



Ofcom's Annual Plan 2014/15

EE's response to Invitation to Comment

24 October 2013

Non-confidential version

Table of contents

Table of contents	2
1. Introduction and Summary	3
2. Ofcom's overall approach and strategy	3
3. Specific projects and priorities	6
4. Administrative Fees	9
5. Response to consultation questions	10

1. Introduction and Summary

EE welcomes the approach which Ofcom is taking in undertaking an “Invitation to Comment” at the start of its annual planning process for 2014/15.¹ It is in both Ofcom’s and communication providers’ interests for Ofcom’s priorities and objectives for the coming year to be clear. Clearly Ofcom has limited discretion on whether to undertake a number of its planned projects (for example, in relation to market reviews required under the EU Common Regulatory framework). However, where Ofcom does have more discretion on whether to undertake investigations, EE considers that it would be beneficial for Ofcom to provide more detail on the criteria by which it selects which work streams to take forward.

The remainder of this response provides EE’s views on the issues raised by the Invitation to Comment and on what Ofcom’s priorities and approach should be in the period 2014/15.

In particular, Ofcom’s overall approach should take account of the wider context of individual pieces of proposed regulation and, in particular, the interaction between different pieces of regulation should be assessed in terms of their impact on communications providers, incentives to invest and long term consumer interests. We also consider it important that Ofcom acts in a timely way in relation to projects which it does undertake in the interests of competition and consumer interest, which could usefully be included in description of the way in which Ofcom intends to approach its over-arching strategy. Section 2 of this response expands on these points.

In relation to specific work-streams, EE has the following additional key suggestions (which are dealt with in more detail in Section 3 below).

- The roll out of 4G networks requires the associated backhaul capacity, which Ofcom should take into account in relation to both the work on the next Business Connectivity Market Review and in relation to work on ensuring an appropriate regime for wireless backhaul spectrum.
- Ofcom needs to ensure that there is a coherent overall approach to the information which is required to be provided to consumers and that a clear case is made for why telecoms specific regulation is required.
- EE also urges Ofcom to provide clearer criteria on what consumer protection investigations it believes warrant taking forward.
- Finally, an overall review of the General Conditions is now overdue and ensuring that these are consistent, up to date and fit for purpose would provide benefits to the communications sector and consumers.

2. Ofcom’s overall approach and strategy

Ofcom’s statement of its over-arching strategy, as articulated in the Invitation to Comment (largely reprising its statement of its overall approach and strategy

¹ “Annual Plan 2014/15: Invitation to Comment” published 26 September 2013.

set out in the 2013/14 Annual Plan), essentially provides a summary of Ofcom's key statutory duties as set out in Part 1 of the Communications Act 2003 (the "Act"). Clearly, Ofcom must adhere to the duties and objectives set out in the Act. A statement of Ofcom's strategy has most value for communications providers where it provides an indication of how Ofcom plans, over the coming year, to balance the various statutory requirements placed upon it and how it prioritises different claims on its resources in meeting these objectives. In this regard, it is important that Ofcom's 2014/15 Annual Plan makes its priorities clear to communications providers (at least in the way these are set out in paragraphs 2.7 to 2.12 and in Figure 2 of the Invitation to Comment).

While we agree that the broad areas identified in the Invitation to Comment (which are also set out in the current Annual Plan), as summarised in Figure 2 remain important and appropriate, the specific areas which are covered under these headings needs to be reviewed. We comment below in relation to the specific projects and priorities under each of the main headings.

Before turning to these specific projects and work items, we believe that there are at least the following areas where Ofcom could and should provide more general on-going clarity around how it will organise and prioritise its work.

First, in considering how individual pieces of proposed regulation will impact the industry and consumers, Ofcom should commit to taking a wider view. Increasingly, we consider that each piece of proposed regulation is considered in isolation without taking a more considered view of how various regulatory measures interact. The combined impact of these measures is starting to restrict the ability of communications providers to recover efficiently incurred costs in a competitive market. While it is possible that many of the individual regulatory constraints on their own do not have this impact, the combined effect is greater than the sum of the individual parts and Ofcom should undertake impact assessments within the wider context that recognises the way in which different regulatory measures have the potential to interact with each other. This overall impact is starting to constrain the commercial ability of communications providers to compete effectively and sustainably, to the ultimate harm of consumers and citizens.

For example, Ofcom's current proposals in relation to Annual Licence Fees for 1800 MHz and 900 MHz under the 2013/14 Annual Plan will lead to a very significant increase in the annual costs of mobile networks. In this regard, we do not feel that Ofcom has taken adequate account of the wider implications of setting such fees at the upper end of the feasible range required by the Direction to set such fees at "full market value". A number of other on-going or recent projects have also constrained the ability of mobile networks to compete freely and recover efficiently incurred costs. Cumulatively the overall impact of such regulation will be to harm both consumers and the wider UK economy. Mobile networks are currently in the process of undertaking significant investment in 4G infrastructure with investment in LTE-Advanced also being possible in the future. Regulation curtailing the return which can be made on such investments below reasonable levels will simply lead to roll out of this critical infrastructure being slowed down or becoming uneconomic in some geographic areas.

Second, we feel that more needs to be done by Ofcom in order to make compliance by Ofcom with its obligations to publish and meet promptness standards under section 8 of the Act more meaningful and reliable, both to the industry and those overseeing Ofcom's performance. Over the course of recent past Ofcom Annual Plans, we have witnessed inadequately explained slippages from the scheduled completion dates for key Ofcom projects, coupled with an increasing lack of specificity in relation to Ofcom's proposed completion deadlines – both of which are damaging to industry regulatory certainty and the best interests of consumers and competition.

For example, in Ofcom's 2011/12 Annual Plan, Ofcom stated that it expected to provide its final statement on switching processes by "the end of 2011/early 2012" (§3.27)². In Ofcom's 2012/13 Annual Plan, the date for publication of this statement had, without any explanation for the delay, been expressed to have slipped by some 12 to 15 months to "Q1 2013-14" (§3.27)³. In Ofcom's 2013/14 Annual Plan, the date for publication of a statement on switching was again without any explanation expressed to be delayed until "summer 2013" (§4.16)⁴. We are pleased to see that Ofcom has published an interim statement on this issue in August 2013. However we note that Ofcom is still consulting on a number of key matters, and that its final statement is now not expected to be published until "early 2014" (§10.4)⁵ – more than two years after industry was led to expect from the details specified in Ofcom's 2011/12 Annual plan.

Whilst we welcome the recent steps towards resolution that Ofcom has taken, Ofcom's longstanding failure to determine the historic Donor Conveyance Charge rate in spite of repeated assurances to industry that resolution of this issue was "imminent" is another example of unexplained Ofcom delays from initial plans causing material industry uncertainty.

Finally, we consider it would be useful if the next Annual Plan could be more explicit on setting out the criteria by which more "discretionary" work streams are taken forward. Clearly there are a number of key projects (for example in relation to making spectrum available or undertaking market reviews) which Ofcom has a requirement to take forward. However, there are a number of projects which can take up significant regulatory resource (both for communications providers and Ofcom itself) where the criteria being used to prioritise are not clear. Such projects should not be launched unless they are deemed very important and Ofcom is confident it has the resources to complete such projects within a reasonable time frame and without repeated delays. Many of these fall under the broad headings of consumer information or protecting consumers from harm. We provide comments below on the specifics in relation to the areas, but as a point of general principle EE considers that Ofcom needs to be more explicit and specific on the criteria by which such projects are chosen to be taken forward.

² <http://www.ofcom.org.uk/files/2011/04/annplan1112.pdf>

³ http://www.ofcom.org.uk/files/2012/03/Annual_Plan_2012-13.pdf

⁴ <http://www.ofcom.org.uk/files/2013/03/annplan1314.pdf>

⁵ http://stakeholders.ofcom.org.uk/binaries/consultations/consumer-switching-review/summary/Consumer_Switching.pdf

3. Specific projects and priorities

Promoting effective competition and informed choice

Under this heading EE fully agrees that, on what Ofcom terms “supply-side competition policy”, the focus needs to be on enduring economic bottlenecks. That is, Ofcom should focus regulatory intervention on measures which will create and sustain on-going competition and investment. Protecting and promoting competition should be a key priority for Ofcom, but one which recognises and takes account of the already vigorous competition which exists in many parts of the UK communications landscape. Regulation must also be applied in way which ensures a level playing field and care must be taken that differing regulatory requirements are not in themselves the cause of competitive distortions.

EE notes that Ofcom will be undertaking significant work on two major market reviews during 2014/15 (on mobile call termination and business connectivity / leased lines). Such market reviews are key areas where we consider that it is important that Ofcom also takes account of the impact of regulation in the round and that the broad effect of regulation is considered (including the impact of other pieces of related regulation), as discussed above.

In terms of the specifics of these individual market reviews, we have the following comments.

- On mobile call termination, we anticipate that a key aspect of this review will revolve around updating the cost model to take account of technological and market developments. The exact way in which the existing model is updated and how this will impact on the resulting cost measures is not clear at this stage. We therefore urge Ofcom to develop the model in conjunction with the industry as early as possible. Ofcom has indicated that it intends to share earlier versions of the updated model with stakeholders before the full consultation occurs next year. EE fully supports this.
- In relation the next Business Connectivity Market Review, EE fully agrees that this will take time and should be initiated in the next year. This will need to focus on the extent to which BT retains bottleneck control over key areas of the markets. The important areas which EE considers this review will need to cover are whether physical infrastructure access should be introduced alongside 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 the extent to which there is competition in the provision of mobile backhaul products and the consequent regulation. In relation to the latter point EE considers that there are significant areas where there remains no effective choice to purchasing backhaul from BT and that, in the context of continuing 4G investment requiring greater backhaul capacity, this requires regulation in relation to price and the service quality/technological evolution offered.

Turning to what the Invitation to Comment terms “demand-side activities”, EE urges Ofcom to create a coherent approach to consumer information which communications providers are mandated to provide. Ofcom’s current approach appears to be driven by a simple belief that ‘more is better’. The better approach would make a proper assessment of which information is actually relevant for which customers and when in the contract life-cycle this information would be most effectively provided. An example of this is Ofcom’s Call for Input on Quality of Experience, where Ofcom aims to provide more granular mobile coverage information to consumers. Communications providers have so far invested significant resources taking part in workshops, providing responses to a Call for Inputs and meeting with Ofcom. Yet, it still remains unclear what issue Ofcom is trying to address and whether provision of more consumer information would be the appropriate remedy. The provision of more information should meet a clear need in the market, but any such need still remains to be articulated in this case.

More generally, EE urges Ofcom to assess the current consumer information requirements in the General Conditions, which have built up over time. It would be sensible for there to be a commitment in the next annual plan to have a project to remove duplicate requirements, check the relevance of current requirements to provide consumer information (to ensure that this is actually requiring the provision of information which can be shown to further consumer interests) and compare these requirements against those in existing consumer law. On the latter point, telecoms sector specific regulation requiring the provision of information should only be imposed where it can be demonstrated that there is a specific need for additional information, to protect competition or consumer interests, to that which would be required by more general legislation because of particular characteristics of the telecoms market.

Protecting consumers from harm

As noted above in our more general comments, EE considers that Ofcom must provide greater detail and clarity on how it sets administrative priorities in the area of protecting consumers from harm. Echoing what was said in the previous annual plan,⁶ the Invitation to Comment merely states that priorities in this area will be decided “on an administrative priority basis using factors such as scale or nature of detriments and our ability to address the issue”.⁷ Such a statement somewhat begs the question and provides little clarity to communications providers on the actual criteria which will be applied and what evidence is used in order to ascertain whether a particular area warrants further investigation by Ofcom.

In the past year, EE notes that there have been a number of instances of Ofcom, for consumer protection reasons, starting projects, sending out onerous information requests or Calls for Input without providing concrete evidence as to the consumer harm which it considers is arising or needs to be addressed. Specific recent examples include the information requests on Bad Debt

⁶ See paragraph 4.39 of the 2013/14 Annual Plan.

⁷ Paragraph 2.10 of the Invitation to Comment

management processes by CPs, on Call Barring Facilities, and on SIM unlocking. Despite the significant resources that have been taken up by these investigations, none of these initiatives contained an analysis of consumer harm and, so far, none of them have been taken forward by Ofcom.

On a separate note, Ofcom publishes their Infrastructure report on a yearly basis. They have a duty to do this only every three years. Doing it on an annual basis means the yearly resources on the network side to collect a vast amount of information, in a certain predefined format, are substantial. EE questions the additional benefits which are realised in undertaking this exercise on an annual basis compared to the costs of so doing.

Related to the above comments, but as a separate issue, EE also believes that a wider review of the General Conditions themselves is overdue. This is a project which has been discussed several times in the past but which should now become a priority. The General Condition framework has been built up over the last decade, often in a rather piecemeal way responding to specific individual issues which have arisen. Combined with the legislative and technological changes and a range of individual transpositions of EU requirements, over the same ten years, this has now led to a regime which is complex to understand, contains numerous duplications and compliance with which is unnecessarily costly. EE therefore considers that the overall General Conditions framework should now be reviewed, with a view to making it clearer, more coherent and relevant. Such a project could also usefully review Ofcom's guidance notes on regulatory compliance, many of which are now significantly out of date.

Spectrum Priorities

Clearly the relevant priorities in terms of spectrum management have changed significantly since the 2013/14 annual plan (as set out in Figure 2 of the Invitation to Comment). For example, EE does not consider that timely clearance of 800 MHz and 2.6 GHz spectrum is a strategic priority anymore, even though there may still be some work to do.

With the massive investment in 4G access networks, there is a need for Ofcom to now focus on backhaul to support those networks and the traffic which they are generating and will continue to generate. Part of this involves the provision of fixed backhaul products (as covered by the Business Connectivity Market Review discussed above and related work). However, EE also considers that Ofcom should focus on wireless backhaul issues in the 2014/15 period. Specific questions which Ofcom should ensure are covered by priority work streams include:

- Can the regulatory regime for fixed links benefit from more European harmonisation to create a single market for microwave equipment – which would be similar to single market which broadly exists for handsets (and where there are significant benefits from such harmonisation)?
- How can the Wireless backhaul regime properly support and enable the developing use of small cells? Spectrum management needs to enable and promote more cost effective solutions to facilitate small cell roll out

(which could be based on WiFi or licensed spectrum 3G/4G access solutions). This will be an important part of alleviating the capacity crunch in relation to access spectrum and as such deserves prioritisation in the same way Ofcom has, and plans to, prioritise enabling new access spectrum releases.

The faster speeds and lower latency associated with 4G is driving consumer behaviour. The benefits of 4G are leading to consumers using greater amounts of data which in turn drives the supply of more data based services which consumers value.⁸ EE sees this trend continuing and therefore also agrees that Ofcom should continue its projects to identify manage the release of further access spectrum. The value and usability of such spectrum is massively enhanced to the extent that it is harmonised for international use and therefore it is important that this is taken into due account in such projects.

Finally, we would like to see Ofcom process the requests that licensees have made to increase the power limits in 1800 MHz licences so that these are equivalent to the newly increased limits in 900 MHz. Indeed Ofcom may consider a general review of whether the different power limits across different bands could be harmonised.

4. Administrative Fees

As Ofcom is aware there was some industry concern around the increase in Ofcom's administrative fees for operators in the Network and Services sector for 2013/14. In particular, the significant annual increase and the specific allocation of Ofcom's costs between sectors was not known until the final announcement (which provided no notice of these changes). We therefore consider it is important, as part of this process, for Ofcom to consider now what can be done to ensure that a similar situation is not repeated next year.

While the new approach of issuing an early invitation to comment on Ofcom's annual plan is a welcome addition to the process, this in itself does not ensure that there will not be late surprises on the level of the fees. We do consider that Ofcom needs to provide greater and earlier transparency around the calculation of its fees and are disappointed that the consultation on charging principles appears to have been delayed (and will therefore be too late to impact on next years' fees). In May of this year Ofcom indicated this consultation would be "later this year". Following the recent UKCTA meeting with Stuart McIntosh, on 2 October, it is clear this has now been delayed and will now occur in the last quarter of the current financial year (i.e. in the first quarter of 2014).

However, given the current situation EE urges Ofcom to ensure that the fee announcement next year does not again contain significant surprises for the sector. While we appreciate the constraints Ofcom is under in relation to due process and audit requirements, greater transparency about any potentially significant re-allocations of either work streams or Ofcom's major cost items

⁸ For example, EE's market research suggests that 50% of consumers state they browse the web more on 4G than 3G, with over one in 3 saying they use other data services more on 4G. See EE press release "4GEE transforming Britain into nation of nomadic sharers, streamers and shoppers", 19 August 2013.

should be possible to provide network operators with at least some indications which can be taken into account in individual corporate budgeting processes .

5. Response to consultation questions

Are there areas of Ofcom’s overall strategic approaches and purposes, outlined in last year’s annual plan that may need to change?

EE has set out its views on how the overall strategic approach and purpose set out by Ofcom should evolve in Section 2 of this response above. In summary:

- Ofcom should take due account of the wider context when considering any individual piece of regulation and consider the cumulative impact of regulation on competition, investment and the sectors its regulates as a whole;
- Ofcom should commit to considering issues in a timely manner in a more transparent and accountable way than as under previous annual plans ; and
- Ofcom should provide greater clarity on the criteria it uses to prioritise more discretionary work streams.

What are the issues and areas that should form Ofcom’s priorities or major work areas in 2014/15?

EE has set out its views on the major work areas on which Ofcom should focus in 2014/15 in section 3 above of this response. While there are a number of areas where Ofcom has a requirement to finish or undertake specific projects (for example market reviews), EE considers that Ofcom should also initiate specific projects on:

- Reviewing the General Conditions (including, but not limited to, rationalising the requirements to provide information to consumers) to ensure that they are coherent, up to date and relevant; and
- Enabling and promoting backhaul to support the roll out of 4G networks, including especially the availability and suitable licensing of spectrum for wireless links.

One specific area where Ofcom could also ensure that, over the period covered by the next annual plan, better progress is made is in relation to next generation text relay. The development of the new BT service, on which other communications providers are reliant, is developing very slowly and there is a major risk that there will not be sufficient time for operators to implement the launch of this new service in the currently envisaged time frames and that the wholesale pricing of this service will not be appropriate. Ofcom is likely to need to intervene for this service to be developed and in relation to pricing of the current generation of text relay services, which have increased by around 60% recently in a context where there is no competition to BT’s wholesale service (and little prospect of competition developing).

Are there any specific areas for deregulation or simplification in the coming year?

EE considers that a specific area where Ofcom could focus in 2014/15 under this heading relates to the power levels in the various mobile spectrum licences. Such limits are now different across the different licensed bands. In particular, Ofcom should consider whether to make such power limits consistent across 1800 MHz and 900 MHz spectrum licences.

Whilst we appreciate that Ofcom has an obligation to continually assess appropriate areas for deregulation, as a matter of general principle EE considers that Ofcom should both impose and remove regulatory obligations with a high degree of caution.