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To whom it may concern

Hutchinson 3G UK Limited (Three) response to the UK Government's Call for Evidence in Relation to the Balance of Competencies between the UK and the European Commission

This is the response of Three to the Government's Call for Evidence in relation to the European Single Market and the Review of Free Movement and Services, published first in October as part of the Government's Review of the Balance of Competencies between the United Kingdom and the European Union.

Three welcomes this opportunity to participate in this important debate and bring our experience to bear, both as the UK's leading provider of mobile data as well as the most successful challenger communication's company in Europe. Three is part of the Hutchison Whampoa Group of companies, the largest inward investor in the UK. Our response is limited to those questions in the Call for Evidence that are relevant to Three and some more substantial comments about the implementation of European Directives in the UK and across Europe more widely. We hope that this is helpful.

Three believes that the Government's review of the balance of competences is an important piece of work, that if conducted properly, can garner informed views on how, and potentially drive improvements in both the ways in which the European Commission promulgates legislation and Member States implement that legislation.

However, we believe it is potentially misplaced to focus on where competencies should sit as this potentially boils down only to high level arguments on points of principle. The debate instead should focus on the quality and purpose of decision making and whether the impacts of that decision making is beneficial to UK business. We believe that exploring this aspect of the debate in more detail might yield greater benefit.

It seems to us that the balances of competencies is broadly in the right place and provide an appropriate level of checks and balances. We do not believe there are many areas of the market that might benefit from either greater subsidiarity or for the ceding of wider ranging powers to the decision making bodies of the European Union. However, it is our view that there are real advantages to the scale and scope of the single market as well as to consistency in the implementation of legislation. Consistent implementation of pro-competitive legislation is likely the most effective way of delivering improved industry, services and economic growth.

The regulation of the UK and European communications sector

As a communications provider Three is not covered by the terms of the Services Directive but instead by the sector specific directives which together make up the European Electronic Communications Framework. This is intended to deliver for the communications sector the same outcomes around a free, open and competitive market as the Services Directive. In the UK, the Electronic Communications Framework is implemented through the Communications Act 2003 and other amending legislation.

It is without doubt that the UK communications market has benefitted from some of the most forward thinking and pro-competitive legislation and regulation in the world. This is the consequence of both European and domestic legislation that has driven ever greater competition and opened up the communications market to new players. This has benefited consumers and the UK economy, both in terms of the lowest priced and best value mobile telephony in the Europe but also in terms of the continued rollout of new and improved infrastructure. In many respects, the liberal UK approach to the regulation of markets has provided the model for legislation at a European level. This is to be welcomed.¹

However, this does not mean that a change in the current balance of competencies towards the individual Member States would be to the benefit of UK businesses. Rather the approach taken to the implementation of some European Directives by the UK, namely to advance competition and to further the development of fair, competitive and open markets, should be adopted more consistently by the European Commission when promulgating legislation and should provide a model for other Member States when seeking to implement legislation.

If European operators and businesses are to benefit fully from the access to potential markets that Europe can provide, and in so doing, become truly global players, then more needs to be done to further the integration of those markets, improve competition through the removal of anti-competitive bottle necks and incumbent advantages, and ensure a fair and level playing field.

Whilst Three is aware that a politically consistent approach may not always be optimal or indeed practicable for all Member States, Three believes that there is much to be gained both at a European and a national level through the consistent promotion of competition to the benefit of both consumers and business. We recognise that there may well be market failings and inconsistencies in some states that may require distinct remedies but suggest that the promotion of free and fair competition and the removal of anti-competitive bottle necks should be the primary focus of European policy making and the implementation of European Policy at a member State level. We believe that this approach will provide the best outcomes for both Europe's citizens but

¹ Three notes that recent regulatory interventions by the communications regulator, Ofcom, have diverged from this pro-competitive approach. Increasingly, Ofcom has sought to regulate consumer outcomes, particularly in relation to: mid-contract price changes; measures to tackle bill shock; accessible services for disabled consumers; and information to consumers on network performance.

While Three recognises that it is entirely valid for the regulator to consider these issues, these should not come at the expense of decisions necessary to improve competition. It is also questionable whether such interventions are the best means of achieving those outcomes or whether the right correct of intervention was chosen, as they reduce the ability and scope of operators and other providers to differentiate the services they offer and compete with one another.

In many cases these interventions are not light touch and the cost is ultimately borne by the consumer. Three has no doubt that the market could deliver solutions to consumer issues at less cost. Three is clear that were Ofcom to spend greater resource on ensuring a fair, competitive and open market, then many of the consumer issues that it is currently seeking to resolve through regulatory intervention would be addressed through positive differentiation in the market.

also its businesses and think that the UK Government is uniquely placed to drive these objectives forward.

Specific areas for further action at a European and national level

It is Three's view that improving competition across markets should be the prime driver of European economic policy and the focal point of the UK Government's implementation of European Directives. However, addressing restraints on competition no longer appear to have been a priority for legislators in Europe and in the UK. Current proposals in the Draft Regulation for a Consolidated Single Market in Electronic Communications are symptomatic of this trend. These seek to legislate for specific market outcomes, particularly in relation to international roaming charges, that are potentially discriminatory and will ultimately undermine competition.² We believe that were legislators at both European and national level to spend greater resource on ensuring a fair, competitive and open market, then many of the consumer issues that legislators are currently seeking to resolve through regulatory intervention would be addressed through positive differentiation in the market.

Three believes that there are a number of important interventions that remain to be made in the communications market at a European level, if it is to deliver for consumers and business in the UK and across Europe. These are in relation to the deployment of networks, the management of spectrum and the wholesale market that the need to be realised across Europe. Both the Commission and Member States should look to expedite these to create a fairer, competitive and more open market. This will help to create the conditions that European and UK businesses need to flourish. Similarly, action in these areas will enable communication providers to compete more vigorously and effectively with each other, and deliver benefits to consumers

Specifically, The European Commission and Member State Governments should act to encourage more efficient and low cost network deployment through the timely release of future tranches of spectrum at sustainable prices and in a manner that avoids allocations that will undermine long-term competition.

Additionally, the Commission and national Governments must also take meaningful action to further reduce the wholesale costs of roaming, if the benefits of a truly single market in communications are to be realised. This was the intention behind the Second and Third Roaming Regulations and their record has been one of success with real reductions in retail costs delivered across the sector. Current proposals seek to provide for predetermined outcomes that are anti-competitive.

Both the Commission and the UK Government have also identified consumer switching as the one of the key means through which increases in consumer costs can be restrained. However, switching processes differ across Europe and in many markets are chaotic, difficult for consumers to manage and ineffectual. In mobile, most of Europe has adopted a Gainer Led model to the benefit of consumers and competition. This has not been the case in the UK which remains an outlier in Europe and continues to operate a donor led system which results in delay and poor outcomes for the consumer.

The Commission and national Governments will only succeed in promoting effective competition if consumers can switch from one communication provider to another without the undue hassle

² We support the policy outcome, but believe it is best arrived at through market competition – see Three's recent launch of free roaming across a range of EU and non-EU countries. Mandating a competitive outcome removes competition and undermines incentives to invest and innovate in services: Three's bold market leading proposition will lose its edge. To the extent roaming regulation is required to achieve the policy outcome, it should focus on wholesale inputs to support retail innovation.

and delay. Until this happens, consumers will still face unnecessary barriers when trying to move between providers and real competition in the market will continue to be impeded.

A level playing field in future

Legislators in Europe and at national government level have also not done enough to ensure that the competitive playing field across markets and particularly in the communications market is truly fair. Again, this is to do with the nature and quality of legislation and implementation, rather than the competency or degree of subsidiarity. We believe that there is a real role for the UK Government in ensuring that European legislation promotes fair competition.

Specifically, legislators need to look at the burden across service providers to ensure that UK and European businesses are well placed to compete globally.

Regulation across Europe has historically assumed the vertical integration of communication provision. However, increasingly this regulatory assumption has been overtaken by growing differentiation between network and service level competition. The consequence of this is many service providers, particularly Over The Top providers, are not bound by UK or European regulation, despite providing services that, in many cases, are identical to the consumers as those provided by traditional network operators. By contrast, network operators bear regulatory burdens in excess of those carried by their service only counterparts. This undermines the ability of network operators to innovate and compete in the long term.

Whilst we welcome the disruptive innovation that such services may bring, the distortion to competition caused by differing levels of regulation is less healthy. So too, the current and growing disparity in consumer protection which will ultimately lead to consumer harm and detriment.

We therefore urge policy makers to give thought to the market paradox that such development has caused. Both the UK Government, its counterparts across Europe, and the European commission needs to finally grapple with the regulation of aspects of service, and particularly, Over The Top provision, not only to keep consumers safe from harm but also to promote healthy, open and fair competition. Action in this area is increasingly necessary if policy makers are to ensure the viability of the European communications market in future.

Responses to specific questions raised in the Review of competencies Call for inputs.

To what extent do you think EU action on the free movement of services helps or hinders UK businesses?

Three believes that action on the free movement of services has broadly helped UK businesses and is good overall for the UK economy. They have opened up new markets to and expanded customer bases while introducing greater competition to the UK market. In the long term this can only be good for UK businesses.

Three believes that further action could be usefully undertaken at an EU level to further reduce barriers to the provision to the free movement of services. In the communications sector this means further action to reduce barriers to entry, as well as barriers to the low cost roll out of infrastructure improvements and new services. It also means measures to improve competition, such as removing obstacles to consumer switching.

Greater liberalisation at a national level is welcome as this helps improve the competitive dynamics of the market to the benefit of business and consumers. However, if this is not matched with action at a European level then it is only of limited value.

How well or otherwise have the EU's mechanisms for delivering the free movement of services worked?

Three believes that the EU's mechanisms for delivering free movement of services have worked well. This does not mean that there is no substantial scope for improvement (or that Member States might on occasion be in a better position to affect action to facilitate the free movement of services themselves) but that European mechanisms for delivering the free movement of services have been broadly effective and delivered for consumers and business in the UK. We doubt that the UK government would have been able to deliver the same outcomes in isolation.

As noted, in the communications sector, the free movement of services has been provided for by the Electronic Communications Framework. This series of Directives implemented in two tranches, first in 2003 and then revised 2011 to take account of technological and market change, has driven the liberalisation of the sector. It has brought improved consistency to the regulation of communications services across Europe and removed a number of competitive bottlenecks around access and wholesale cost. Further, it has sought, with some success, to remove incumbent advantage and ensure consistency of consumer protection in Member States.

Perhaps most importantly, the Electronic Communications Framework has opened up the wider European market to increasingly open competition and has enabled the entry into the market and growth of challenger successful operators, like Three, to the benefit of consumers and the UK and European economies. It is highly unlikely that similar action at Member State level could have brought this level of advantage at the wider European level. This can only come through consistent and determined action to promote competition and open and fair markets at an EU level. At a domestic level, despite the overarching pro-market approach pursued by the UK Government, there are pro-competitive interventions that still need to be made to reduce wholesale costs to ensure the future health and dynamism of the communications market.

Do you think the UK's ability to effectively regulate cross-border provision of services would be better, worse or broadly the same as the result of more or less EU action?

Three believes that the UK ability to regulate cross border provision of services is broadly governed by the extent of EU action in this area. Three believes that there is more that can be done at a European level to remove anomalies that still exist within the single market and act as barriers to the free movement of services. These include archaic practices on the part of some national regulators in the communications field, often to the benefit of incumbent operators, to the more prosaic differences in customs procedures, which prevent operators in Europe from realising the full benefit of economies in that a single market should bring.

Three is not clear how the UK's ability to effectively regulate cross border provision of services could be improved through less action at an EU level, as the UK would be unlikely to be able to effect the changes needed to improve the effectiveness of the regulation of cross border provision of services in Europe and beyond. Indeed, Three suggests that the ability of the UK to regulate cross border provision of services is directly to its position in Europe. Three is not convinced that UK-led bilateral and multi-lateral treaties would deliver the same outcomes for consumers or business.

Is there a case for more EU action to ensure that assessments for proportionality and necessity are more consistently interpreted? Or should the competence to assess these remain with Member States?

Three believes that is a clear case for the more consistent assessment of proportionality and necessity of policy measures both at European level and also in the UK across Member States.

Assessments of the proportionality and necessity of legislative measures vary significantly in quality and impact across Member States, leading to differences in implementation which must be accounted for at cost by businesses operating in more than one Member State. Recent examples of such inconsistent practice can be seen in the assessment and implementation of recent changes to provision in the e-Privacy directive on Cookies. This has led to a patchwork of ineffective and inconsistent regulation across the EU. This is not good for business or for consumers.

Three believes that recent Government innovations in the UK around one in one out regulation, as well as the introduction of impact assessments that are more clearly rooted in economic evidence as well as their assessment by the independent Governmental bodies in Whitehall (the RRC and RPC), have led to improvements in the overall quality of economic regulation and some other economic policy in the UK. However, the impact of these developments is not uniform. Further, there is some evidence to suggest that these bodies can act as a brake on development and reform, as they do not allow for the advancement of change in some arenas (Please see Three's submissions to the Department for Business on the need for change to regulatory appeal processes brought under the Communications Act 2003).

At a European level the quality of assessment as well as the consistency of approach can leave much to be desired. The Commission's recent impact assessments underpinning the Draft Regulation for a Consolidated Single Market for Electronic Communications were inadequate, poorly thought through and largely unevidenced.³ This is clearly both inappropriate and insufficient for a sector worth over £90bn per year to the UK economy and was criticised as such by BEREC, the Body of European regulators of Electronic Communications. However, this criticism has not given cause the Commission to revisit its proposals.

Economic policy making on such a basis is clearly not acceptable and will likely lead to detrimental outcomes and unnecessary distort the development of the market. Fortunately, such insufficient process is almost unimaginable in the UK, where interventions by the RPC and RRC have resulted in ill-considered policy being red flagged and reconsidered by the appropriate Government Department.

There are clearly lessons from the British experience particularly around the assessment of the proportionality of legislative measures that could be well applied at a European level but this does not mean there is a need for greater subsidiarity in this area, rather better processes at the Commission.

What do you see as the advantages and disadvantages of EU action on the mutual recognition of professional qualifications?

Three's business requirements require a high skill workforce across a range of skill bases. These include engineering and ICT expertise, as well as softer skills including retail and marketing. Our UK workforce is drawn from across Europe and from across the globe. Similarly, Three's sister

³ Please see: http://berec.europa.eu/eng/news_consultations/whats_new/1673-berec-views-on-the-proposal-for-a-regulation-laying-down-measures-to-complete-the-european-single-market-for-electronic-communications-and-to-achieve-a-connected-continent

operations elsewhere in Europe make use of high skilled labour to provide essential, business critical services. For Three, a clearly understood system for the mutual recognition of professional qualifications is therefore of great importance. EU action on the mutual recognition has worked well, although there is scope for greater efficiency and flexibility. However, it is not clear how this might be improved through more action at a nation state level without the loss of the advantages that exist under the current system and we would not be supportive of greater action at Member State rather than EU level.

Conclusions

Three believes that it is important that the Government subjects the quality and consistency of European legislation to rigorous scrutiny, and seeks to drive improvements both at EU level as well as closer to home. This can only improve the function of the single market and the free movement of services. With regard to the issues raised in this submission, Three makes the following concluding observations:

- The balance of competencies is broadly in the right place.
- UK businesses benefit substantively from access to the single European market. They would benefit further from more action at an EU level to remove competitive bottlenecks and barriers to open and fair competition across the single market. It is not clear how action at Member State level might effectively address market issues at a Europe-wide level.
- There are also competitive bottlenecks in the domestic UK market and the UK Government should not shy from addressing these, if the UK is to maintain its competitive advantages
- More pressing is the need to address the consistent implementation of EU Directives and regulations both at a Member State and EU level. Currently, a patchwork of implementation distorts competition, harms growth and hampers the development of players capable of competing at a global level.
- The promotion of competition and measures to ensure open, free and fair markets across the single market should be the primary focus of EU directives and regulation. Where the EU and domestic Governments have focused down on delivering true competition in markets, those markets have succeeded.

We hope that this submission is helpful. We would of course be happy to discuss any of the matters raised further if that would be of assistance.

Yours sincerely

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