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Dear Andrew

**Notice of Revocation of SMP Condition MA6  
Monitoring compliance with charge controls statement – 18 December 2007**

We have worked closely with you over the past 12 months on Ofcom's charge control compliance monitoring project and welcome the opportunity to provide a few observations about the Notice of Revocation of SMP Condition MA6 and the events leading up to this.

We were surprised to learn the reason why the Charge Control Statement had to be revoked, although we agree that it was the sensible approach to take under the circumstances. It is vital that Ofcom follows the spirit and letter of the law and the established consultation process. That said, the revocation does demonstrate that the concerns we enumerated during the consultation phase were not unfounded: namely, that Ofcom's timescales for consultation and implementation were far too short. We believe that Ofcom now has the opportunity to take stock of comments received about all aspects of the proposals and this is a welcome turn. We have commented on this and other points in more detail below.

**The importance of following the spirit and letter of the consultation process**

The level of contact with Ofcom was generally good both during and after the consultation process; Ofcom sought to ensure that we at least had the opportunity to communicate our views. However, we do not believe that Ofcom allowed enough time to review any comments received. It was obvious at the time that the consultation was merely a formality, as Ofcom

already had a good idea as to what the compliance regime would look like. For instance, whilst Ofcom was asking “do you agree that additional measures to ensure that charge control compliance submissions are properly prepared and independently assured are necessary” in question one of the formal consultation on the one hand; on the other, we were receiving informal information requests regarding our thoughts on the content of the Charge Control Standard. The perception was, therefore, that Ofcom was consulting simply to ostensibly meet its legal and regulatory obligations.

Indeed, the concern that Ofcom approached the consultation as a mere “box ticking” exercise has been borne out by the revocation. It is worrying to note that Ofcom clearly stated in its Notification and Draft Condition<sup>1</sup> that “Copies of this Notification and the accompanying explanatory statement have been sent to the Secretary of State in accordance with section 50(1) (a), and to the European Commission and the regulatory authorities of every other Member State in accordance with section 50(3) of the Act”. The intention may have been to carry out this step, but clearly it was not followed through. Furthermore, the December Notification<sup>2</sup> assured stakeholders that this step had been duly followed: “A copy of the Notification was sent to the Secretary of State in accordance with section 50(1) (a) of the Act, and to the European Commission and to the regulatory authorities of Every other member state in accordance with section 50(3) of the Act”. So, it seems that whilst the standard paragraphs were included in the formal notifications, the steps described therein, which Ofcom has a statutory duty to carry out, were not performed.

However, we suspect this oversight was due to a breakdown in communication rather than a complete disregard for the process in s.50 of the Act. Nevertheless, questions still arise as to Ofcom’s genuine commitment to its consultation principles and we would expect Ofcom as a whole to take remedial action to rectify/avoid any other such oversights in other project areas. The consultation process should be more than a cut and paste exercise.

### **The need for realistic project timescales**

We had expected the consultation on the Monitoring of Charge Controls to be published soon after the Call Termination Statement in March 2007. Indeed, we were advised that this would be published well before Ofcom’s “summer freeze”. However, due to internal Ofcom delays, a consultation was not published until the autumn, which meant the actual consultation and subsequent implementation phase had to be compressed as a result.

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<sup>1</sup> Paragraph 8, Annex 6, page 35

<sup>2</sup> Paragraph B, Annex 2 page 36 <http://www.ofcom.org.uk/consult/condocs/compliance/statementold/statement.pdf>

Despite these delays, which were outside our control, Ofcom maintained that it wanted to implement a Standard for the first charge control year. We do not agree that this target should have been the sole driver of the consultation timescales, particularly as Ofcom could not yet have had the requisite information to assess the costs, benefits and proportionality of the proposed compliance monitoring.

Ofcom's unrealistically short timescales resulted in a cursory consultation on a very important regulatory matter. We stressed in our consultation response that Ofcom's priority should have been to get the charge control monitoring process right and not to meet self-imposed deadlines.

### **The need for cross departmental, joined up Ofcom thinking**

We suspect that Ofcom's failure to comply with s. 50(3) of the Communications Act was due, in part, to a breakdown in internal communication and a lack of communication between Ofcom departments. We believe that this procedural omission would have been picked up had there been closer liaison with Competition and Markets, which is the directorate that more regularly carries out consultations in this area. For instance, it may have been more obvious to those colleagues that a 6 week consultation process was too short where the European Commission and other NRAs needed to be notified and provided with an opportunity to input.

### **Next steps for the Charge Control Standard**

Ofcom has generally sought to keep us up to date with developments and progress. However, post-revocation of the notice, we feel somewhat in "limbo" as Ofcom has yet to set the next steps out formally. We hope that Ofcom will let us know how it wishes to proceed without delay as, assuming a new monitoring process is still to be implemented, we will need time to engage auditors and prepare any supporting documentation in accordance with the regulation.

That being said, we would reiterate our request to Ofcom to use this opportunity to conduct a full review of the proportionality of the proposals, as we are not convinced this was properly considered during the consultation phase. We are still firmly of the opinion that where the regulated rate ("flat rate") is charged there should be no need to perform an audit or provide detailed supporting documentation. This would simply add to the regulatory burden, without providing additional clarity for buyers or Ofcom. We do not believe that Ofcom has clearly explained why, where there is a flat rate, the benefits of doing an audit would outweigh the cost.

In summary, we appreciate Ofcom's frankness in dealing with this procedural oversight and take comfort from the fact that failures were noticed before it was too late. We hope that Ofcom will take a less mechanical approach to consultation in future. Specifically in relation to this project, we expect Ofcom will now take the opportunity to consider the comments received throughout this process carefully. We look forward to hearing your views on the next steps for this project shortly.

Yours sincerely

Clare Seabourne

**Regulatory Analyst**