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Ofcom Strategic Review of Digital Communications

Dear Ed,

Thank you for taking the time to meet with our Secretariat and some members at the meeting in May. As discussed, here is a brief outline of the main areas of concern that we have in advance of the forthcoming consultation. We look forward to contributing fully, once the consultation is released and would be happy to meet prior to this if there are any further issues you would like to discuss with the ITSPA membership.

Businesses

Ofcom can often give the impression that it is only focussed on the needs of residential consumers of telecommunications. Whilst ITSPA acknowledge that this is an important area of focus, it cannot be at the expense of the needs of businesses. These two segments' needs often diverge and they cannot be treated as a homogenous group; this is especially relevant now the EU, by virtue of their third recommendation regarding ex-ante markets acknowledge the need to closely regulate high quality connectivity.

Ofcom certainly has discretion in the small business market with less than 10 employees; our position on the inadequacy of this metric to denote size is well known, however, Ofcom would do well to ensure it has the right powers and administrative priorities to secure outcomes for all businesses, especially given current, residential market driven consolidation.

Switching

Consumer outcomes can only be guaranteed if there is a sufficiently liquid market for switching. Ofcom have focussed on ideological elements of this area, such as the merits of gaining and losing provider led and have reached conclusions, however, Ofcom have not engaged in any potential reforms in wholesale mechanisms required to support a liquid market for nearly 10 years.

The main area that our members are concerned about is number portability. For the avoidance of doubt, we are not proposing radical top-down change in this area, merely the intervention of the regulator to prevent many games being played to the detriment of competition and consumer outcomes, such as the apparent inability to port numbers hosted on BT's IP Exchange platform, or Communications Providers stalling the establishment of portability for up to 2 years, process failures in Openreach that cause unlawful suspension of service.

Furthermore, we believe that the transposition of General Condition 18 from the European Directives should be reviewed in light of these issues to ensure it sufficiently represents the will of Parliament in removing such barriers to competition and switching. Finally, this cannot be left to the Office of the Telecommunications Adjudicator's Number Portability Process and Commercial Group which has not proven an effective forum (despite best efforts of the OTA) in resolving the many problems involved.

Performance

Ofcom has now itself acknowledged that the service performance of BT's Openreach division is inadequate; in the last Fixed Access Market Review and in the current Business Connectivity Market Review. Keeping in mind what we say about businesses users above, it is clearly untenable that the lack of investment in providing adequate levels of service to businesses is allowed to continue to defame our brands. Collectively, we do not believe that the structural separation of Openreach cures this; the problems stem from ineffective regulation and incentives on this monopoly asset which need to change to correct the substantial issues regardless of notional "ownership".

Businesses generally demand certainty; be that the certainty of an installation date, right first time or a first time fix and are generally prepared to pay a premium for this. Our members have substantial bodies of evidence demonstrating that Openreach does not meet its current targets, often to the substantial detriment of our end users, and nor, seemingly, does Ofcom take any action to sanction failure. Whilst this latter point may not hold true in fact, it is important to note that it is the perception of the industry that this is the case.

Level Playing Field

Our members wish to compete with each other and former incumbents alike on the merits of their products and services. To that end, it is vital the regulator acts effectively to ensure that a level playing field in the industry is maintained. Unfortunately, in some cases, this is not true. There are a number of historical idiosyncrasies in the regulatory construct that favour the incumbent to the detriment of its competitors. An example include the continuing sanction of 10k block routeing and original range holder routeing which gifts BT supernormal profit and denies our members the ability to recover their efficient costs (e.g. in having to pay an APCC that exceeds the termination rate which naturally favours the former incumbent's retail divisions) or in paying for BT's diversification into pay-TV through a fundamentally flawed cost of capital calculation.

Add to that the long standing debate on net neutrality, which is not yet resolved in Europe and nor does the BSG Code of Conduct have force in law (whilst we note it is a hugely welcome step in the right direction), along with evidence from our members that blocking is still taking place, there is clearly not an environment in which there can be confidence in the investment in innovative and disruptive services.

Finally, we do not believe the mobile market is competitive. It is generally foreclosed to other operators through contractual limitations on over the top services or restricting access to 4G. Despite the claims of various MNOs engaged in consolidation currently, there is a highly restricted wholesale market for MVNOs which needs addressing; we trust our submissions to the CMA provide adequate insight into this matter.

Future proofing regulation

A final comment to consider would be how Ofcom perceive and plan for future market developments. The net neutrality issue is a good example in point where Ofcom have been unwilling to act as they have no current evidence of real consumer harm around blocking of VoIP services. However it is clear

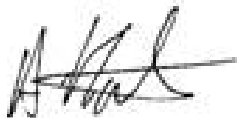
that blocking has taken place and the market is developing in a certain direction. Unless clear and early action is undertaken, mobile operators will try to prevent OTT providers from competing. It is the job of the regulator to foresee these changes and plan accordingly rather than only basing their future policy on current evidence. There are a number of areas where planning and future proofing the regulatory environment would help new entrants to the market and prevent anti-competitive behaviour taking hold. We appreciate this is not necessarily an easy request but would be happy to discuss ways in which we believe the regulator could approach future regulation on various issues that ensure a thriving market is maintained and not stifled by companies with vested interests.

ITSPA is keen to actively participate in discussions that can bring about constructive solutions for some of the difficulties highlighted within current industry processes. In the next stage of the review, once the consultation has been published as anticipated in July, ITSPA will provide a more detailed response which will clearly set out our vision for how Ofcom can continue to effectively regulate the telecoms market.

As always, we are happy to work with you and your colleagues at Ofcom to ensure this review is a success and provides value to the whole communications sector and the consumers it serves.

We look forward to working with you and your team closely in the coming months.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eli Katz', with a long horizontal stroke extending to the right.

Eli Katz
Chair, ITSPA