to equality issues. The CWU is given to understand that the establishment of a new consumer group is being created by Ofcom under the guidance of Ofcom's Director of Consumer Affairs. If this proposal is correct then the CWU suggests that Ofcom should make explicit its intentions in this regard for such a group's responsibilities and functions.

46. The CWU supports Ofcom in its continued research programme to investigate the extent of media literacy in the UK and in identifying any emerging issues. However the CWU expresses its concerns that funding for this vital area of Ofcom's work is to be reduced as this could well lead to increased levels of media illiteracy and thus propagate the 'digital divide' between different socio-economic groups. This is an essential area of funding for Ofcom if the British economy is to have the requisite technological skills for the future. Any gap in funding on media literacy research may well end in prejudicing the UK's competitive economic ability globally.

Contact

For further information about any aspect of this submission, please contact:

Billy Hayes
General Secretary
Communication Workers Union
150 The Broadway
Wimbledon SW19 1RX

Tel: (020) 8971 7200
Fax: (020) 8971 7300

e-mail: info@cwu.org
<http://www.cwu.org.uk>