

Cover sheet for response to an Ofcom consultation

BASIC DETAILS

Consultation title: **Draft Annual Plan 2010/11**

To (Ofcom contact): **Jakub Dubaniewicz**

Name of respondent: **Mark Falcon**

Representing (self or organisation/s): **3UK**

Address (if not received by email): by email

CONFIDENTIALITY

Please tick below what part of your response you consider is confidential, giving your reasons why

Nothing

☒

Name/contact details/job title

☐

Whole response

☐

Organisation

☐

Part of the response

☐

If there is no separate annex, which parts?

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Name **Mark Falcon**

Signed (if hard copy)



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NON- CONFIDENTIAL VERSION

17 February 2010

Dear Mr Dubaniewicz,

Hutchison 3G UK Limited ("3UK") response to Ofcom's consultation Draft Annual Plan 2010/11 ("The Draft Annual Plan")

1. Introduction

3UK welcomes the opportunity to respond to Ofcom's consultation on its Draft Annual Plan 2010/11. We find it a useful process to be given visibility of Ofcom's proposed work programme for the next twelve months, however as we have commented in previous years we would like to see more detail set out in the plan itself. In particular, 3UK requests that in the final version of the plan, Ofcom supply more detailed information around the timing of work programmes and anticipated publication dates of important consultations. This is because 3UK needs to plan for 2010 in much the same way as Ofcom. Responding to consultations and dealing with Ofcom's information requests requires a great deal of work and resource from both 3UK's regulatory department and the wider business. We especially urge that Ofcom do everything they can to stick to the deadlines for work programmes and consultation processes and advise stakeholders promptly of any changes.



We discuss below our views on each of the priorities identified by Ofcom in the Draft Annual Plan, which are most relevant to our business.

In addition, we note with interest the prominence that Ofcom has given in the Draft Annual Plan to the work it intends to carry out to ensure that wireless services are adequately delivered during the London 2012 Olympic Games and Paralympic Games. Whilst we recognise the national importance of such a project, we believe that Ofcom should act to limit its impact on Ofcom's regulatory agenda. We would be extremely concerned if the Olympics project took precedence over Ofcom's other priorities, which could produce significant consumer and market benefits in both the short and long-term.

2. Spectrum

There has been a huge growth in data use through the rapid take up of mobile broadband in the UK over the last couple of years and this trend is likely to continue. Many new intelligent data devices and applications have appeared on the UK market in the last two years, driven by effective competition and availability of appropriate spectrum, fuelling the growth in demand for mobile data services. 3UK expects technology in devices and services to continue to expand at the current rate on a global basis. Whether UK consumers will benefit from these further technological developments will depend upon the effectiveness of competition in the UK market and the availability of spectrum, specifically because data traffic requires significantly greater spectral capacity than voice or SMS traffic. New evolutionary mobile broadband technologies such as LTE and HSPA+, which offer high speed advantages over earlier 3G technologies, are becoming available, and are placing increasing pressure on Mobile Network Operators' (MNOs) spectrum holdings. All these important matters need to be taken into account when Ofcom assesses clearing spectrum in the 2.6GHz and 800MHz spectrum bands. We encourage Ofcom to proceed with planned key spectrum auctions with minimum of delay.

Spectrum is key to an operator's ability to deliver good quality services to customers. A shortage of spectrum will significantly increase the cost of delivering services to customers and constrain the ability of operators to provide certain services, such as high speed data services, potentially driving up prices and hindering the development of new technologies. [•] This "spectrum crunch" is likely to continue at least into the medium term, as additional appropriate spectrum is unlikely to be available for use by operators until at least 2013. [•] 3UK does not have any current holdings of spectrum outside of the 2.1GHz bands, and therefore cannot benefit from the re-use capacity as a result of the liberalisation of current 2G spectrum.

There are many references in the Draft Annual Plan to the Government's Digital Britain Final Report and how this could potentially affect Ofcom's work over 2010/11. However there appears to be little clarity as to the extent of Ofcom's role in this project and what its role is in working with the



Government for this piece of work. It would be very useful for Ofcom to explain where it sees its involvement being over the coming year and how it will impact on Ofcom's overall strategic framework.

3. Mobile Number Portability and Switching

3UK notes that one of Ofcom's proposed priorities for 2010/11 is to make significant progress on ensuring consumers can switch between communications providers by removing unnecessary barriers. 3UK believes that the current donor-led Mobile Number Portability ("MNP") system is a significant barrier to switching and competition which is systematically flawed. The current MNP system causes consumer harm by making it difficult for customers to exercise consumer choice and port their numbers, and poses a significant barrier to competition for new entrants hoping to acquire new customers.

The existing processes are outmoded, and regulatory reform is urgently required. Whilst 3UK welcomes Ofcom's renewed focus on a review of the processes for MNP and routing of calls to ported numbers, we are very concerned that the timetables outlined in Ofcom's consultations of August 2009 have already slipped back. Ofcom must expedite its decision-making process relating to these matters, especially the work necessary to reach a decision as to whether to mandate a recipient-led porting system, so that a decision can be reached as soon as possible.

We further note that such reforms attract even greater urgency in light of the EU's New Telecoms Package, which requires porting to take place "within the shortest possible time", and, in any case, "within one working day". Given the significant delays that have already occurred in this decision-making process, it would be entirely unsatisfactory for Ofcom, at this stage, to introduce the possibility of further delays. [•]

In relation to Ofcom's work regarding contractual barriers to switching, we note that 3UK has previously provided a comprehensive response to Ofcom [•]. 3UK also notes the recent Supreme Court decision in *Office of Fair Trading v. Abbey National PLC (and 7 others)*¹ and its relevance to, and impact upon, the Guidance previously issued by Ofcom.

4. Mobile Termination Rates and the Market Review

¹ [2009] UKSC 6



Ofcom acknowledged the need to open up the debate on mobile termination rates ("MTRs") in 2009 and 3UK agrees with Ofcom that the regulatory regime for mobile call termination needs to change. The convergence of fixed and mobile communications points strongly towards the direction this change should take: regulation of fixed and mobile termination needs to be more closely harmonised whereby MTRs need to fall. In the Draft Annual Plan, Ofcom states that it:

"must ensure that regulation helps, rather than hinders, the development of markets. To achieve this, our principle is to use the least intrusive regulatory mechanisms appropriate for the situation."

3UK recommends that Ofcom take this on board and make sure they follow the EC recommended approach to setting MTRs through the less intrusive pure LRIC approach. This will hopefully set the UK on a track towards the EU's long term goal of a Bill and Keep MTR regime as illustrated in the recent European Regulators Group (ERG) report; Next Generation Networks Future Charging Mechanisms / Long Term Termination Issues². A consistent harmonised regulatory approach to MTRs needs to be adopted across all European member states.

5. Broadband and Mobile Not-Spots

3UK is investing heavily in its network through the MBNL joint venture agreement with T-Mobile. We have now consolidated over [•] base stations on our network and we are on track to have over [•] base stations (up from just over [•] base stations in 2007) by the end of October 2010. This will give us 98.5 per cent outdoor population coverage.

3UK are also looking at improvements to connection speed for Mobile Broadband and Mobile Internet users. We have already rolled out the 7.2 Mbps HSPA (high-speed packet access) standard in [•]% of our network and will start the roll-out of the 14.4 Mbps standard in the first half of 2010. This will allow more customers to benefit from higher data speeds when they connect to our mobile broadband services.

3UK have seen a huge explosion in the use of data services over the past 2 years. This poses a different set of challenges and we are striving to ensure that we can satisfy the needs of our consumers. 3UK are in the middle of a massive network improvement programme. This includes boosting the links between sites and the core network and also upgrading or replacing older equipment to increase speeds. We believe that more and more customers are now noticing improvements in our network and coverage.

² http://www.erg.eu.int/doc/publications/2009/erg_09_34_draft_cp_ngn_future_charging_mechanisms_final.pdf



3UK has already begun to engage with Ofcom to look at mobile coverage and the reasons for the existence of not spots. Although we are supportive of enabling Ofcom to better explain why not spots exist, we strongly believe that Ofcom's work in this area should not result in it mandating or requiring not spots to be 'filled in' with new coverage requirements. Decisions on network planning should be left to the mobile networks.

3UK, however, is supportive of efforts to improve consumer understanding and awareness of coverage, and to work towards the meaningful provision of comparative information about coverage. Currently, without an agreed methodology for measuring coverage, mobile networks are free to use their own methodology and make claims about the extent of their coverage without independent evaluation. As Ofcom is aware, 3UK believes this is at best damaging to consumer confidence in the mobile sector and at worst mis-leading information.

3UK therefore supports Ofcom working towards an industry-wide agreed formula for measuring network coverage.

6. Consumer empowerment and protection

6.1 Promoting Digital Participation

3UK supports the work of the Digital Participation Consortium and also that of the Digital Inclusion Taskforce. We believe there are considerably fewer barriers to consumer uptake of mobile services than there are for other digital services. During 2009, 3UK made it possible for any consumer to access free Skype to Skype calls forever on its network. There is no requirement to top up your credit or have a contract, nor do customers incur any data charges when using Skype. In short for the price of a low cost 3G handset (£29.99), customers can make free Skype to Skype calls on our network. In comparison, similar access to voice over IP (VoIP) on fixed broadband would require the payment of a monthly line rental.

3UK notes that as part of Ofcom's work on digital participation it intends to review both the Universal Service Obligation regarding services for disabled customers. As we stated previously in our response to the consultation on Ofcom's 2009/10 draft annual plan, 3UK believes the market has effectively delivered increased access to mobile telephony and broadband without recourse to regulatory intervention. Indeed where intervention has occurred – in relation to the provision of services for disabled customers – take-up has been very low. As Ofcom examines the use of communications services by disabled people in 2010/11, 3UK would urge Ofcom to review not just those services that do not exist and so may prevent disabled people from participating equally in society, but also observe those mainstream products and services that do exist and are being used by disabled people now. 3UK believes that there are a range of services available on mobile that currently facilitate communications,



and that regulatory intervention to require specific service provision risks duplicating the facilities that are already available and will only increase the costs that arise from the provision of bespoke services, costs that will have to be recouped from consumer.

3UK believes that, whilst this is clearly an important issue for Ofcom to consider, some of Ofcom's other priorities in 2010/11 have the potential to deliver real benefits to all consumers, including disabled and disadvantaged consumers. In particular, we note the significant consumer benefits that will result if Ofcom mandates a move to near instant, recipient-led MNP.

6.2 Protecting consumers from harm

3UK welcomes the reduction in mobile mis-selling complaints reported in the draft annual plan, and notes as a result that mobile mis-selling is no longer a priority area for Ofcom. However, 3UK is concerned to note that in paragraph 4.42 of the draft annual plan, Ofcom suggests that the self regulatory approach to mobile mis-selling has proved ineffective and it was only following the introduction of a compulsory code, that complaints fell. As Ofcom is aware, formal regulation only came into force in September 2009, so it is more likely that the reduction in complaints between September 2007 and October 2009 cited in the annual plan owes more to the enforcement of the self regulatory code than it does to the compulsory code which had been in place for a matter of days by October 2009.

3UK is concerned that claims like this instil little confidence in Ofcom's assertion that it will seek the least intrusive regulatory method of achieving its objectives. The least intrusive method in this instance would have been to support and encourage continued enforcement of the self regulatory code, rather than resorting to a compulsory code.

6.3 Switching

Ofcom's response to mobile mis-selling is in marked contrast to its approach to supporting consumer empowerment in the mobile market. As noted above, despite evidence that consumer choice is frustrated by a donor-led MNP system that encourages aggressive retention activity, Ofcom appears to remain wedded to the current MNP system. This is despite the fact that Consumer Focus has described the current MNP system as raising questions "around overcharging and access to good deals, in relation to the tariffs that are offered to consumers who do not express any intention to switch provider". Consumer Focus has also noted that, under the current system, "there are few incentives for donor providers to port numbers swiftly and efficiently while they stand to lose out by doing so"³.

³ Mobile What's the Problem – Consumer Focus April 2009



3UK notes that whilst Ofcom is proposing to make switching generally a priority for 2010/11, the focus of this project appears to be the problems associated with bundled services rather than on whether a regulated system like MNP does, in and of itself, restrict a consumer's ability to switch provider.

Ofcom identify complaint handling as a priority area for 2010/11, and 3UK looks forwards to engaging further in this project which first started in 2008. 3UK is, however, concerned that a secondary aim of this project will be to seek to establish a system where by comparative data about complaint levels is developed. 3UK has significant reservations as to the relevance of reported complaints. Complaints escalated to external bodies may not give an accurate picture as some Communication Service providers (CSPs) may choose to 'buy off' complainants to prevent them from escalating their complaint further, but the consumer experience would still remain poor. Equally taking CSPs own data could result in inaccurate comparisons, leaving the consumer no more empowered to make an informed choice. 3UK appreciates that Ofcom is merely scoping this area at this point in time, but we would like to place our reservations about comparative complaint data on record at this stage.

6.4 Adapting content regulation

3UK welcomes Ofcom's acknowledgement that "with convergence, the distinctions between different platforms are blurring". Indeed it was in 2005 that 3UK first raised the question as to how Ofcom would adapt its approach to content regulation accessed on communications networks and charged to the consumer's communications bill. Unfortunately despite finally undertaking a review of the current regulatory regime for paid for content accessed on a communications network (known as Premium Rate Content) in 2009, Ofcom is no further advanced in its thinking as to how it can or should regulate charged for content on communications networks.

In particular, 3UK has identified clear inconsistencies in Ofcom's approach to the regulation of paid for content on communications networks. So where a TV channel purchased for 24 hours on 3UK is regulated as Premium Rate (including the regulation of harm and offence) a TV channel purchased for 24 hours on Talk Talk's TV on demand service is not regulated as Premium Rate. Similarly a music download purchased from a third party and charged to the bill of a 3UK customer is regulated as Premium Rate, but a music download purchased from iTunes and charged to the bill of a BT broadband customer is not regulated as premium rate. Yet the Communications Act makes no distinction between communications providers, and so it must be that either all communications providers providing access to direct to bill charged content are caught or alternatively, none are caught.

As mentioned these inconsistencies were first drawn to Ofcom's attention in 2005. We therefore trust that now that Ofcom has identified the adaption of content regulation as a priority area for 2010/11 it will move quickly to apply the analytical framework it developed in 2009 and revise the Premium Rate



Condition so as to ensure that whilst all content services charged for across a communications network and to the communications bill are deemed PRS, only those that are deemed to present a risk to consumers are regulated.

All of the above work areas important to 3UK, fit well within Ofcom's proposed future work programme and developing a regulatory framework for their nine key priorities. 3UK would be happy to discuss the above issues and further proposals with Ofcom.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mark Falcon'. The signature is fluid and cursive, with the first name 'Mark' being more prominent than the last name 'Falcon'.

Mark Falcon
Head of Economic Regulation
For and on behalf of Hutchison 3G UK Ltd