Ofcom's Strategic Review of Digital Communications

EE's response to Ofcom's discussion document

October 2015

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1. Introduction and executive summary

EE Limited ("EE") welcomes the opportunity to respond to the discussion document regarding Ofcom's Strategic Review of Digital Communications, published on 16 July 2015 (the "DCR").

The concept at the heart of the European Common Regulatory Framework ("CRF"), as well as that underpinning much of economic regulation in Europe, is that in general competition between private enterprises is the most effective way of delivering benefits to consumers - but that, where competition fails for one reason or another, direct intervention in the way the market operates may be needed. As a consequence, economic regulation is focused on either maintaining competition or addressing bad consumer outcomes directly when competition has failed.

This thinking is reflected in Ofcom's Regulatory Principles[1]. In particular that, "*Ofcom will intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve*" and that "*Ofcom will always seek the least intrusive regulatory mechanisms to achieve its policy objectives*."

The DCR provides a timely opportunity for the industry, for other stakeholders and for Ofcom to look again at the core concepts underpinning successful communications regulation, to think how those core concepts should be reflected in regulatory principles of the sort promulgated by Ofcom, and whether Ofcom abides by its principles. EE is appreciative of the opportunity to participate in this exercise – it is a decade after the pioneering and transformational founding period of our (then) new regulator, and revisiting the big issues is likely to be valuable.

EE's view at a high level is that, while the basic principles underpinning telecoms regulation in the UK are still valid, there are two major threats to good outcomes in practice.

The first is the prospect of changes to the regulatory framework in Europe – here the threat derives from muddled policy thinking in Brussels, combined with a highly politicised and unpredictable legislative process. While this represents a real threat to the economic environment that has produced 'good enough' outcomes in the UK for many years, and whilst we entreat Ofcom to help resist its further worsening, it is not the focus of this document.

The second threat relates to Ofcom and how it interprets its role. Our concern is that an already discernible shift in Ofcom's ability and willingness to trade-off and balance objectives may become a permanent feature of the way Ofcom operates. The shift in question is that Ofcom is becoming a 'belt and braces' regulator. A key progressive element of the CRF, in contrast to the old EU ONP Directives previously in force, was a move away from overly prescriptive, top-down, regulatory restrictions. As summarised recently by the Supreme Court: "*Subject to ex ante regulation in circumstances where there is not effective competition, the scheme of the Directives is permissive*".[2] However, instead of

[1] http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/

[2] [2014] UKSC 42 at 5

relying largely on the competitiveness of the mobile sector to deliver good consumer outcomes (and intervening very selectively when competition fails to deliver), Ofcom is now both promoting competition and routinely intervening on a range of detailed operational issues, many of which do not require intervention, and some of which are liable to hinder effective competition and the undistorted evolution of the market. Providing evidence of this shift, particularly with respect to Ofcom's implementation of the 'General Conditions' regime (along with showing how disproportionate and damaging it is) is the major purpose of this response.

The argument can be amplified as follows. Mobile telecoms supply in the UK is extremely competitive. There is strong network based competition; there is strong Mobile Virtual Network Operator ("MVNO") based competition; there is additional competition provided by the Over The Top Providers ("OTT") players; and there is fierce competition at the sales and distribution level too, with the Indirect Channel representing 48% of new pay-monthly (handset) acquisitions in 2014/15.[3] The result is one of the leading consumer mobile experiences in Europe, offering:

- smartphones as the most widely owned internet-enabled devices in the UK, and with the average amount of time spent online per user on smartphones exceeding that spent browsing on desktops and laptops;
- data carried on EE's mobile network alone expected to triple by 2018, reaching [✂] – the equivalent of streaming 38,000 years of HD Films;
- 93% of premises receiving outdoor coverage from a 4G mobile network in May 2015, up by over 20% from June 2014;
- according to Akamai, one of the biggest content providers in the world, an environment for delivering mobile broadband that is number one in the world, offering more than double the speed of Korea;
- huge increases in UK 4G mobile subscriber numbers, with 23.6 million subscribers (28%) at the end of 2014, compared with just 2.7 million (3%) at the end of 2013;
- 62.6 million mobile data connections (including internet on a mobile handset, dedicated mobile broadband and M2M connections) at the end of 2014, up 13.6% from 2013;
- Blended average monthly retail revenue per mobile subscription down by 1.3% in 2014 to £15.38, falling consistently in each of the last 5 years and by over 11% from £17.35 in 2005, in spite of the phenomenal increase in the value and quality of mobile services offered over these periods; and
- 89.9 million mobile subscriptions at the end of 2014, up 1.8% from 2013 but with overall retail mobile revenues continuing to fall since 2011, by 1.5% in 2014.

In such a competitive environment delivering such tangible benefits for the UK's mobile consumers, one would intuitively expect the requirement for regulatory

[3] This is based on data provided by GFK for the 12 month period ending 31 July 2015.

intervention to be very limited. This was indeed the case a decade ago – at the time of Ofcom's last strategic review. Now, however, through the increasingly intrusive application of the General Conditions regime and its enforcement of interventionist EU driven regulation, Ofcom regulates almost every single aspect of the way in which the mobile industry interacts with its customers. An illustration of this exponential increase in mobile regulation can be seen in the number of times to which the General Conditions refer expressly to mobile services. In the consolidated version in force in December 2006, the term "mobile" appeared just seven times. In the current consolidated version published in May of this year, it appears 113 times. EE considers that this approach has now reached a level where it is threatening both innovation and investment by the mobile industry.

It is clear that Ofcom can have a legitimate role to play in ensuring consumer protection even in competitive markets. However it does not follow that the important and ever growing role in consumers' lives played by mobile communications needs to be matched by an ever growing raft of regulatory interventions. On the contrary, the proof of a world class consumer protection regime is one that is sufficiently effective, efficient, clear, stable, principles based, light-touch and practical to stand the test of time and deliver benefits to consumers without the need for constant modification and expansion. Ofcom's Regulatory Principles, equally valid and valuable now as they were ten years ago, stand up to these rigorous criteria. Ofcom's various forays into consumer protection regulation over the same period, on the whole, do not.

The risk posed to the future of the UK's mobile industry by overzealous regulation and the attendant regulatory cost and risk of regulatory distortion is a very real one. Our ability to continue to invest and innovate in order to improve existing mobile services (e.g. extending mobile coverage) and develop new services (e.g. rollout of 5G services) for UK businesses and consumers depends fundamentally on our ability to make adequate returns. Single regulatory decisions by Ofcom can materially change this dynamic and deter incentives to invest in improved mobile services. By way of just two notable examples – in 2014 Ofcom's regulation of mobile termination rates wiped 11.5% (£0.8bn) off industry wholesale revenues, and in 2015, Ofcom has proposed to increase industry spectrum costs to nearly £200m per year, up from £64m currently. The cumulative effect of those interventions is substantial, particularly in an environment where commercial returns are already low. But are they low?

Ofcom in the DCR suggests that mobile network operators are making very substantial returns on capital. This suggestion is dangerously wrong. We attach to this submission a report from Economic Insight which explains the flaws in Ofcom's methodology that have resulted in it reaching such false conclusions. In particular, we note that Economic Insight's independent assessment of returns in the sector suggests a far more cautious outlook for investment than Ofcom suggests in the DCR. We consider correction of Ofcom's inflated view of mobile industry returns to be a very important matter. Firstly, in running so obviously counter to Ofcom's own conclusions on the competitiveness of the UK mobile industry, it threatens to undermine the credibility of the DCR. More fundamentally, we do not believe that Ofcom is able to properly discharge its duties to promote investment without a realistic understanding of the returns being made by the industry members who fund it.

The rest of this response provides the detailed arguments and evidence underpinning the broad themes laid out above.

The response is structured as follows:

- section 2 assesses returns in the UK mobile sector in order to inform the view on whether the sector will be able to attract investment in the future;
- section 3 suggests how Ofcom can continue to support sustainable competition in the UK's highly competitive mobile sector through its next stages of evolution to 5G and beyond;
- section 4 shows how Ofcom's approach to consumer regulation has become increasingly interventionist and sets out opportunities for deregulation; and
- section 5 is focussed on one particular area where we see regulatory support from Ofcom being able to benefit mobile investment and innovation – namely in relation to reforms necessary to extend and improve mobile coverage.

2. Returns in the UK mobile sector

In the DCR Ofcom sets out four key challenges for regulation, one of which is to provide the right incentives for future investment and innovation. Ofcom states that:

> *"A key consideration in policymaking is the effect of regulation on operators' anticipated returns on efficient investment, and the implications for potential future investment. The most important consideration for companies that are not capital-constrained is whether future investments will make what shareholders would consider to be an adequate return"[4].*

Based on its own analysis and a report by WIK-Consult, one of Ofcom's key findings from its assessment of returns in the UK mobile sector is that the sector "*is earning returns above its cost of capital within the current market structure and regulatory environment*". Ofcom suggests that "*in some cases, mobile operators are earning returns significantly higher than the cost of capital*".[5] On this basis, Ofcom's current view is that there is no evidence demonstrating that "*competition and investment are in tension in the UK*".[6]

Ofcom's findings rely heavily on its estimate of EE's Return on Capital Employed ("ROCE") in 2012 and 2013, which Ofcom states that it considers to be a reliable measure of Mobile Network Operators' ("MNOs') forward looking profitability.[7]

Ofcom estimates EE's adjusted ROCE in the calendar years 2012 and 2013 to be around 28% and 27% respectively. This is significantly above EE's unadjusted ROCE for the corresponding calendar years which were 1% and 2% respectively. The significant disparity between these estimates is the result of Ofcom making substantial, and in EE's view entirely unjustifiable, adjustments to EE's capital base as stated in EE's statutory accounts (the "accounts"). These adjustments included:

- significantly reducing the value of EE's 3G spectrum assets by over £2 billion (i.e. a 90% reduction) and almost halving the value of EE's 4G spectrum assets in capital employed;
- excluding, entirely, the value of customer relationships, which is valued at over £1 billion in the accounts; and
- excluding, entirely, the value of goodwill, which is valued at over £5 billion in the accounts.

EE has, through a series of exchanges with Ofcom that pre-dated the DCR, strongly refuted Ofcom's approach to estimating forward looking profitability in the UK mobile sector, and in particular its significant and unjustifiable adjustments to EE's capital asset base (as stated in the accounts). For example, Ofcom's proposal to attach no value to EE's existing customer

[4] Ofcom, The DCR, Para 4.44
[5] Ofcom, The DCR, Para 4.43
[6] Ofcom, The DCR, Para 9.89
[7] Ofcom, The DCR, Para 4.45

relationships and goodwill is wholly at odds with commercial reality and practice. EE and other MNOs could not for instance reach their current market positions, without incurring significant costs, and therefore customer relationships are legitimate assets upon which EE and its shareholders would expect to earn a return. Furthermore, EE's goodwill includes key intangible asset such as know-how or managerial expertise that are costly to produce. Competitors and new entrants would have to replicate these expertise independently, and at a cost, in order to reap the benefits from them (i.e. increased revenues or lower costs). EE's shareholders' could therefore also expect a return on these intangible assets.

In EE's view the exclusion of these intangible assets (both goodwill and customer relationships), along with the adjustments to the value of EE's spectrum assets, leads to a gross overstatement of profitability. In order to obtain a wider view, we asked a number of telecoms analysts that regularly advise would-be investors in the telecoms industry, to provide their view on the appropriateness of Ofcom's adjusted ROCE as a measure of future returns in the sector. We received responses from analysts at Citi, Nomura and Royal Bank of Canada (RBC). All three analysts were critical of Ofcom's approach to calculating EE's ROCE as a measure of future returns. Citi said that:

> "*The Ofcom measure is almost looking forward and expecting that there won't be large capex requirements. That's not how the world works and if you measured that way then everyone would be making huge returns*."

Nomura explaining that:

> "*Ofcom's [ROCE] figure would imply a return of 4x a typical WACC, and, if treated as sustainable, implies a valuation at four-times the invested capital, which is extreme. We wouldn't apply ROCE (and EV/invested capital) as our primary valuation measure and that valuation looks inflated*."

Furthermore the analyst at RBC stated that:

> "*we [RBC] would not use the methodology chosen by Ofcom, as it would appear to inflate real RoCE [in the UK mobile sector], excluding significant costs like spectrum, customer acquisition and also bearing little relationship to historic investments by shareholders in EE.*"

These statements corroborate to a large extent EE's view that Ofcom's approach to estimating ROCE is out of touch with the commercial reality and is likely to materially overstate profitability in the sector. From this one might conclude that Ofcom's approach reflects a lack of robust research and analysis as well as a degree of commercial naivety.

In the context of Ofcom's DCR, EE is very concerned that Ofcom's grossly flawed estimate of future returns might suggest that there is a lack of competition in the UK mobile sector. This is completely at odds with both EE's view and Ofcom's observations of the state of competition in the UK mobile sector, as set out in section 3 of this response. We consider that these observations draw into question the credibility of Ofcom's estimate of EE's adjusted ROCE and we are surprised that Ofcom does not appear to have reconciled its own estimates with its assessment of competition in the sector.

EE is also concerned that Ofcom's flawed findings on mobile returns could set a misleading market context for Ofcom's current and future policy setting. This would ultimately harm competition, investment and innovation in the sector. EE notes that a number of telecoms analysts have already raised serious concerns with investors around Ofcom's analysis on returns in the sector and the impact this could have on Ofcom's future policy setting. For example in a very recent UK Telecoms report on the DCR, HSBC Global Research wrote:

> "*We suspect that investors will find the Review's [Ofcom's DCR] returns analysis worrisome given that these calculations underpin so much regulation, and we think ourselves obligated to highlight this issue when in future discussing risk factors associated with operators invested in UK telecoms infrastructure.*"[8]

In order to ensure that Ofcom's future policy setting is guided by accurate evidence on future industry returns, EE has commissioned Economic Insight to review Ofcom's supporting analysis and undertake an independent assessment of appropriate measures and estimates of future returns in the UK mobile sector.

We provide Economic Insight's report titled "*Returns in the UK mobile sector*" with our response and Ofcom should treat it as an integral part of our response.

Economic Insight's assessment of returns in the UK mobile sector clearly demonstrates not only that Ofcom has based its findings on a very narrow range of evidence both in terms of depth and breadth, but also that its adjustments to ROCE are highly questionable and artificially inflate ROCE. Economic Insight's independent assessment of returns in the sector suggests a more cautious outlook for investment than Ofcom suggests in the DCR.

In summary Economic Insight finds that:

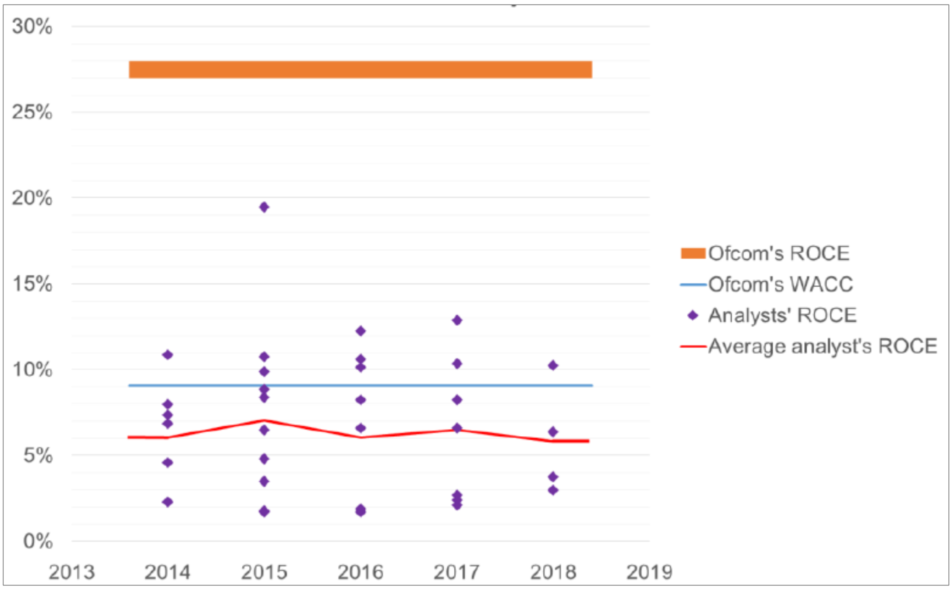
- Ofcom's evidence gathering and analysis has a number of limitations and as a result it is not possible to draw robust conclusions in relation to future investment from the analysis/evidence. The limitations include:
  - Ofcom's own analysis focuses only on one company (i.e. EE) and only covers two years – Economic Insight state that "Ofcom should have looked at the profitability of the sector as a whole and/or over a longer period of time given its research objectives and the fact that the relevant investments are long-lived"[9]; and
  - not checking the information that investors are relying on to make their investment decisions.
- Ofcom's adjustments to ROCE are highly questionable and artificially inflate ROCE. Economic Insight considered that whilst in principle it is right to consider whether assets have been appropriately valued when considering forward-looking returns, there is no basis for Ofcom to entirely ignore the value of goodwill and customer relationships from its analysis. In particular, it is highly doubtful that a new entrant seeking to replicate the cash flows of EE, which is a relevant consideration for the

[8] HSBC Global Research, "UK Telecoms – Reviewing the Review", 24 September 2015
[9] Economic Insight, Returns in the UK mobile sector, Page 6

purposes of estimating economic profitability, could do so without some upfront investment in intangible assets, such as customer relationships.

- The limitations of Ofcom's evidence gathering and analysis, the lack of foundation for its adjustments to ROCE and the tensions with its position elsewhere, point to a need to reconsider the evidence and undertake broader research.
- When analysing returns and the ability of the sector to attract investment in the future, the relevant consideration is what information investors use to make investment decisions in practice.
- Economic Insight's research finds that investors use a wide range of information and measures to reach their decisions. They consider, for example, both quantitative metrics and qualitative information on the policy and regulatory environment in which firms of interest operate.
- Analysing a broad range of evidence from measures that are widely used by investors to make investment decisions, **Economic Insight finds that there is a much more 'cautious' outlook of investment in the UK mobile telecoms sector** than might be inferred from Ofcom's ROCE figure of 27%-28%. For example figure 1 shows the ROCE figures for the parent companies of the UK MNOs presented in 11 analyst reports. The **analysts' ROCE estimates are all significantly lower than Ofcom's ROCE estimate** and in most cases below the industry cost of capital. The average of the **analysts' ROCE estimates is 6.4%**, which is also below Ofcom's estimate and the cost of capital for the UK mobile sector.
- Economic Insight recommends that Ofcom should reach a more balanced view on the investment outlook by using a wider range of information and measures to inform its conclusions, with a particular emphasis on the sources of information that investors use.

Figure 1. Ofcom's and investors' view of ROCE



Source: Economic Insight, Returns in the UK mobile sector

The evidence provided in Economic Insight's report, suggests that the outlook of investment in the UK mobile sector is far less promising than Ofcom's analysis might indicate. It also corroborates the evidence that the UK mobile sector is highly competitive, and strengthens the case for Ofcom to favour a bias against intervention and to adopt a light-touch approach to regulation that promotes competition and provides the stable and predictable environment to attract investment in the sector.

3. Competition in the UK mobile sector

Competition in markets will generally ensure that the best outcomes are achieved for consumers. Regulatory intervention should only be considered where there is clear evidence of market failure. Any intervention must be proportionate, taking full account of both the positive and the negative impacts. EE welcomes the fact that in the DCR Ofcom has recognised this by stating that:

> "*In general, we believe that the best mechanism for delivering choice, quality and affordable prices is a healthy competitive market" and "Regulation works best when it is targeted where it is needed, and removed where it is not*."[10]

It is clear that the UK mobile sector is highly competitive. Competition in the UK retail mobile market has evolved very differently from fixed markets. There is no incumbent provider, but rather there are a number of strong MNOs, who engage in fierce end-to-end competition along with a very strong range of MVNO providers (taking, for example, a 16% share of total mobile voice minutes). There is also strong and evolving competition provided by a range of current and emerging OTT competitors. Apps on mobile smartphones now enable consumers to switch easily between voice, video calls (e.g. FaceTime), instant messaging and social media. As a result of the shift towards voice and messaging services provided by OTT competitors, mobile operators are seeing falling SMS and MMS volumes and revenues with, for example, WhatsApp's share of messaging now at around 50% of traditional messaging. EE also notes that OTT players such as Google and Apple are potential MVNO entrants overseas and here in the UK.

It is market driven competition, and not regulation, that has and continues to drive excellent consumer outcomes including in terms of innovation, investment and prices. Ofcom's own assessment of the sector is that competition has delivered significant benefit to consumers. For example, in the DCR Ofcom has acknowledged that:

> *"UK consumers have benefited greatly from end-to-end competition in mobile services*."[11]
>
> *"The UK also has some of the lowest mobile prices among the EU5 countries. In 2014, the UK had the second lowest total 'lowest available' and 'weighted average' stand-alone prices for the eight mobile baskets we included in our analysis."*[12]

In this section, we set out some of the ways in which we believe, Ofcom's future approach to regulation, can assist to continue to foster vibrant and sustainable competition in the delivery of UK mobile services and infrastructure. In so doing, we have focussed on issues within the scope of the DCR which are not already or liable to be covered by more in-depth, subject specific, separate regulatory review or consultation processes. We do not, therefore, make comment on

[10] Ofcom, The DCR, Para 1.12.
[11] Ofcom, The DCR, Para 1.49.
[12] Ofcom, The DCR, Para 4.11.

matters which may be consequent on the proposed H3G / O2 merger which will be assessed in detail by the European Commission, nor on future spectrum allocations which will be subject to separate stakeholder input and review processes. We also refrain from comment on matters relating to BT's proposed merger with EE, which is subject to a separate CMA review process.

3.2 Sustaining competition

In order to sustain competition in the UK mobile sector as it continues to grow and evolve, EE considers that Ofcom needs to (1) continue to support market driven entry and growth, and (2) create a level regulatory playing field across all platforms. We discuss each of these in turn.

3.2.1 Continued faith in market driven entry and growth

EE considers that the strongly competitive mobile market in the UK is testimony to the benefits of Ofcom's approach of acting with a bias against intervention in terms of unnecessary and potentially damaging wholesale regulation. EE agrees with Ofcom's conclusions in the DCR that *"regulated access may not deliver the same level of benefits [as market driven outcomes], and we [Ofcom] would be cautious about adopting it unless end-to-end competition proves unsustainable*".[13]

3.2.2 Creating a level regulatory playing field across all platforms

EE considers that Ofcom needs to review the general conditions ("GC's") and other regulatory obligations faced by MNOs, with a view to creating a level regulatory playing field across all platforms. EE notes that under the current regulatory regime, OTT providers are able to use MNOs' networks to provide substitutable services to customers, but without being subject to the same onerous regulatory obligations which mobile communications providers face. For instance, while MNOs are required to comply with the CRF and a long-list of GC's when offering their services to consumers (e.g. conditions which determine minimum contractual terms and conditions, maximum contract duration, publication of information, marketing, sales, and complaints handling), OTT players are not. Furthermore, MNOs can also be investigated for alleged breaches of GC's and be fined up to 10% of group turnover. In contrast, OTT providers typically only face sanctions of such a magnitude if they engage in anti-competitive conduct.

In EE's view this demonstrates that the regulatory regime favours OTT providers and creates an uneven playing field at present. This disparity is even more concerning given that the three main OTT providers have global reach and benefit from extensive economies of scale and scope that cannot be matched by most MNOs across Europe. The lack of a level playing field both in

[13] Ofcom, The DCR, Para 4.30 and 1.49.

terms of the regulatory regime, the requirement to invest in networks, and also in terms of global reach, means there is a significant risk of distorting competition and weakening incentives for MNOs to invest in networks and new technologies. Clearly where OTT players can 'free ride' on MNO's substantial investments by operating OTT services using the MNO's network without paying for the network costs there is a danger that, in the future, MNOs will not make further investments in carrier grade network services.

EE notes that in the European Commission's ("EC's") public consultation on the evaluation and the review of the CRF[14], the EC has already set out proposals aimed at creating a level regulatory playing field by considering whether OTT providers should also be subject to existing obligations imposed on MNOs. EE agrees with the EC's objective, and believes that in some cases it may be appropriate to consider whether some existing regulatory obligations currently imposed on MNOs should also be imposed on OTT providers. For example, it seems appropriate that OTT providers should also be required to ensure that end users can access 112 and 999 services free of charge and, where technically feasible, make caller location information available to the emergency services, as per General Condition 4.

However, EE considers that in general Ofcom would better meet its statutory duties and regulatory principles by applying lighter touch regulation to MNOs and considering opportunities for deregulation, including reforms to GC's, instead of simply extending all existing or new MNO regulatory obligations to OTT providers. In particular this approach would better meet Ofcom's duty to "*where appropriate promote competition*", as well as its principles to "*seek the least intrusive regulatory mechanisms to achieve its policy objectives*".

EE recognises that in most cases, Ofcom's GCs are driven by European Union ("EU") Directives, to which Ofcom is bound, and therefore at present Ofcom's ability to remove these conditions is constrained. Despite this, EE considers that there are a number of steps Ofcom can take to lessen the regulatory burden on MNOs and thereby begin to address the current imbalance between MNOs and OTT providers. These include:

- Considering reforms to GC's which do not relate to European legislation and therefore Ofcom does have greater discretion to reform;
- Removing duplication and improving the consistency and clarity of existing GC's to reduce the regulatory burden on MNOs and make it easier for MNOs to comply with existing GC's (we set out specific examples of GC's that should be reviewed in section 4 of this response)
- Responding to the EC's consultation on the review of the CRF, which is requesting views from National regulatory authorities ("NRAs") in particular, on how to "ensure proportionate regulation and a level playing field to protect end-users and promote fair competition between digital players that provide communications services". This might

[14] https://ec.europa.eu/digital-agenda/en/news/public-consultation-evaluation-and-review-regulatory-framework-electronic-communications)

include setting out the case for lighter touch regulation to MNOs in favour of extending GC's to OTT providers.

4. Consumer regulation

In section 3 of this response we noted and endorsed Ofcom's view that the UK mobile sector is highly competitive, and has delivered significant benefits to consumers. In such a competitive environment, one would expect economic regulation to be very limited. However, instead of relying largely on the competitiveness of the mobile sector to deliver good consumer outcomes (and intervening very selectively when competition fails to deliver), EE's experience is that Ofcom has in recent years been routinely intervening on a range of detailed operational issues, in many cases without demonstrating the need for intervention or applying its own Regulatory Principles.

Ofcom's DCR sets out the broad outcomes it tries to achieve[15]:

- Investment and innovation, delivering widespread availability of services.
- Sustainable competition, delivering choice, quality and affordable prices.
- Empowered consumers and businesses, able to take advantage of competitive markets.
- Targeted regulation where necessary; deregulation elsewhere.

EE fully agrees with these outcomes, but considers that Ofcom currently does not strike the right balance between them. Furthermore, Ofcom increasingly focuses on attempting to achieve consumer outcomes by means of direct regulatory intervention at the retail level, rather than relying on competition to deliver those consumer outcomes.

This is particularly concerning considering the evidence provided in the report by Economic Insight (summarised in section 2 and attached to this response), which suggests that future returns in the UK mobile sector may be below the Cost of Capital for the UK mobile sector, required to enable efficient network operations and investment.

In this section we set out evidence on which our concerns are based. We then set out our more detailed concerns in relation to Switching, Ofcom's approach to information provision and areas for potential reforms to Ofcom's General Conditions.

4.1 Evidence of Ofcom's interventionist approach to consumer regulation

Despite the evidence that the UK mobile sector is highly competitive and the high level of consumer satisfaction with mobile services, Ofcom has in the past five years increasingly focused on discretionary, consumer related issues. Ofcom primarily uses the following formal regulatory 'tools' to achieve its consumer related objectives:

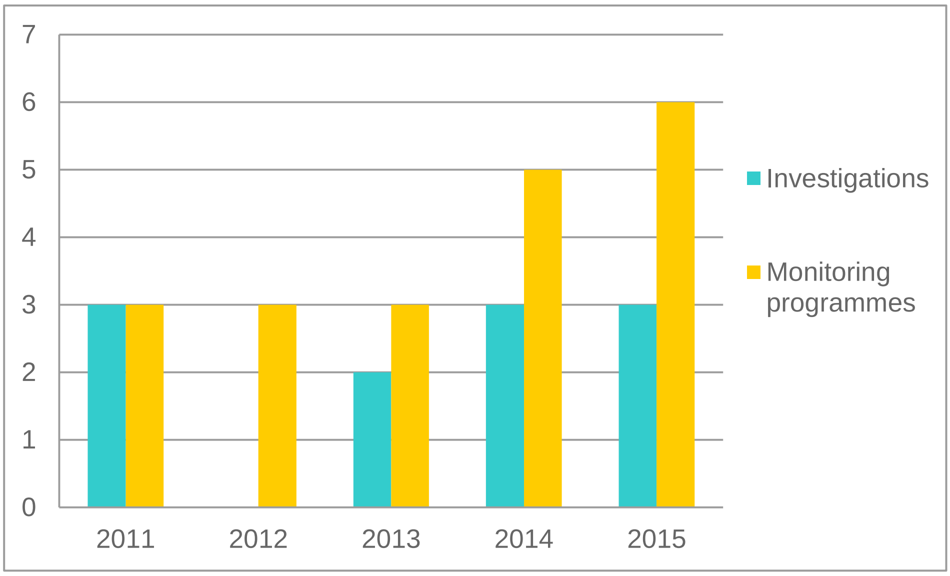
[15] Ofcom, The DCR, Para 1.12

1. Own initiative investigations into individual companies, assessing whether they have been in breach of regulations or law.
2. Own initiative monitoring programmes, to assess compliance of industry with certain rules and regulations.
3. Policy interventions, where following consultation with industry Ofcom considers a number of options to address certain issues, and puts in place formal regulation.

Below we evaluate the use of these tools by Ofcom over time, and give an assessment of Ofcom's policy interventions against its regulatory principles.

Figure 2 shows that the number of Ofcom consumer related investigations and own initiative monitoring programmes has been steadily increasing since 2012. Whilst the absolute number of consumer related investigations and monitoring programmes may not appear to be high, the increase in these initiatives at a time when the sector has become increasingly competitive, is not indicative of a regulator that believes in competition and has a "*bias against intervention*".[16]

Figure 2. Number of Ofcom consumer related investigations and own initiative monitoring programmes since 2011



Source: Ofcom Competition and Consumer Enforcement bulletin

Annex 1 to this response contains a list of the investigations and own initiative monitoring programmes included in this table.

EE considers that in addition to the increasing trend of consumer related investigations and monitoring in recent years, in a number of individual cases Ofcom's policy interventions have been inconsistent with its own regulatory principles.

In Table 1 we provide a number of examples of Ofcom consumer related policy interventions which, in EE's view, have been inconsistent with one or more of Ofcom's regulatory principles.

16 http://www.ofcom.org.uk/about/what-is-ofcom/statutory-duties-and-regulatory-principles/

Of the nine examples there are four interventions which we believe have contravened at least three of Ofcom's principles. For example in relation to its guidance "GC9.6 Price rises in fixed term contracts (2013)", Ofcom opted to take a highly prescriptive approach to and narrow interpretation of GC9, in favour of a far less intrusive approach allowing enforcement to be driven by evidence of consumer harm. Moreover Ofcom's intervention was only based on an analysis of complaints (without any quantification of harm), and thus lacked objective justification and proportionality. In doing so Ofcom therefore did not demonstrate a bias against intervention.

Table 1 includes three policy interventions where Ofcom decided to publish information. In section 4.3, we discuss in more detail Ofcom's approach to information provision.

Table 1. EE assessment of Ofcom main policy interventions against Ofcom's regulatory principles

Intervention	Proportionality	Bias against intervention	Evidence based	Least intrusive
GC23: Sales and Marketing of mobile telephony services (2009)				
GC24: Sales and Marketing of fixed telephony services (2009)				
Fixed broadband speeds publication (2009)				
Complaints publication (2009)				
GC9.6: Price rises in fixed term contracts (2013)				
GC22: Fixed switching (2013)				
Non-geographical calls (2013)				
Mobile broadband speed publication (2014)				
Nuisance calls (2013)				

Key: Red indicates regulatory principle clearly not satisfied; Amber indicates that the regulatory principle was partly satisfied ; Green indicates that there was evidence that the regulatory principle was met.

Annex 1 contains a further discussion of EE's assessment of these interventions against Ofcom's regulatory principles.

The evidence suggests that not only has Ofcom become increasingly interventionist and increasingly focussed on discretionary consumer related issues, but that Ofcom fails to consistently apply its own principles in practice. EE fully supports Ofcom's outcome of empowered consumers, and acknowledges the importance of safeguards for consumers when things go wrong. However, we are concerned about Ofcom's reluctance to rely on competition, investment and innovation to deliver these outcomes. In addition, we believe that Ofcom should clearly demonstrate that it has applied its own regulatory principles before deciding whether to intervene in the market. We would urge Ofcom to apply its Better Policy Making Guidance[17] to all of its consumer related interventions – not just by way of lip service, but by honouring the spirit of regulatory restraint and faith in market outcomes with which it was intended to be applied. This will improve consistency and transparency in Ofcom's decision making, and minimise the risk that Ofcom's interventions have a negative impact on investment and innovation and therefore on consumers. Ofcom should also recognise the cumulative effect of its interventions when considering whether to intervene, ensuring it recognises its effect "in the round", rather than just looking at potential interventions on a case-by-case basis.

4.2 Switching

In the Consultation Ofcom has suggested that, all else being equal, Gaining Provider Led ("GPL") switching processes will deliver the best outcome for consumers. Ofcom reasons that the gaining provider has an incentive to make "*the switching process smooth and easy*".[18] In particular Ofcom is concerned that bundling may "*make it harder for consumers to choose between increasingly complex offerings and to complete a switch – for example, where there are different switching processes for the services in a bundle, and/or when contracts for services in a bundle have different end dates*."[19]

EE has already responded to Ofcom's Call For Inputs ("CFI") on Switching, which set out EE's views on this matter. However, we wish to make the following points in the context of the DCR:

- EE considers that by stating a general preference for GPL switching Ofcom is potentially taking a one-size-fits all approach to regulation, which would demonstrate a lack of regard for the evidence on switching in different sectors. In accordance with its own regulatory principles Ofcom should instead consider the evidence on the customer experience of switching for different services as well as assessing the costs and benefits to consumers of changing to a different switching process.
- EE agrees with Ofcom that where services are commonly sold as part of a bundle, having different switching processes for each service has the potential to make switching difficult for consumers. Furthermore, where the providers of the same service are subject to different switching processes (i.e. asymmetric switching processes) this potentially creates an unfair competitive advantage for those providers that are not subject to the GPL process, which could ultimately distort competition in the market.

[17] http://stakeholders.ofcom.org.uk/binaries/consultations/better-policy-making/Better_Policy_Making.pdf
[18] Ofcom, The DCR, Para 12.20
[19] Ofcom, The DCR, Para 4.20

- These considerations on the face of it strengthen the case for a move to a single switching process, possibly a GPL switching process, in the pay TV, Fixed line and Fixed broadband market where:
    i. there is clear evidence that bundling of these services is becoming increasingly common. For example Ofcom's own analysis shows that take up of bundled services, primarily fixed, broadband and pay TV, has increased from 29% in 2005 to 63% in 2015. This could make switching between different providers difficult in the absence of a single switching process; and
    ii. providers of the same service are not subject to the same switching process. For example, Sky follows a Losing Provider Led ("LPL") switching process in the pay TV market whilst BT provides a competing pay TV service but is subject to the GPL switching process. This undoubtedly provides Sky with an unfair competitive advantage over BT and has the potential to distort competition in these markets.
- However the situation relating to competition in the supply of mobile services in the UK is very different:
    - Firstly, mobile services are very rarely sold as part of a bundle. Classically, fixed and fixed content services are purchased as a "household" decision – often remotely, whereas mobile services are purchased as an individual decision – most frequently in-store. Ofcom's own analysis shows that only around 2% of households pay for mobile services as part of a bundle, and in 2014, 95% of consumers took out a mobile contract on a stand-alone basis. We expect that this is likely to be the case for the foreseeable future for a variety of different reasons relating to the relevant UK market environment.[20]
    - Secondly, all MNOs are subject to the same switching process. In this respect therefore, there is a level playing field between MNOs, in comparison to other markets such as pay TV.
    - It is therefore clear that the primary justification for moving to a GPL switching process in the pay TV, Fixed and Broadband sectors does not apply to the mobile sector.
- Furthermore there is a range of evidence which suggest that customers are satisfied with their mobile provider and have not experienced problems switching.
    - Ofcom's Consumer Experience Report 2014 showed that 92% of switchers were either "very happy" or "fairly happy" with the mobile switching process.
    - Whilst Ofcom may consider that switching levels are low, this does not mean switching is difficult. In fact, the overwhelming evidence is that customers tend to stay with their current provider because they are content to do so – this can often be due to (i) the duration of the contract (they freely chose to enter into commonly in return for a subsidised

[20] [✂].

hand-set) or (ii) a perceived lack of financial benefit from switching provider (indicative of the fact that prices for UK mobile services are some of the lowest in the world). These two reasons, which have nothing to do with the switching process available to those consumers, together account for 73% of reasons for not switching.

- These views are reinforced by the fact that Ofcom's Consumer Experience Report found that 87% of mobile customers are very or fairly satisfied with the value for money they get from their provider. In particular when coupled with the low prices for mobile services in the UK, it is obvious that high satisfaction levels with mobile services are liable to result in a lower propensity to switch. Certainly evidence from other sectors suggests that there is a correlation between customer satisfaction and switching levels. According to Ofcom's research, sectors with higher switching levels such as car insurance for example, have lower satisfaction scores when asked if they consider the services provide good value value for money.[21]
- Research from Ofcom's Consumer Experience Report 2014 also shows that the percentage of customers who find it easy or very easy to make comparisons between mobile providers has increased. This indicates that the market is becoming more transparent rather than less transparent as Ofcom has suggested. This is what EE would expect given the increasing number of price comparison websites and the move towards unlimited bundles.

- Taken together this suggests that the benefits of a change of switching process are likely to be limited, and certainly significantly lower than in other sectors such as pay TV. Moreover, the costs of changing switching processes in the UK mobile sector could be substantial.

Overall EE considers that Ofcom should not adopt one-size-fits all approach to determining the appropriate switching process. In accordance with its regulatory principles Ofcom should have a bias against intervention and only intervene in the market where is has clear evidence of market failure that can only be addressed through intervention. Before considering any formal intervention in the UK mobile sector Ofcom therefore needs to provide clear and transparent evidence that, in the absence of regulatory intervention, consumers will face difficulties switching between mobile providers, and that the benefits of changing switching processes would outweigh the associated costs.

To date the evidence on switching in the mobile sector suggests that, unlike other sectors (e.g. pay TV), at present there is no justification for Ofcom to intervene in the market. Whilst we encourage Ofcom to continue to monitor the sector, at this stage we believe that any intervention would not be evidence-based and would be unjustifiable. Conversely, we urge Ofcom to focus its resources on areas where further reform clearly is required, namely harmonising switching processes across all fixed platforms including cable; and on the switching of now common fixed and fixed content bundles. Ofcom should not be tempted by perceived "quick wins" on mobile at the cost of

[21] Ofcom's Consumer Experience Report

diverting its scarce resources from more thorny but more beneficial further interventions in the fixed arena.

4.3 Ofcom's approach to information provision

Ensuring that customers have access to relevant information that allows them to make informed choices is a key driver of a competitive market. EE considers that consumers have access to a range of information, provided by both Ofcom and independent third parties, about the performance and price of mobile services. This has been one of the key factors that has enabled the UK mobile sector to remain highly competitive and consumers to benefit from improved services and low prices.

EE notes that, despite the wide range of information available to consumers, and the clear evidence that the sector is highly competitive and consumer satisfaction is high, Ofcom has begun to take an increasingly active role in trying to make more information on mobile services available to customers, with the intention of enabling customers to make informed choices about the mobile services they purchase and use. Whilst EE fully supports Ofcom's *intentions*, EE has a number of concerns with Ofcom's current approach to providing information, which we do not believe are delivering the intended *outcomes*. We set these concerns set out below.

<u>The need for a consistent approach to information provision</u>

In Ofcom's "Review of Consumer Information remedies", Ofcom set out the following criteria for assessing whether it is appropriate to publish information for consumers:

- assessing the nature of current information provision;
- identifying if there is a need for new information;
- considering the extent to which consumers are likely to engage with the new information; and
- evaluating who is best placed to provide the information to consumers.

EE supports these guidelines and believes that Ofcom needs to explicitly demonstrate that these criteria are met before publishing any information to consumers. EE considers that there have been a number of cases where Ofcom has failed to apply these criteria before deciding to publish information. This is likely to, amongst other things, lead to a lack of consistency in the information that Ofcom makes available to consumers.

<u>Identifying if there is a need for new information</u>

Busy consumers have a limited capacity to absorb information. In this context, more is not better – it is far, far worse. The average consumer dials a non-geographic number less than once a month, and volumes are falling. Is it, in this context, really "necessary" for Annex 1 of GC 14 to require CPs to provide no less than 11 separate pieces of information and advice to their customers relating to these numbers as specified in clause 3.3; for Annex 2 of GC14 to specify a further 5 pieces of information relating to these numbers to which CPs are required to give “prominence” as per clause 3.2, or to require CPs to advise customers of the Access Charge at point of sale in addition to including it in all of their tariff information as required by GC 23.5? EE would say no.

EE would also say that much of the information published by Ofcom for ostensible consumer benefit is equally unnecessary, and we would include as examples here Ofcom’s coverage checker, comparative information about handset unlocking, and certain pieces of information included in publications, such as fixed and mobile broadband speeds (technical measures such as packet loss, DNS resolution etc.).

Ofcom may disagree, and there may be cases of which we are unaware, that do justify the material amount of resources industry is putting into supplying this information and then dedicated by Ofcom in compiling, verifying and publishing it. However, we consider it an important part of the DCR for Ofcom to really scrutinize the need for the information it publishes and requires CPs to provide to customers.

Considering the extent to which consumers are likely to engage with the new information

Whilst Ofcom has been very proactive in making more information available to consumers it is not clear that Ofcom has monitored or measured whether customers actually engage with the published information. For example it is unclear how many customers visit the Ofcom website and use the information that Ofcom makes available. As a result Ofcom and stakeholders don’t have a clear view of what information consumers are utilising. Moreover, if it is the case that consumers are not utilising the information, then this could indicate that either Ofcom has not effectively publicised the information or that customers are not interested in the information, and therefore Ofcom is arguably using resources inefficiently and placing an unnecessary burden on CPs. EE considers that Ofcom should regularly monitor whether customers are accessing the information that Ofcom publishes, and importantly that they are using it to make informed choices. This information should help Ofcom to improve its communications and identify what information customers want and are likely to engage with.

In this context, we believe Ofcom should pursue its work in the area of behavioural economics, which they started doing on a small scale in 2010[22]. In their publication on behavioural economics Ofcom said that their work in this subject area had further highlighted the usefulness of consumer research in developing policy. The Financial Conduct Authority recently published a discussion paper[23] on the subject, recognising that information itself does not necessarily empower the consumer and that their work on behavioural economics has shown that ‘*it can overwhelm, confuse, distract or even deter people from making effective choices if presented in a way people struggle to engage with*.’ The paper also recommends building a wider understanding of

[22] http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/experiments.pdf
[23] http://www.fca.org.uk/static/channel-page/dp-smarter-comms/dp-smarter-comms.html?utm_source=smarter-comms&utm_medium=smarter-comms&utm_campaign=smarter-comms

their customers' information needs and objectively considering not only what consumers actively demand to know, but also:

- What the consumer needs to know;
- How much they need to know; and
- When they need to know it

We consider Ofcom should try and reflect the way consumers engage with information and consider incorporating the research on behavioural economics in its approach.

<u>Evaluating who is best placed to provide the information to consumers</u>

Ofcom should carefully consider whether it is the best party to provide information. There have been a number of cases where Ofcom has failed to do this. For example, Ofcom recently published its own research on fixed and mobile broadband speeds, despite the fact that there are a number of independent third parties that specialise in this area who have a wealth of expertise and experience in measuring broadband speeds and communicating the findings effectively to consumers.

EE is concerned that if Ofcom continues to publish information where it is not best placed to do so, there is a significant risk that the information it publishes will be inaccurate. This could have a number of unintended consequences. Firstly, it could lead to the market becoming less transparent, which could potentially distort competition. Secondly it could undermine the credibility of Ofcom as an information provider, which could result in consumers not engaging with the useful information that Ofcom publishes.

We therefore encourage Ofcom to review this matter as part of the DCR. Furthermore, even in cases where it is determined that there is a legitimate and beneficial role for Ofcom to play in relaying industry information to consumers, we urge Ofcom to humbly accept and acknowledge its own limitations in this regard. Ofcom is rarely, if ever, likely to be in as good a position to understand the information relayed to it by industry, as the CPs from whom the information is sourced, or to who's networks and services it relates. It is accordingly imperative that Ofcom engages extensively with industry on such information provision initiatives, and utilises expert independent third parties and stakeholders' experience and expertise, especially when providing technical information. Prime areas where this is required are in relation to any Ofcom publications relating to mobile coverage and mobile speeds and quality.

<u>Undertaking a quality assurance before publishing information</u>

One additional and very obvious requirement regarding Ofcom providing information to consumers is accuracy. Where Ofcom decides to provide information it has to be sure that the information is accurate. Inaccuracy could result in consumers making the wrong transactional decision, and could distort the market. We have seen recent regrettable instances of Ofcom providing inaccurate information. In Ofcom's quarterly complaints report for instance, there have been issues around the size of the customer bases of CPs, where Ofcom took into account business customers as well, resulting in a distortion in the ratio of complaints per 1000 customers. In Ofcom's Mobile Broadband Speed report, Ofcom's testing methodology and lack of validation resulted in inaccurate web browsing results. We also have concerns about the impression created by the coverage information Ofcom is publishing. We urge Ofcom to put in place quality control and validation measures to ensure that the data it publishes is accurate. As noted above, we also strongly urge Ofcom to work extensively and collaboratively on relevant publications relating to CP services and networks. We can help and we want to help here, but we need to be given realistic lead times and timeframes in which to do so. Better organisation and preparation on Ofcom's part in this regard would greatly assist to deliver no less timely but much higher quality information outputs.

4.4 Opportunities for deregulation and simplification of GCs

In section 3.2 we proposed that Ofcom should seek to, where possible and appropriate, apply lighter touch regulation to mobile operators to address the imbalance between regulations placed on mobile operators and OTT providers that provide substitutable services (and thereby create a level regulatory playing field). Whilst we recognise that EU directives require Ofcom to implement and enforce certain GCs on MNOs, Ofcom still retains discretion to review these GCs to determine whether they remain fit-for purpose.

The GC framework was put in place in 2003 and has grown over time, with GCs being updated and changed based on changing EU Directives and Ofcom's own policy interventions. The framework has become unwieldy, which makes compliance harder. Transparency requirements are included in at least four GCs, there is duplication in a number of requirements, and some of the information is outdated. A number of years ago, Ofcom set out that it planned to carry out a review of the GCs. EE is disappointed that this still has not been done. EE considers that there is significant scope for removing duplication of GCs, removing parts of GCs that are no longer appropriate or proportionate, and aligning definitions between GCs. In table 2 below we set out some opportunities for deregulation and simplification of GCs that would be within Ofcom's current remit, and which could reduce the regulatory burden on CPs and make compliance easier. Where Ofcom has the discretion to remove GCs, we consider it would be good regulatory practice to assess on a regular basis whether a particular GC is still required (for instance GC23).

Table 2. Proposed changes to existing General Conditions

General Condition(s)	Current concern	Proposed amendments
GC9, GC10, GC23 and GC22	Overlap with Consumer Rights Act (‘CRA’)	Withdraw parts of the GCs where there is overlap with general consumer law
GC9, GC10, GC23 and GC22	Duplication of some of the information requirements	Combine GCs
GC14.2	Appears to be redundant with the introduction of the unbundled tariff	Remove GC
GC14 – Annex 1; Annex 2	Regulatory obligations disproportionate to use of non-geographic numbers	Review and refine scope of obligations
GC8 and GC19	Duplication - both relate to directory enquiries	Combine GCs
GC11, GC12 and GC13	Duplication - all relate to billing	Combine GCs
GC17 and GC20	Duplication - both relate to numbers	Combine GCs
All	Potential for inconsistency between terminology and definitions	Aligning terminology and definitions

4.5 Conclusion

Over the years, Ofcom has become increasingly interventionist, focusing on discretionary consumer related issues, rather than considering options for more lasting and valuable benefits to be driven by better facilitation of competition, investment and innovation. There are also a number of examples of where Ofcom has intervened without providing convincing evidence of market failure or consumer harm. The cumulative impact of these discretionary interventions is substantial, particularly in an environment where commercial returns are already low.

We are concerned about this direction of travel. As a key part of this important DCR process, we urge Ofcom to revisit its own regulatory duties and principles when considering its role in delivering key consumer outcomes over the next five to ten years. In particular Ofcom should wherever possible allow competition to deliver good consumer outcomes effectively and efficiently. Only where there is clear evidence that competition fails to deliver outcomes should Ofcom consider intervention, whilst also taking into account the impact of its interventions in the round rather than on an isolated basis.

5. Improving mobile coverage

In the DCR Ofcom notes that whilst mobile services are widely available in the UK, there are significant gaps in mobile coverage. Furthermore, Ofcom states that although the private sector has taken the lead in investment and innovation in communications services, it is seeking views on "*what more can be done through public policy to deliver truly widespread availability*"?[24]

UK consumers now enjoy outdoor 4G coverage from at least one operator covering 93% of premises and for 2G and 3G services covering over 99% of premises. However, we agree that despite the state of the art UK mobile services now available, courtesy of fierce competition in the mobile sector and heavy investment by the network operators, there remain some gaps in mobile coverage.

EE considers that public policy does have a part to play in further improving mobile coverage. However, in order for it to be effective, it must support rather than dampen the commercial incentives for MNOs to invest and compete wherever viable. Unfortunately, the most recent examples that EE has experienced have all had the opposite effect. In particular, Government's threatened mandated national roaming obligations late in 2014; its failure to deliver promised and desperately needed legislative reforms to the Electronic Communications Code ("ECC") prior to its last term nor so far in the current term; and Ofcom's recent blinkered application of the Secretary of State's 2010 direction on spectrum annual licence fees, resulting in the tripling of current fees and the denial of any compensation to 1800 MHz spectrum based operators in respect of the large increases in costs they will face in order to deliver 90% geographic coverage by the end of 2017.

In our view, if Ofcom wants to contribute to continuing improvements in coverage, then it needs to:

- Undertake further work in collaboration with MNOs and expert third parties in the following areas:
    - Defining the nature and source of "poor" coverage - In EE's view there is a perception that "poor" coverage is limited to rural areas, and is purely due to low network performance or lack of network presence. However we consider that the problem is more complex than that. "Poor" coverage may not be limited to remote rural areas. Furthermore in some cases "poor" coverage may be due to non-network related factors such as low quality or faulty handsets. A better understanding of the nature and source of "poor" coverage will allow Ofcom and MNOs to make more informed decisions to address "poor" coverage (e.g. targeting "poor" coverage areas where there is the greatest consumer benefit from doing so).
    - Improving the coverage checker - EE has previously raised a number of concerns with Ofcom's coverage checker, in

[24] Ofcom, The DCR, Pg 70 and 71

particular around (i) the accuracy of the information provided by Ofcom's coverage checker, (ii) whether there is a need for Ofcom to publish such information and (iii) whether Ofcom is best placed to provide the information to consumers, given the wide range of experienced expert third parties that already provide this information to consumers. Notwithstanding this, EE considers that Ofcom should work with MNOs and third parties, which have the required experience and expertise in this area, to improve the accuracy and transparency of its coverage checker.

- Take an active role in advising Government on and raising public awareness of the benefits of and best way to reform the ECC (for example by allowing the automatic upgrading of equipment) and planning rules (for example by creating greater scope for higher mobile masts), in order to meet Government coverage objectives. In contrast to many of Ofcom's current "top-down" consumer protection initiatives launched in this and other areas, EE really sees support for ECC and planning reform as being a key way in which Ofcom can effectively and efficiently deploy its resources in ensuring the right up-stream conditions to enable huge downstream benefits to be delivered to UK consumers in the form of extended network coverage at lower costs.
- Adopt a credible and realistic view of MNOs future returns on investment. In view of this, Ofcom should then clearly acknowledge and endeavour wherever possible to avoid the harm caused to MNO investment incentives and capabilities by Ofcom regulatory initiatives which increase regulatory costs or which limit the ability to make commercial returns.
- Recognise the cumulative impact of regulatory interventions on incentives to invest. Ofcom should reflect on recent interventions when considering any potential interventions in the future, taking into account the effect of interventions in the round, rather than independently on a case-by-case basis.
- Continue to support positive outcomes for consumers driven by competition and commercial investment in infrastructure and innovation, by providing considered and objective advice to Government on relevant policy proposals. We note that the publicly available information on the matter suggests that Ofcom did this to good effect in its 2013 policy executive paper on national roaming as part of its programme of work on mobile coverage and quality.[25]
- Develop alongside Government, targeted incentives for MNOs to extend coverage in areas where it is currently not commercially viable to do so. For example, Ofcom could alongside Government introduce financial incentives for MNOs to extend coverage in areas that it deems not to be commercially viable (e.g. through lowering spectrum annual

[25] http://stakeholders.ofcom.org.uk/binaries/foi/2013/september/1-242688726_FOI_request_domestic_roaming.pdf

licence fees by a given amount if MNOs reach a certain coverage target).

Annex 1: Assessment of Ofcom's initiatives against Ofcom's regulatory principles

The list below contains Ofcom's consumer related investigations and own initiative monitoring programmes included in Figure 2 of Section 4. Investigations are marked in blue, own initiative programmes in yellow.

Investigation / Own initiative monitoring programme	Year
Own-initiative investigation into Everything Everywhere's (trading as Orange) compliance with General Condition 23 in respect of its sales and	2011
Monitoring and Enforcement programme in respect of the international	2011
Own-initiative investigation into Nowtel Management Limited in respect of the sale and advertisement of its international calling cards	2011
Own-initiative investigation into TalkTalk Group concerning compliance with	2011
Monitoring and enforcement programme: General Condition 9 (requirement	2012
Own-initiative investigation into Hutchison 3G UK Limited (trading as Three) concerning compliance with paragraph 14.4 of General Condition 14 – Code of	2013
Own-initiative investigation into Etico Solutions Limited concerning its compliance with General Condition 22 – Service Migrations	2013
Own-initiative Monitoring and Enforcement Programme: General Condition	2013
Own-initiative investigation into EE Limited (trading as EE, Orange and T-Mobile) concerning compliance with paragraph 14.4 of General Condition 14 –	2014
Own-initiative investigation into Universal Utilities t/a Unicom ("Unicom") in respect of compliance with General Condition 24	2014
Own-initiative Monitoring and Enforcement Programme: Communications Providers' compliance with GC14.5 – Dispute Resolution Schemes	2014
Own-initiative investigation into compliance with General Condition 15 and the provision of next generation text relay services	2014
Own-initiative investigation into Jason Clifford trading as UK Free Software Network concerning compliance with General Condition 14.5 –Dispute	2014
Additional Charges – enforcement and monitoring programme to assess	2009-2014
Own-initiative investigation: Monitoring and enforcement of Fixed-Line Provider's compliance with rules concerning their sales and marketing	2010-2014
Own-initiative investigation: Monitoring and enforcement of Fixed-Line Providers' compliance with rules concerning their sales and marketing	2014
Own-initiative monitoring and enforcement programme into GC10 –	2015
Own-initiative monitoring and enforcement programme in respect of	2015
Own-initiative monitoring and enforcement programme into compliance with requirement to publicise details of services offered to end-users with	2015
Own-initiative investigation into Sky's compliance with rules about	2015
Own-initiative investigation into Vodafone Limited ("Vodafone") in respect of compliance with General Condition 11 – Metering and Billing, General Condition 23 – Sales and Marketing of Mobile Telephony Services and	2015
Own-initiative investigation into Vodafone Limited ("Vodafone") in respect of compliance with General Condition 11 – Metering and Billing – as well as	2015
Own-initiative monitoring and enforcement programme into cancellation	2015

Source: Ofcom Competition and Consumer Enforcement bulletin

Below we provide a qualitative assessment of a number of Ofcom's consumer related initiatives, as summarised in table 1, Section 4, against Ofcom's regulatory principles.

General Condition 23: Sales and marketing of mobile telephony services

We consider the intervention was disproportionate because Ofcom could have used existing legislation under the Enterprise Act. In addition, industry developed its own Code of Practice to deal with the issue. Ofcom did not give the industry code sufficiently long to assess whether it had had an impact and did not have a bias against intervention.

General Condition 23: Sales and marketing of fixed telephony services

Ofcom did take into account evidence in the form of complaints and carried out a trend analysis. Ofcom had had a monitoring programme in place since 2005, which did not appear to be effective. We therefore believe it was proportionate for Ofcom to introduce regulation. However, we do consider some of the information required to be provided at Point of Sale to be overly onerous (information around termination rights and procedures).

Fixed Broadband Speeds publication

In 2009, there may have been few third parties who published reliable fixed broadband speed information and the publication may therefore have been proportionate. However, there are currently a number of third party providers who publish this information, and we therefore do not think there is a need for Ofcom to continue to do this. We therefore consider that Ofcom’s continued involvement imposes unnecessary regulatory burden on industry, for very little discernible consumer benefit. This would accordingly be in our view a prime area for Ofcom to apply the recommendations in its Better Policy Making Guidance to conduct an impact assessment of the costs and benefits involved in its regulation in this area to date, in order to consider whether and if so how continued involvement of Ofcom in this area will yield net benefits.

Complaints publication

This information is not available to consumers so we believe it is relevant for Ofcom to publish. Our main question is whether it is proportionate to include smaller players, since small changes in complaints numbers into Ofcom can lead to big differences in the ‘complaints / 1000 customers’ ratio over time, making the information less relevant. We also note that some of Ofcom’s publications have contained inaccurate information for a few quarters, which is highly regrettable. If Ofcom is going to dedicate its resources to consumer publications and require industry to dedicate resources in support, then Ofcom needs to be very sure the information is both accurate and useful to consumers.

General Condition 9.6: Price rises in fixed term contracts

We believe that there was a lack of evidence to justify the restrictive interpretation that Ofcom has applied in its guidance on GC 9.6. Ofcom’s guidance was based only on complaints, and failed to make a quantitative assessment of consumer harm.

General Condition 22: Fixed switching

There was clear evidence of harm related to the difference in switching processes for switching the same service. We believe the intervention was proportionate, and necessary. However we believe that Ofcom should have acted much more quickly given the clear evidence of harm, and that Ofcom should have gone (and still should go) further and also looked at harmonising switching on competing cable platforms, and switching Pay TV which is commonly purchased in fixed bundles. Ofcom’s regulatory principles advocate not only a bias against intervention, but also "*a willingness to intervene firmly, promptly and effectively where required*". This is in our view a prime example of an area where Ofcom has spread its resources too thinly across too many different areas not actually requiring any intervention at the cost of leaving itself and industry insufficient resources to promptly and effectively implement reforms in areas where there is a clear and urgent need for reform.

Non-geographical calls

EE has never been convinced by the claimed evidence of harm put forward by Ofcom in this area. The intervention was also hugely disproportionate considering the low volumes of calls to these numbers, and the fact that the market for non-geographical calls has been declining for a number of years. The unbundling is not easy for consumers to understand, and the implementation has been very costly.

Mobile broadband speed publication

We believe that there are independent third parties in the market who already provide this type of information, and that Ofcom did not need to publish the information itself. Some of the information published by Ofcom was inaccurate and some of it hard to understand for consumers. Our comments in relation to Ofcom's fixed broadband speeds publications generally apply.

Nuisance calls programme

Ofcom started their programme in 2013, and there is overwhelming evidence of substantial consumer harm in this area. We believe Ofcom (and the ICO) should do more, and that Ofcom's bias against intervention has been wrong in this instance, and that Ofcom should have intervened more firmly, promptly and effectively. There remains scope for Ofcom to do much more in this area. Ofcom can and should apply penalties at maximum levels in this area under its current powers and current Penalty Guidelines. This may in addition be an area for Ofcom to work with Government on in terms of further reforms to its powers to ensure that this leading source of consumer complaints can be better brought under control.