

Draft Annual Plan 2009/10

T-Mobile welcomes the opportunity to respond to Ofcom's consultation, Draft Annual Plan 2009/10

Executive Summary

As we also mentioned in our response to the draft annual plan for 2008/09, this Draft Annual Plan contains scant detail which makes it difficult for T-Mobile to evaluate exactly what is included and when the work is intended to be done. We would request more information as stakeholders need to plan to the same extent as Ofcom. Responding to consultations and dealing with Ofcom's information requests requires a lot of work from both T-Mobile's regulatory department and also, where relevant, the wider business. It is essential that we have more guidance with regards to the expected dates when Ofcom will publish documents, and that Ofcom both do their utmost to stick to these deadlines or advise stakeholders promptly of changes. There is an opportunity cost involved for stakeholders if they have to remain perpetually on standby waiting for delayed consultation documents to be published.

Following a decision in an appeal, Ofcom needs as soon as practicable to publicly set out a timetable for how the conclusions of the appeal will be implemented practically across the industry. There have been a number of appeals that have concluded in the last year which Ofcom has lost, and in both cases Ofcom were particularly reluctant to issue any public information describing how things will move forward. This delay leads to months of uncertainty within the industry. Ofcom has plenty of notice of litigation and should plan to deal with possible losses. Ofcom needs to ensure that they issue this timetable and/or guidance as swiftly as possible following a decision.

This lack of detail in the consultation means that at points it gives rise to more questions than answers. The brevity is also misleading at points and if a reader does not know the detail surrounding a specific work area, they may easily jump to the wrong conclusions based on this document. Whilst we appreciate Ofcom's intention to not issue unwieldy and cumbersome documents, they still need to ensure that the essential elements are included in sufficient depth to make the document both useful and beneficial to stakeholders.

T-Mobile believes that Ofcom's major efforts in the coming year should be addressed towards withdrawing from regulation wherever possible and towards pursuing more efficient regulation where appropriate. We hope to see effective action taken in this direction in the next year. If Ofcom truly wants to act with a bias against intervention and wants to minimise the regulatory burden on communication operators, it should always make sure that either competition law or self regulation are not appropriate before introducing regulation. We would also appreciate more in-depth impact assessment analyses and cost-benefit estimates.

1. What are your views on the continued relevance of Ofcom's three-year strategic framework for the proposed work programme in 2009/10?

T-Mobile feels that the three-year strategic framework is still relevant for Ofcom. However together with how Ofcom's work fits it to this 'big picture', Ofcom still needs to provide within this annual plan sufficient detail as to what work is planned for the coming year.

2. What are your views on Ofcom's proposed policy work programme and top priority areas for 2009/10?

Further releases of Spectrum

T-Mobile welcomes plans from Ofcom to take forward work on releasing further spectrum. However given the plans already published for releasing 2.6 GHz spectrum, DDR spectrum and 900 MHz spectrum, Ofcom needs to ensure that all stakeholders have a fair and equal understanding of the various spectrum bands that will be released and the timing of the release schedules.

Ofcom is aware of T-Mobile's legal challenge to the 2.6 GHz auction on the sequencing of its liberalisation decision and the decision to hold the auction. There are similar interactions between other spectrum bands that Ofcom plans to auction and it is imperative that all parties understand the full extent, and use, of the spectrum they hold and that on offer in the coming years before bidding for one portion of this.

It would be prudent therefore for Ofcom to publish a spectrum plan, such as that in its spectrum framework review: implementation plan, clearly identifying the spectrum that they are planning to release, together with the planned release dates and dates of first usage before moving forward with any award of spectrum. This will allow all participants to make an informed decision before bidding for this spectrum.

Given the current economic climate, it would be preferable for Ofcom, if it is going to proceed with auctions, to ensure that significant notice is given so that approvals and sources of credit can be obtained. It may also be advisable for Ofcom to ensure that options are available for participants in the auction to spread payments as necessary over the lifetime of the spectrum.

We welcome Ofcom's commitment to engage with European and wider policy development. We have consistently argued that large cellular radio systems require harmonised spectrum, preferably on a global basis but, as a minimum across the European Union. Without it, the UK economy and citizens and consumers will be disadvantaged. This means that Ofcom's role should go further than merely encouraging

technology neutrality and should ensure there is EU commitment to spectrum harmonisation. This is particularly important to the digital dividend spectrum but can be applied to spectrum which will become available commercially as a result of the Cave review.

In figure 3 of the Draft Annual Plan, there is a description of Ofcom's current strategic framework. The question raised in this figure about spectrum, namely "whether Ofcom should refine its approach to spectrum liberalisation and trading" is not dealt with later in the document. Whilst the document does detail the work that Ofcom is planning on doing with regards to liberalisation, it does not mention anything further about trading. It would be good to get further information from Ofcom about its policy regarding Spectrum Trading and how this will be part of the work plan for 2009/10.

Enabling clear regulation for next generation access and core networks

Whilst T-Mobile supports Ofcom's intention to support the early development of fibre and next generation networks, it is worried that support of this policy with "flexible and pragmatic regulation"¹ may lead to negative consequences. It is not clear what this specific phrase means, as surely all Ofcom regulatory policy could be defined in this way. The specific inclusion of this phrase with regards to these future networks implies that Ofcom may bypass traditional regulatory methodologies in order to ensure that any investment in such development is not curtailed whilst continuing intrusive regulation of existing mobile networks. This development would be very troubling and could lead to severe competitive repercussions.

Ofcom needs to use the regulatory tools at its disposal, namely impact assessments and market reviews to determine the costs and benefits of any regulation. One area that we have seen regulatory practice been bypassed in is in terms of a dark fibre review. In the Business Connectivity Market Review, Ofcom asked stakeholders whether it should conduct a dark fibre review. The majority of participants responded positively. Nevertheless, Ofcom has concluded that no review is necessary.

In this specific case, it is likely that one of the costs of regulation could be stifling the development of future networks. However this needs to be seen in relation to the potential resulting benefits of regulation. If the Impact Assessment indicated that given all the direct and indirect impacts, the availability of dark fibre would lead to a beneficial situation for the UK as a whole, then this would obviously be the correct approach.

If 'flexible and pragmatic regulation' means that Ofcom abstains from its regulatory principles, in order to safeguard any future developments of Next Generation Networks, then this would be very problematic.

Ofcom needs to ensure that it does not give regulatory leniency to one specific company, whilst continuing burdensome regulation on others. This would be an anti-competitive measure and lead to a significant distortion to the market. Given the increasing synergies

¹ Paragraph 5.16

between fixed and mobile telecommunications that Ofcom have identified in the mobile sector assessment, it would be essential for Ofcom to consider the numerous direct and indirect effects of any well-intentioned “flexible and pragmatic regulation” for a specific company.

999 mobile ‘camping’

T-Mobile is happy in principle to support 999 ‘camping’ between networks and feels that it important to restate here that T-Mobile (then One 2 One) allowed calls to the emergency authorities when out of coverage many years ago and that the technology was disabled due to misuse/abuse of the service. This risk of this occurring today is even more prevalent because of the number of mobile phone subscribers in the UK, so it is crucial that a technical feasibility analysis is undertaken as part of the project to ensure that any solution is workable in practice and achieves the overall objective to enable callers to make genuine emergency calls when out of coverage.

Reserving capacity

In Paragraph 1.15, it is noted that “To ensure that Ofcom has sufficient resource to carry out such unplanned tasks without compromising our ongoing work, we plan to reserve a share of capacity for unexpected tasks in 2009/10.” During the last year there have been constraints on Ofcom’s work where lack of resources has been cited as the reason (e.g. determining the outstanding issues on the DCC dispute), which have not been dealt with. Given this statement in the annual plan about reserving sufficient capacity, we assume that this will not continue to be a problem in the coming year.

There is no discussion in the draft annual plan of Ofcom’s involvement in litigation and how this affects resources, and of the results of the litigation. Given the large amount of litigation that Ofcom deals with each year and the likelihood that the volume will not substantially decrease, it would be prudent for Ofcom to explain how it will have sufficient resource for this litigation without comprising other areas of Ofcom’s work plan.

Developing and enforcing consumer protection policies

In the draft annual plan, Ofcom noted that they will publish guidance on additional charges, which has since been published. Given the synergies between this work and other consumer protection work that the OFT has authority over, we think it would be more appropriate for the OFT to look at this issue as opposed to Ofcom.

3. What are your views on the elements which should be contained within Ofcom’s new strategic framework?

In Ofcom's new strategic framework, we would appreciate some guidance and a framework for Ofcom to follow as to when and how it intervenes in consumer markets with regulation. There appears to be a worrying trend for Ofcom to introduce more intrusive consumer regulation and we feel that this is counter-productive for the fiercely competitive mobile industry and will lead to higher end-prices for consumers. Ofcom needs to spell out the criteria for any planned consumer regulation which should be framed on "evidence based regulation" together with Ofcom's "bias against regulation."

There are many references in the draft annual plan to the Government's Digital Britain work and how this will affect Ofcom's work from 2010. However there appears to be little clarity as to the extent of Ofcom's involvement in this project during this year and what its role is in working with the Government for this 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 new strategic framework.

One specific issue that may or may not come out of the Digital Britain work is whether there are competition issues currently in the spectrum markets. There has been little trading to date and T-Mobile considers with valuable spectrum, such as 900 MHz spectrum, there is unlikely to be much in the future and would urge Ofcom to look at the competition issues around this.