

F/T: 0300 244 4000  
E: [scottish.ministers@gov.scot](mailto:scottish.ministers@gov.scot)



Annual Plan Team  
Strategy, 3rd Floor  
Ofcom  
Riverside House  
2A Southwark Bridge Road  
London SE1 9HA

By email: [annualplan@ofcom.org.uk](mailto:annualplan@ofcom.org.uk)

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Dear Sir/Madam

### **Ofcom Proposed Annual Plan 2017/18**

We have pleasure in enclosing the Scottish Government's response to Ofcom's Proposed Annual Plan 2017/18 at ANNEX A.

Our response reflects the key role we believe Ofcom has to play in realising the Scottish Government's broadcasting and digital connectivity ambitions and we look forward to continued ongoing collaborative work with Ofcom over 2017/18 in delivering shared outcomes.

We are happy to have a further dialogue with Ofcom to discuss any aspect of our response and we would invite you to contact Harry Emambocus ([harry.emambocus@gov.scot](mailto:harry.emambocus@gov.scot)) in the Scottish Government's Digital Directorate or Laura Turney ([laura.turney@gov.scot](mailto:laura.turney@gov.scot)) in the Scottish Government's Culture, Tourism and Major Events Directorate in the first instance.



**FIONA HYSLOP**

**FERGUS EWING**



## **OFCOM PROPOSED ANNUAL PLAN 2017/18 – SCOTTISH GOVERNMENT RESPONSE**

### **Introduction**

The Scottish Government welcomes the opportunity to comment on Ofcom's Proposed Annual Plan for 2017/18. More generally, we believe it is important for government and regulators to work closely in partnership with industry to ensure the best possible outcomes for consumers. We view Ofcom as having a key role: to use the levers at its disposal to ensure that the market continues to invest in future-proofed infrastructure – particularly in rural areas – so that access to all can be delivered in the most cost-effective way; and, to ensure that suppliers deliver the quality of service that people expect.

We also welcome Ofcom's recent expansion in Scotland and the establishment of new offices in Edinburgh. Coupled with the forthcoming appointment of an Ofcom Board member for Scotland, we are hopeful that this enhanced Scottish presence will further strengthen the collaborative working between the Scottish Government and Ofcom. We ask for commitment from Ofcom to early engagement and joint working with us on pertinent issues to ensure both: alignment with our activity; and, that the needs of Scotland can be fully reflected as Ofcom discharges its functions.

### **Broadcasting**

This is the first Annual Plan proposed that covers Ofcom's new responsibilities in terms of broadcasting. The regulator now has a pivotal role in ensuring that the BBC delivers improved outcomes across the nations and regions.

As Ofcom is aware, the Scottish Government secured, for the first time, an active role in the review and delivery of the new BBC Charter and worked hard with the UK Government, alongside the other devolved nations, to develop a Charter and Agreement that is fit for purpose over the next 11 years and which provides a strategic context for the organisation to keep pace with devolution and delivering for the devolved nations.

We appreciate that the regulator has a complex and challenging task ahead to put in place the necessary structures and processes to ensure that the BBC delivers on its mission and purposes and we look forward to submitting our views on the ongoing and future consultations on this matter. We do, however, have strong expectations of what will be required in the short, medium and long term if the BBC is to deliver for the people of Scotland and we are not convinced that there is a sufficient level of detail in this plan to enable us to get a clear understanding of Ofcom's intentions.

The Scottish Government's position on the future success of the BBC has been very much developed in the context of what we believe is required for the long term sustainability of the BBC both in Scotland and the wider United Kingdom. Overall, our position is rooted in the Scottish Government's commitment to public service broadcasting and in ensuring the long-term sustainability of the public service broadcasting model, one which is empowered to deliver high quality outcomes.

However, in order to ensure the future success of the BBC and to ensure that the corporation continues to make an important contribution to our social, economic, cultural and democratic life, we believe the BBC needs to:

- Empower and resource BBC Scotland to address the concerns of audiences and deliver better outcomes for audiences, including more representative content across *all outputs and platforms*.
- Deliver better outcomes for audiences in Scotland and implement commissioning and editorial practices which will support the growth and sustainability of creative industries in Scotland.

The new operating licence will be key to ensuring that the BBC delivers improved outcomes for Scotland, not only in the specific BBC services for Scotland, but with reference to the *whole network offer*. In this regard, we expect to see a robust and ambitious operating licence in place, which takes full account of the necessary actions required to ensure that the BBC delivers for Scotland *as a whole corporation* and not simply with reference to very specific BBC services within Scotland, important as they are.

Given that Ofcom will have powers to impose regulatory goals, we expect Ofcom to take a wide range of evidence into account when assessing the BBC's plans and performance. These powers need to be used proactively rather than retrospectively, and although we appreciate that Ofcom is not responsible for setting the BBC's strategy, its mission and public purposes should enable the regulator to use its powers to ensure that the BBC delivers meaningful outcomes for Scotland and the other devolved nations.

As Ofcom is aware, we strongly support the relationship that exists between the BBC and MG ALBA and we very much welcomed the new commitment to continued partnership working as set out in the Agreement. The Charter sets out clear support for minority languages in the UK and the Agreement specifically references support for Gaelic broadcasting and the BBC partnership with MG ALBA. Ofcom's Proposed Annual Plan refers to 'diverse communities' and the 'UK's nations and regions' and we would encourage Ofcom reflect the Charter commitments to the UK's minority languages in its Annual Plan.

We very much welcome the commitment to deliver the work necessary to ensure that our broadcasters demonstrate that they are delivering meaningful progress with reference to diversity and equality of opportunity. Throughout the Charter Renewal process, the Scottish Government placed significant emphasis on the equality and diversity matters reinforcing our expectation that we look to influential and powerful institutions, such as the BBC, to lead the way on promoting equality and ensuring that talents, skills, and stories of all our communities are reflected, valued and enjoyed by all both on and off-screen. We expect Ofcom to hold the BBC to account in this regard and challenge the BBC to aim higher and deliver more with reference to the diversity and impact of its creative output and in its role as an employer.

## **Digital Connectivity**

We welcome the prominence of measures within the Proposed Annual Plan aimed at improving fixed and mobile connectivity, which is now universally accepted as an essential part of our everyday lives. We also welcome that the Proposed Annual Plan recognises that commercial rollouts have, in the past, often failed to deliver on expectations – particularly in rural and remote areas.

Moreover, we believe that current legislative framework has delivered sub-optimal outcomes in Scotland. Under the current constitutional arrangements, telecommunications is a reserved matter. However despite the fact that the UK Government retains the legislative and financial responsibility to ensure the delivery of fit-for-purpose broadband and mobile connectivity in rural areas, the Scottish Government has had to take the lead and intervene.

We are already working in partnership with the UK Government through our Digital Scotland Superfast Broadband (DSSB) programme, which will extend fibre broadband access to 95% premises in Scotland by the end of 2017. However the UK Government's funding contribution towards DSSB does not reflect its responsibility for telecommunications (£100.8 million, compared to over £177 million from the Scottish public sector). The fact that we have had to intervene, to push the programme further, reflects the importance of good quality connectivity to people across Scotland and to our economy.

Deployment of DSSB continues to progress well. This has been recognised by Audit Scotland, who concluded that the programme is on track to meet its targets, and by Ofcom – the Connected Nations reports have charted the year-on-year rises in superfast broadband availability since 2014. Further investment of around £18 million, generated by Gainshare clauses linked to early take-up on the new infrastructure, will push eventual coverage footprint even further.

The Scottish Government is not content to stop at 95% coverage. We have allocated £112 million for 2017/18 to meet our digital connectivity ambitions and have made a commitment to extend superfast broadband access to 100% premises in Scotland by 2021 – and we will launch new procurement activity later this year. On mobile, we have agreed an Action Plan with the four Mobile Network Operators (MNOs) to work collaboratively to improve 4G coverage, while laying the groundwork for 5G deployment in Scotland. We have committed to developing proposals for 4G mobile infill and will set out our approach in the Spring.

## **Spectrum**

We welcome Ofcom's commitment to consider mobile licence conditions and coverage obligations in relation to future spectrum auctions. As set out in our recently submitted response to the 2.3 & 3.4 GHz spectrum consultation, we believe that it is vital for Ofcom to ensure that adequate spectrum is available for those that need it. Spectrum auctions must not be solely considered on the basis of maximising immediate or short-term financial receipts, but also in terms of the wider economic, social and fiscal benefits they could produce. This is an important consideration to ensure delivery of mobile services to areas of Scotland (and the UK more widely) where there is likely to be limited or no investment to deliver 4G connectivity and the future evolution to 5G. Where appropriate, we encourage Ofcom to consider radical approaches – for example the use of beauty contests rather than auctions (as has been used in Estonia).

To complement this, we urge Ofcom to consider the full range of regulatory conditions at its disposal which could be attached to spectrum auctions. Coverage obligations are already well established, but we ask Ofcom to consider setting even higher levels than presently – e.g. 99% or higher – as has been set in France, Iceland and Finland. Another method could be in the form of rural tariffs to complement coverage obligations. For example, MNOs could be required to provide rural and remote area tariffs which would see any mobile broadband products underpinned by appropriate pricing and access packages. This may make it more affordable (from the end-user's perspective) for mobile broadband to become an alternative to fixed services.

We ask Ofcom to consider attaching higher geographic coverage obligations than the current agreement MNOs have with the UK Government to reach 90% by the end of 2017: such as 95% and 98% obligations in Estonia and Denmark respectively. We ask Ofcom to consider other geographic approaches, which could include: an "outside-in" approach to deployment (such has been used in Germany); deployment on key transport routes (road, rail and sea);

and, potentially differing application of obligations in the different UK nations, dependent on individual circumstances and that nation's connectivity requirements. A coverage obligation linked to broadband notspots could also be adopted, as has been used in Sweden and Estonia.

Finally, we ask Ofcom to consider setting obligations which require the delivery of high mobile broadband speeds – this approach has been used in a number of countries including Cyprus, Spain and Iceland. We would be happy to discuss any of these proposals more fully with Ofcom to determine the right approach for Scotland's interests and needs.

## **Infrastructure Competition**

We welcome Ofcom's plans to promote competition in fixed-line networks and, specifically, through the strengthening of Openreach's independence from BT. Ultimately, we understand that these changes are likely to stimulate new investment – and competition – in FTTP, but that this investment is likely to focus on cities and other urban areas. Whilst such growth is, of course, welcome, we are nevertheless concerned that the majority of rural customers may not benefit from these changes and that there is a risk of further exacerbation the digital divide. We ask Ofcom to consider what actions within its powers could be taken to incentivise investment so that all parts of the UK can benefit as a result of the planned changes to Openreach.

More generally, we welcome that Ofcom has indicated willingness to assess the viability of new regulatory approaches to achieve improved connectivity outcomes. We believe there are opportunities for Ofcom to assess how use of regulatory levers could deliver better outcomes for rural Scotland. As such, we urge for Ofcom's approach to regulation to focus on the differences in the likely impacts between urban and rural areas – and consider how these impacts can be mitigated to ensure that rural areas are never disadvantaged.

As we set out in our response to Ofcom's Strategic Review of Digital Communications (DCR) in 2015, we believe that that in areas where there is effectively no competition (often rural areas), consumer outcomes have often been lacking and the regulatory environment has not been able to incentivise or ensure the necessary investment to maintain or upgrade network infrastructure. Consequently, an infrastructure deficit has been created over time, which has resulted in variable availability and quality of service across the country. That is inequitable and we would welcome greater clarity from Ofcom on how it proposes to address this through future competition.

Our DCR response presented evidence which demonstrates that telecoms markets do not operate in the same way across the whole of the UK. We reiterate our ask that Ofcom starts to assess markets at a more granular level than it does presently: so as to uncover these differences and consider regulatory remedies that take account of, and address, market failure in areas where there is little or no competition at both the infrastructure and services layer.

## **Universal Service Obligation**

We welcome Ofcom's commitment to implement the universal service obligation, following direction by the UK Government. Moreover, we were pleased that Ofcom's technical advice on the USO, published in December 2016, included the option of a 30 Mbps superfast USO. We strongly support the development of a superfast USO. This would bring the rest of the UK into line with the Scottish Government's 100% superfast commitment and ensure that the USO can deliver a step change in the quality of the UK's digital infrastructure. However

regardless of whatever speed at which the USO is ultimately set, we ask Ofcom to recognise that there will be a clear requirement for the USO's alignment with our range of digital policies, and that includes ensuring that USO delivery complements our 100% superfast commitment. This will necessitate close joint working with Ofcom and DCMS, and we seek assurance that Ofcom will work with us in this way.

## Consumer Issues

We welcome Ofcom's plans to both improve the quality of service for fixed and mobile communications, and to make this type of information more available to consumers. We view this as being particularly important in the management of customers' expectations. However, we urge Ofcom to go even further, and consider how this information could be made available to customers at the point of sale, for both broadband and mobile. For broadband, this could be done as part of Ofcom's planned work to revise existing broadband speeds Codes of Practice. For mobile, we suggest that Ofcom could consider a requirement on mobile providers to provide relevant coverage information to customers before they sign up for contracts.

On mobile specifically, we urge Ofcom to consider how user experience can be measured for both voice *and* data services. We ask Ofcom to consider the need for rigorous, independent testing of speeds and quality of service, as opposed to over-reliance on modelled data and/or measures that are self-declared by MNOs. Furthermore, we also ask Ofcom to assess how such work could be tailored so as to uncover – and ultimately be used to address – any regional inequalities in speeds and quality of service issues. One of the key issues for consumers is the complex language used by providers to explain service and tariffs – much plainer information provision would help address expectations.

We welcome Ofcom's plans to publish reports on broadband and mobile coverage and speeds, including data on variations between rural and urban customers. Building on this, we consider Ofcom to be in possession of a wealth of data which could play an important role for both industry and government in the design of network rollout and publicly funded interventions. Whilst we acknowledge that a relationship between Ofcom and the Scottish Government has already been established to facilitate some data sharing, we would welcome a discussion on the other types of data Ofcom holds and how this could be made available to benefit our digital connectivity objectives more widely.

The issue of the comparative pricing of broadband in rural areas has been raised with The Scottish Government. Whilst we understand that operators in the UK do not differentiate pricing on a geographic basis, rural customers are often still disadvantaged through being unable to access the same range and level of competitive products and packages as customers in urban areas. We appreciate that this can be attributed to, at least in part, the lack of competition at the infrastructure level. In addition to our above comments on this issue, we ask Ofcom to consider how such disparities could be addressed and ensure that rural customers are never disadvantaged on price – and this includes pricing in the context of the future USO on broadband.

Furthermore, we recognise the longstanding concerns about nuisance calls and about parcel deliveries to rural and remote areas of Scotland. We welcome the work Ofcom is doing on these issues.

## **Network Security and Resilience (Section 5.13)**

Finally, we ask Ofcom to differentiate resilience from security with greater clarity.

We also suggest to Ofcom that as well as collating reports relating to network failures, that it might be useful to include data on network vulnerabilities to help identify areas with higher outage rates, the cause of failure and ways to mitigate these failures. This is of particular importance to island and rural areas and communities who have, by their location/geography:

- increased single points of failure;
- less diverse routing;
- difficulty in engineering access to maintenance/repairs;
- reduced generator/battery backup; and,
- weaker supporting infrastructure in general.

**SCOTTISH GOVERNMENT  
MARCH 2017**