BT's Response to Ofcom's Draft Annual Plan 2010/11

1. Introduction

1.1 The Ofcom Annual Plan is an important document for stakeholders, setting out Ofcom's policy framework and priorities for the year ahead. Preparing for and responding to Ofcom's consultations and reviews requires significant resources from stakeholders and the plan, and in particular the detailed workpackages and timings, are vital in planning how and where to deploy resources most effectively.

1.2 The communications markets continue to rapidly evolve and convergence has now matured to the extent that the consumers are now routinely looking to buy packages of fixed voice and broadband, mobile voice, text and broadband, and Pay TV. Providers need to be able to gain access on cost-orientated terms to any remaining bottlenecks that are preventing consumers experiencing the same benefits for bundled services as they have for their fixed-line voice and broadband services.

1.3 Innovative services are being developed at an ever faster pace and are underpinned by substantial investments, which are made possible by the presence of a stable regulatory regime that promotes consumer benefits whilst minimising regulation and rewarding investment. It is essential that there is a common understanding between Ofcom and stakeholders of how the regulatory regime will evolve to keep pace.

2. Key points and priorities

2.1 BT believes Ofcom's draft Annual Plan covers the key programmes for the year ahead. We have made a number of comments and suggestions about key issues in this section with further comments in the next section, followed by a final section with comments relating to Ofcom's role internationally.

2.2 In the year ahead, Next Generation Access (NGA) is a key priority for the communications industry including BT, and for the UK. BT's own plans for superfast broadband are clear and ambitious, and in order for a vibrant and competitive market to develop for the benefit of consumers, there should be a clear, stable regulatory regime that encourages investment, innovation and an enhanced consumer experience.

2.3 The Government's Digital Britain proposals will affect Ofcom's role going forward. It is proposed that Ofcom, when exercising its functions to further the interests of consumers, would do so by promoting efficient investment in communications infrastructure where appropriate. This would mean that promoting such efficient investment would sit alongside Ofcom's duty to further the interests of consumers by promoting competition. BT believes that promoting investment should be a key consideration for Ofcom in appropriate circumstances and all stakeholders will be keen to understand how Ofcom intend to discharge this new duty.

2.4 Ofcom has set out its proposed priorities for 10/11 within the three overarching categories "Consumer and Citizen", "Competition", and "Infrastructure and Spectrum". Within the category "Competition", there are two main sub-headings, one being "Implement regulation to support effective competition and investment in super-fast broadband". Given the nascent state and importance of NGA, and given Ofcom's proposed new duty to promote efficient investment in such areas, we would have expected super-fast broadband to be categorised as an "infrastructure" project. This would seem more appropriate given its point in its lifecycle and the parallels with the spectrum based infrastructure projects, which are intended to facilitate spectrum availability.

2.5 Ofcom had originally planned to have a programme of work in 09/10 to put in place a new medium-term strategic framework following the expiry this year of the current three-year strategic framework, and particularly to consider how best to regulate for convergence. We would expect to see a similar work programme next year to develop a new forward-looking medium term strategy. This should, inter alia, reflect the impact of the Digital Britain proposals and other similar government initiatives.

2.6 BT strongly believes that Ofcom should ensure that regulation is always applied appropriately and proportionally to enhance the overall customer experience in communications markets. However, where this involves the regulation of others, we believe it sometimes takes far too long and would highlight the often poor consumer experience in switching between different suppliers. We urge Ofcom to take the lead and ensure that their planned consultation in the summer establishes a viable single migration process – having separate processes for broadband and fixed narrowband lines is no longer tenable. Ofcom should also ensure that a future single process is designed to ensure customer protection, by ensuring upfront validation of customer identity and intention, accurate identification of the services or assets to be migrated, provision of customer information on the consequences of switching, which should all contribute to a better customer experience. Similarly the confusing state of the NTS market should be reviewed as soon as possible, to remove the asymmetric regulation on BT and to ensure that Ofcom introduce new regulation that provides a more stable basis for both customers and industry alike.

2.7 We believe there should be a key regulatory principle of focusing regulation on all clearly identified enduring economic bottlenecks in communications markets. This will ensure relevant products and services are provided on equivalent terms to all downstream players on fair and reasonable terms and allow providers of these services to recover all relevant costs and make a reasonable return on their investments. This principle has enabled the UK to have one of the most competitive fixed-line telecoms markets in the world and we are encouraged by Ofcom's consultation proposals to apply the same principle to the economic bottleneck in premium Pay TV content. To ensure consumers are able to enjoy competitive prices and innovative packages, Ofcom should ensure providers have access to premium content, i.e. Sky Sports 1, 2, 3 and 4, and Sky Movie channels, at a price that allows genuine competition and that the arrangements are completed in time to allow providers to acquire customers prior to the start of the next premier league season. Furthermore, we believe it crucial that Ofcom that should take an active role to ensure any remedies imposed are effective and deliver the intended competitive outcomes.

2.8 However, we are disappointed that Ofcom did not find that the mobile networks were a bottleneck in their Mobile Sector Assessment (MSA) and are surprised that Ofcom's draft Plan makes only passing reference to one of the most significant developments in the communications market in recent years, namely the prospective merger of two mobile operators to create a single player with almost 40% of the retail market (operating from a shared network serving more than 50%). Ofcom recognised at the end of the MSA last year that developments, such as the Independent Spectrum Broker's (ISB) report and the proposed merger between T-Mobile and Orange, may well have significant implications for the conclusions reached in the MSA. BT agrees and believes that concerns about the effects on consumers and on the potential for meaningful competition, including from MVNOs warrant revisiting those conclusions. Paragraph 2.35 of the draft Plan states "monitoring the effect of potential consolidation in the market", but there is no specific commitment associated with this. Unless Ofcom specify what monitoring they will undertake, there is a danger that the effects on consumers of the merger may not surface until it is too late for any meaningful remedy.

2.9 We expect that Ofcom will further progress their plan to simplify and reduce regulation by removing the remaining regulatory burdens on BT where markets are competitive. This is the case for those retail markets (such as low bandwidth leased lines, retail ISDN30) where retail products can be replicated by underlying wholesale services. In those markets, retail regulation becomes unnecessary while retail deregulation can further increase price competition for the benefit of consumers.

2.10 We welcome Ofcom's commitment to a review of Universal Service. We believe the review should reflect current competitive market conditions and remove outdated obligations, whilst looking ahead at the impact of new technology (e.g. Next Generation Access). We also believe that all communications providers, including cable and mobile should contribute to the funding of universal service delivery. As a general principle, we believe that any new or enhanced obligations considered necessary (for example, to address accessibility issues) should be placed on all of industry, not just on the universal service provider.

3. Other comments

3.1 The Government's smart metering programme has a significant level of communications requirement. It would be useful to understand Ofcom's proposed work plan in this area.

3.2 The EU Directives will be implemented in the UK in 10/11. Whilst there is mention in the draft plan of the new Directives particularly in respect to spectrum, we would expect that Ofcom will have a significant programme of work specifically around the implementation of the new EU Directives in the UK.

3.3 The proposed Government direction of Ofcom on spectrum is not yet decided and the final scope of any direction is also currently unknown. Whilst the proposed Ofcom workplan on spectrum seems reasonable, so far as the situation is presently known, it seems possible that when the uncertainty of the possible direction of Ofcom is resolved the detailed Ofcom work programme may need to be further substantially amended and more detail added.

3.4 We welcomed Ofcom's preliminary work last summer in their review of the mobile termination market, but are anxious to see further substantial progress given the enormity of the task that Ofcom, the industry and consumer-advocates still face in arriving at a satisfactory conclusion in time for the new control to take effect by April 2011. If Ofcom adopt the cost methodology recommended by the European Commission (which excludes a number of costs allowed for in the current control), we believe this would deliver substantially lower costs for all end-users who wish to call a mobile network. Ofcom's Plan should ideally include a target to complete their own part by the autumn of this year to ensure end-users receive these benefits as soon as possible.

3.5 Disputes, investigations and appeals against regulatory decisions are an increasingly important feature of the regulatory landscape and use significant resources both within Ofcom and CPs. It is important to ensure the priority regulatory programmes for the year ahead are able to be completed and whilst Ofcom's plans to further reduce costs are commendable, this needs to be balanced against having sufficient resources to complete the programme of work.

3.6 In paragraph 1.40 in the annex to Ofcom's draft Annual Plan titled "Detailed work programme", it states "The current regulatory reporting framework has been in place for over 10 years and it is showing signs of strain. During 2010/11 we plan to begin our work on a significant review of this reporting framework and gather stakeholder views on changes that are needed to ensure its ongoing effectiveness." BT is strongly supportive of a review of the current financial regulatory reporting framework and urges Ofcom to not just undertake a review and gather stakeholder views during the year but to also implement the new financial reporting framework during the year.

4. International

4.1 BT strongly believes that Ofcom should keep an active role within BEREC, in order to promote a greater harmonization of regulation across Europe. In BT's view it is very important, in particular, that BEREC continue the work carried out by ERG on high-end business users, as the competitiveness of these markets is of paramount importance to improve Europe's ability to exploit ICT solutions.

In this respect, it is crucial that SMP operators provide a wide range of wholesale services over access bottleneck infrastructures, under effective non-discriminatory conditions, in order to promote competition between different types of operators in all market segments. Unfortunately, while these services are currently available in UK, in a number of other European countries, NRAs have focused or plan to focus regulation on NGA passive remedies, favouring a model where a small number of infrastructure operators use certain network elements for the exclusive benefit of their customers. This risks creating oligopolistic market structures and consequently, competitive disadvantage for all UK businesses which operate in other European countries.

Moreover, Ofcom's voice will be important at BEREC:

(a) to support the need for a continued focus on genuine non discrimination in the form of equality of access (whether or not provided via functional separation);and

(b) more broadly, to support the retention of a regime of effective remedies that work across the marketplace. NRAs need to ensure that the remedies they propose have the effect that the NRAs intended in the promotion of competition for both consumer and business users of communications services.

Therefore BT believes Ofcom can play a fundamental role in promoting more open and competitive markets across Europe.

xxxxx
February 2010