16 September 2009

Mostly Mobile response

T-Mobile welcomes the opportunity to respond to Ofcom's consultation "Mostly Mobile."

Executive Summary

Ofcom has quite rightly noted in this consultation that the UK mobile sector is very competitive. As a result of this and in order to comply with their stated principle to act 'with a bias against intervention', T-Mobile believes that Ofcom needs to give serious consideration to the question of what scope there is for deregulation in this sector. T-Mobile is very disappointed that Ofcom has not taken the opportunity offered through this MSA process to present any proposals for deregulation. T-Mobile believes that in a mature mobile market like the UK, competition would deliver better results than those that can be achieved through regulation.

T-Mobile believes that most of the current sector-specific regulation is unnecessary and only acts to divert limited resources from more productive uses. This hinders innovation, stifles the market and ultimately results in consumer harm. In this difficult economic period, when all operators are engaged in extensive cost cutting, this additional regulatory burden is a significant hindrance to growth of the sector. It is in the interests of the consumer that the regulatory environment is conducive to long-term sustainable investment and it is a pressing need that Ofcom adapt its approach to the market in order to recognise this.

Another major reason why significant deregulation is necessary for MNOs is because there are significant discrepancies with regards to the regulatory burden imposed on them when compared to that of the other players in the ever-expanding mobile industry. There has been an influx of over-the-top competition recently through international companies such as Apple and Google, as well as many other entrants. Sector specific regulation focuses on the operators of infrastructure and their retail arms, as a consequence of which these new major players in the mobile sector often end up having an artificial competitive advantage as a result of the different regulatory requirements that they face. If Ofcom is serious about promoting innovation in the mobile sector, then it needs to set-up a level regulatory playing field so that all can compete freely.

It follows that T-Mobile considers that Ofcom should adopt the twin aims of (i) deregulating the sector (generally – but with a particular focus on withdrawing sector specific regulation in the retail environment); and (ii) enforcing existing general consumer law consistently as regards all providers of services to end users.

As T-Mobile mentioned in our response to the first MSA consultation, we think that there is significant risk in Ofcom attempting to develop today's regulatory policy on the basis of what it thinks the mobile sector may look like in the future. Therefore whilst we agree with some of the trends identified by Ofcom, we would be extremely worried if these become the basis for any regulation. This is because they could very easily end up being wrong and any pre-emptive regulation could harm competition. Instead of attempting to foretell the future, Ofcom should use its powers to ensure that regulation can be applied promptly if there is compelling evidence of market failure and harm to consumers.

T-Mobile agrees with Ofcom that there is no basis for either a market review of the overall mobile sector or the imposition of any wholesale access conditions. The number and variety of MVNOs and service providers that exist in the UK shows that wholesale access requirements are not necessary. Over recent years there has been an upsurge in the number of new MVNOs in the UK market as well as an increased range of differing wholesale agreements. This demonstrates that the wholesale market is working effectively and no access requirements are necessary.

Ofcom have identified certain features of the market that could potentially limit competition. T-Mobile does not believe that these will be an issue going forward as competition itself should rectify any problems. Ofcom mention product complexity as one of these issues. However T-Mobile suggests that this issue in fact shows how competitive the market is. Historically T-Mobile has attempted to offer products to cater for very specific customer segments. This bespoke service was felt to be necessary due to the extensive competition in the market. Now competition is instead driving us to simplify our product offerings. Regulation is not necessary in this area to achieve any consumer goals and indeed would be counter-productive as it would ossify an otherwise dynamic competitive market that responds to customers' needs. Ofcom also mentions that some new entrants have on occasions faced delays in entering the market. In our experience, these delays are invariably the result of uncertainty due to different operators facing different regulatory requirements. They are not the result of a competition issue with the market.

T-Mobile agrees that the spectrum holdings of each operator will significantly impact on the levels of competition in the market in the future. T-Mobile has consistently argued for redistribution of 900 MHz spectrum from the two incumbent holders to all the national mobile operators. We continue to argue for this and are extremely wary of the results of the long-term impacts of any 'solution' which would perpetuate this historical imbalance (which is out of line with the spectrum holdings of the rest of Europe).

The Digital Britain process has endorsed Network Sharing as a necessary component to ensure that coverage can be extended at an efficient cost level. T-Mobile agrees that this is necessary and does not think that network sharing per se will lead to a reduction of competition at the retail level. Ofcom's proposed facilitation role will play a major role in extending coverage to 'not-spots' and is something that we have been arguing in favour of for some time. T-Mobile believes that mere technology has ceased to be the differentiator it once was. It is the products and services we market that differentiate us and not technology. This will be even more prevalent in the future given the extensive coverage requirements that we all will be fulfilling.

One potential competition issue that we do think Ofcom may need to consider is the prevalence of exclusive deals for handsets with unique operating platforms (such as Apple's iPhone). We believe that operators' major responsibilities involve selling airtime and services, and not handsets. The risk that is implicit with exclusivity deals like that between Apple and O2 is that consumers, and consequently operators, give more precedent to what handset is available on what network, than the actual services developed. This will impact on competition for these mobile services.

We believe that in a fiercely competitive market such as the UK mobile market consumers' interests are sufficiently protected by general consumer law and the functioning of an efficient market so there is no need to regulate directly unless there is clear evidence of consumer harm. Ofcom should be encouraging self and co--regulatory initiatives rather than formal General Conditions which impose unnecessary and inflexible burdens on industry.

In relation to child protection issues the mobile operators have actively participated in a range of effective self regulatory initiatives. We are pleased that Ofcom's research this month has confirmed that there is no evidence of children and young people obtaining inappropriate content via their mobile network.

We strongly believe there is no reason to treat content accessed from mobile phones differently to content accessed from fixed computers. The notion that all parents supervise their children's internet access at home is no longer valid. Education is vital and parents must engage in talking to their children about the types of sites they are happy for their children to access whatever device they are using. The issue of privacy with location services has been addressed by a Code approved by the Home Office and the children's charities and there is no evidence of serious concerns amongst the Police that criminal investigations are being prejudiced due to the lack of PAYG registration.

As content is increasingly accessed from outside operators' portals the responsibility of child protection must extend to all providers in the value chain. Location services based on GPS and WLAN hotspots offer more accurate mapping than services using mobile network cell ID, yet these location providers remain unregulated. Furthermore providers of social networking and interactive services could provide users with more transparency of the safeguards available, moderation policies in place and agreed notice and take down times for complaints.

Q2.1 Do you agree with our principles for mobile regulation?

In summary, T-Mobile:

- considers that the proposed principles specifically for mobile regulation are simplistic and unnecessary and do not add anything to Ofcom's existing general regulatory principles;
- is concerned that Ofcom continues to demonstrate a bias towards regulation, and does not adhere adequately to its stated aim of intervening only where necessary, and in a proportionate manner;
- is disappointed that Ofcom's review of the mobile market and its regulation does not adequately consider the scope for de-regulation, or a greater emphasis on the enforcement of existing rules rather than the enactment of additional regulation;
- considers that Ofcom focuses unduly on regulating the five mobile networks, and overlooks that they compete with a large number of unregulated companies (and that any inconsistency in regulation itself distorts competition).

Need for mobile specific principles

T-Mobile is unclear that the three principles for mobile regulation are more appropriate than Ofcom's currently stated Regulatory Principles, which appear to provide more detailed and thorough guidance on Ofcom's approach. T-Mobile does not consider that mobile specific principles are necessary, or that any specialist principles are useful if they do not address points of difference with the general principles: if Ofcom considers that mobile-specific duties are required then these must be on the basis of, and address, mobile specific issues. Ofcom's proposed principles are unnecessary, simplistic and add nothing to its existing general regulatory principles.

T-Mobile hopes that Ofcom will continue to abide by its published regulatory principles, in particular that it will:

- intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve;
- operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required;
- strive to ensure its interventions will be evidence-based, proportionate, consistent, accountable and transparent in both deliberation and outcome: and
- prefer the enforcement of existing rules and regulations over the introduction of new;
- allow scope and time for self and co-regulatory mechanisms to prove themselves before intervening;
- always seek the least intrusive regulatory mechanisms to achieve its policy objectives; and
- include sunset or review clauses in its formal regulation in order to ensure a closer review of the regulatory burden.

In following and applying these principles T-Mobile believes that, going forwards, Ofcom ought to be able to ensure that the focus of any regulation of the mobile sector is narrowed to those areas (if any) where there is cogent and compelling evidence of market failure and harm to consumers. It would be extremely disappointing to the mobile industry, and the stakeholders of Digital Britain as a whole, if a rapidly evolving market is stifled by unnecessary and inappropriate regulation.

Consistency of principles and approach

Second, T-Mobile considers that Ofcom's approach to regulation of the mobile sector is in any event inconsistent with both its current general regulatory principles, and its proposed mobile-specific principles. Despite "a bias against intervention", "using markets where we can"; and further principles of using the least intrusive, evidence based, and proportionate interventions, Ofcom regularly demonstrates a tendency to intervene in a fashion inconsistent with each of these. Ofcom's purpose as a regulator is not to create regulation, but rather to ensure that the market works and to intervene in areas where it does not. Ofcom appears eager to regulate in the absence of evidence of market failure, and in a manner that is neither proportionate nor the least intrusive available. Ofcom's intervention to address mis-selling is a notable example (and is addressed further later).

T-Mobile therefore welcomes Ofcom's restatement of the primary importance of market mechanisms "using markets where we can", but would encourage Ofcom to place greater emphasis on its actual approach than to rephrasing existing principles that appear not to influence it sufficiently in any event.

Regulating markets that have not failed, and overlooking deregulation and enforcement

Third, and most importantly, T-Mobile is concerned that the proposed principles for mobile regulation are in any event inconsistent and that Ofcom is moving to increase regulation rather than allowing the market to act as the main driver for change.

Ofcom recognises that the driving force behind the success and importance of mobile communications in the UK has been competition. The UK mobile sector is the most competitive in Europe, and consumers have greatly benefited as a result. However, Ofcom's third principle, and its recent approach, suggest that Ofcom is moving to increase rather than reduce regulation, and that it sees the market as producing an increasing number of issues which require regulatory intervention, despite evidence to date of the success of market forces, and an absence of evidence that these are newly failing. Ofcom's mindset appears to be moving towards one significantly more cynical of the market and inclined instead to nanny consumers. For example, competition in the market has resulted in tremendous tariff innovation and choice, which would ordinarily be perceived as a positive market feature. Nevertheless, Ofcom appears minded to intervene to address this supposed 'failure', on the basis that it is difficult for customers to make such a rational choice.

In the context of a fiercely competitive market, T-Mobile believes that Ofcom should place a much greater emphasis on deregulation of the mobile sector. At the beginning of this Mobile Sector Assessment process, the fourth primary question mooted by Ofcom was *"What is the scope for deregulation, competition and innovation in the mobile sector?"* In a bilateral briefing with Ofcom in August 2008, T-Mobile were told that whilst Ofcom's first three questions would be dealt with in the first MSA consultation, this deregulation issue would be addressed later in the MSA process. Indeed our response to the first MSA consultation indicated that we fully expected the potential scope for deregulation to be dealt with later by Ofcom. We said in our consultation response:

> "This general question has not been dealt with by Ofcom as part of this MSA consultation, which makes it particularly difficult to respond to. T-Mobile accordingly will reserve its right to deal with this question about the scope for deregulation, competition and innovation in the mobile sector until the second phase of the consultation

beyond making the general comment that in the light of the level of competition in the market we do see considerable scope for deregulation and would urge Ofcom to seize this opportunity to demonstrate its faith in competition."[1]

We reiterate our general comment that we see considerable scope for deregulation in the mobile sector. It is disappointing that no serious thought appears to have been given by Ofcom to this significant issue at all in this second consultation document. It is notable that the word "deregulation" does not even appear in the text of the main body of this consultation.[2] By contrast, Ofcom's proposed strategic principles for regulation include "widening the focus of regulation." We think that Ofcom need to address this question in the necessary detail and address head-on where, in these difficult times for the mobile industry, there is scope for deregulation. According to Ofcom's published Regulatory Principles[3], Ofcom states that it will only intervene where there is a specific statutory duty to work towards a public policy goal which markets alone cannot achieve, and it will operate with a bias against intervention. In order to comply with those principles, Ofcom must, as a matter of course, consider on a regular basis the scope for deregulation and prepare a plan for the phased withdrawal of ex ante regulation. Unnecessary or excessive regulation can undermine or distort investment incentives and harms competition and consumers.

At its core, the mobile sector is primarily a retail business sector, similar in many ways to other retail sectors which have no industry-specific regulation. Competition and market forces work well in the mobile sector to deliver the best solution for consumers. Indeed the companies that are succeeding in these troubling times are those that put customer satisfaction at the forefront of their thinking. As Ofcom have noted in this consultation, service competition is becoming more important in the mobile industry.[4] Indeed operators can only succeed in the UK mobile industry if they ensure that consumer needs come first – regulation is unnecessary to achieve this aim and may in fact hinder its achievement by diverting limited resources and creating a homogeneous marketplace by fixing the parameters of competition.

More generally, Ofcom must not lose sight of the fact that regulation, both good and bad, always creates costs. The existence of so much industry-specific regulation in the mobile sector creates additional costs and burdens for mobile operators in a difficult period. At a time when almost all operators are involved in significant cost-cutting programmes, already stretched resources are being sidetracked to deal with regulatory requirements rather than essential revenue-generating tasks. In its interim group management report for Q1 2009, Deutsche Telekom announced a €1.8bn impairment of goodwill at T-Mobile UK and noted that *"Regulatory decisions and fierce competition also impacted revenue at T-Mobile UK in the first quarter of 2009."*[5] Thus, the extensive and rigorous regulatory environment in the UK has already been identified as a potential reason to channel future investment in the mobile sector into other countries in preference to the UK. Future regulatory decisions by Ofcom can also be expected to have far-reaching impacts on the UK mobile industry. In this regard, it is worth noting the Government's recent proposals to give Ofcom an additional statutory duty to promote efficient investment in communications infrastructure.

The risk of over-regulation is that the equilibrium balance of return and reinvestment is distorted, inhibiting investment in the new technologies that will continue to provide economic growth. The mobile industry already has a lower Return on Capital Employed (ROCE) than most comparable industries and a further decline in returns would threaten the

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[1] T-Mobile, response to MSA I, 20 November 2008, p24

[2] Indeed it is only mentioned in the annexes when describing the deregulation scenario in the "Mobile Voice Call Termination" consultation and describing the responses to the first consultation.

[3] http://www.ofcom.org.uk/about/sdrp/

[4] Consultation, 1.21

[5] See http://www.download-telekom.de/dt/StaticPage/65/61/68/090507_DTAG_2009_Q1_report.pdf_656168.pdf at page 22.

investment needed to ensure a high quality mobile network infrastructure is maintained into the future.

Regulating some market players but not others distorts competition

A crucial issue that Ofcom needs to address, when taking into consideration the appropriateness of regulation, is the fact that the UK mobile industry no longer comprises just the five mobile network operators. The sector now includes a number of other major players in the mobile industry, including:

- Virtual mobile operators, such as Virgin Mobile, Tesco Mobile etc.
- Independent distributors and suppliers such as Carphone Warehouse and Phones4U;
- New Network Operators such as C&W, utilising the DECT guard-band spectrum;
- New Wi-Fi and VoIP operators such as Skype and Vonage;
- Device manufacturers such as Apple and Nokia;
- Content providers and aggregators such as Sky, the BBC and Saffron Digital; and
- Applications providers such as Apple and Google.

As the mobile sector is evolving rapidly, T-Mobile, along with the other four MNOs, has to interact and/or compete with all of these players in a crowded marketplace. T-Mobile welcomes new technologies and new entrants, all of which add to the vibrancy of this sector, one of the most dynamic sectors of the economy. However, while competition on the merits is to be encouraged, it must on a level playing field. Fair competition is not possible in a market where some players are subject to strict regulation whilst others are left free and unrestrained. In effect, the original five mobile network operators are attempting to compete with newer entrants with one hand tied behind their backs.

For example, currently new entrants' termination rates are not subject to a regulatory price control. Those operators therefore have the opportunity and the incentive to charge termination rates above their efficient costs, and to cross-subsidise their retail services. T-Mobile submits that permitting termination rates above efficient costs for some network operators, whilst regulating others, breaches Ofcom's statutory duty not to discriminate between communications services or networks or the means by which these are made available (and also breaches the fourth Community requirement[6]). It should not be for existing operators to bear the costs of new entry by other firms nor to cross-subsidise their competing retail offers; as this distorts efficient competition in the mobile market.

Ofcom have noted in this consultation that mobile operators are coming under increasing pressure as device manufacturers and application providers seek direct customer relationships.[7] Mobile Operators have no control over this process and cannot control what a mobile phone is being used for. However application providers, together with other major internet content providers, are left to operate completely unregulated. A major area of current development is applications that are based on location based services (e.g. Google Maps). However given privacy concerns that MNOs are required to account for, it is impossible for T-Mobile to develop a comparative service. As a result, over the top competitors are able to offer a wider range of services at prices that undercut the more limited services which the network operators (with whom they notionally compete) are able to offer.

[6] The fourth Community requirement is a requirement to take account of the desirability of Ofcom carrying out their functions in a manner which, so far as practicable, does not favour:—
(a) one form of electronic communications network, electronic communications service or associated facility; or
(b) one means of providing or making available such a network, service or facility, over another.

[7] Consultation, paragraph 3.5

There have been numerous perceived problems in recent years concerning customer protection through sales with independent retailers. However as Ofcom considers that they are unable to regulate these sellers directly, attempts to curtail these problems have been addressed by imposing further regulation on the network operators. Therefore resources are not only needed by mobile operators to ensure that their service offerings comply with every sector-specific regulation; they are also needed to police the independent distributors who compete with them in providing services to the consumers. This is a wholly unsatisfactory approach. If a problem is identified with a particular element of the mobile sector supply chain, any regulatory intervention should directly address the root cause of the problem, and not indirectly regulate by relying on the mobile network operators to police independent third parties, simple on the basis that they also have a wholesale relationship. This is not only unfair on network operators, but is wasteful of scarce resources and distorts competition in a complex, multi-layered sector as the costs of regulation are disproportionately born by the network operators. Ofcom needs to adopt a more holistic approach that deals fairly with all players in the market and does not attempt to regulate the entire market by proxy through the mobile network operators.

In addition to the examples listed above, there is other regulation that primarily falls on the established mobile operators and not directly on the other players in the mobile sector (e.g. the regulation of premium rate services). Extensive regulation on only some players and no regulation (or only indirect regulation) on others is highly discriminatory and prevents the more heavily regulated businesses from competing effectively. Ofcom appears to believe that it is not in their power to regulate certain players in this sector. If that is the case, then surely Ofcom needs to think carefully about the appropriateness of regulating *any* players in the sector, given the risk of competitive distortion. Also, bearing in mind the fast moving nature of the mobile sector, Ofcom needs to consider the urgent need to narrow their focus of regulation, as opposed to widening it. As noted above, the primary question raised earlier on in this MSA process, to consider the scope for deregulation, has been left unanswered.

Q 3.1: Are there any additional sector trends that we should consider in our analysis?

T-Mobile:

- remains concerned that Ofcom should not attempt to set regulation in anticipation since this would (i) distort the course of market development and hinder innovation; (ii) de facto create regulation in the absence of evidence of market failure; and (iii) clearly be inconsistent with its aim to be an evidence based regulator;
- considers that the trends support the conclusion that a formal regulation should be only be adopted with caution and that self and co-regulation are better suited to the regulation of a rapidly evolving market;
- has some observation on the trends identified; and
- would suggest some additional issues are not addressed by Ofcom.

First, T-Mobile agrees with Ofcom that there is a high level of uncertainty when looking at the potential evolution of the mobile market in the UK. As discussed in its response to the 1st Mobile Sector Assessment Consultation, T-Mobile is keen to ensure that regulatory policy minimises the risk of unintended distortions to the evolutionary path.

T-Mobile therefore acknowledges the additional analysis and thinking undertaken by Ofcom since the 1st MSA Consultation, but reiterates its concern that Ofcom is seeking to develop regulatory policy today on the basis of expectations of what markets *might* look like several years in the future. While the identification of market trends is important to remaining well informed about the issues for consumers and stakeholders, Ofcom must not be tempted to shape the regulation it adopts in anticipation of (i) actual developments, and (ii) the development of possible market failures requiring regulation or enforcement action.

In each case, the trends identified by Ofcom evidence the fact that the market, and the services and technologies that underpin it, is rapidly evolving. Nevertheless, Ofcom fails to make clear the obvious conclusion that should be drawn from this, which is that the trends support a cautious approach to regulation, which is by its nature backward looking (as it should only be imposed where a problem has arisen) and fixed (new regulations are rarely imposed for a fixed period, or removed once their initial cause has been removed).

The trends therefore support a conclusion that Ofcom should focus on de-regulation and a move towards self and co-regulation, each of which are better suited to a rapidly evolving market. Moreover, the trends reinforce the conclusion that the market is moving towards the provision of service based retail competition and that there must be a move from sector specific regulation towards the enforcements of general consumer regulation.

Second, T-Mobile agrees that the trends identified by Ofcom in Section 3 will be important determinants of the future direction of the mobile industry in the UK (and are discussed in more detail below), but does not agree that Ofcom's analysis and assertions warrant such clear-cut conclusions.

Trend 1: Mobile voice likely to remain the majority source of revenue for mobile operators in the short to medium term

Across the UK mobile industry, voice revenue accounted for around 70% of mobile operator revenue in Q2 2009. However, this was down 4% YOY from 74% in Q2 2008[8]: voice revenue is not simply declining, but is doing so rapidly.

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[8] From operator reported results

Moreover, this rate of decline is likely to accelerate in the next 12 months, and thereafter: aggressive price competition across both contract (SIM-only) and prepay (segment-focussed MVNOs), mandated reductions in termination rates, and the impact of unlimited SMS offerings are likely to depress voice revenues further and further.

VoIP will further erode voice revenues, with an increasing proportion of consumers on unlimited data plans and the widespread availability of Wi-Fi enabled handsets (iPhone, G1, Nokia N97) putting further downward pressure on mobile operator voice revenues in the short to medium term. Skype's iPhone client has achieved 10% penetration of the installed handset base since its launch in April, with over 4m downloads to date, 1m of which were over the first weekend. Skype's new owner Silver Lake, has cited mobile as a major growth opportunity for VoIP, and one of the key reasons it was prepared to pay a premium to acquire Skype from eBay. With Google also looking to roll-out a software-based voice communications client in the next few months, mobile operator voice revenue is likely to come under increasing pressure moving forward.

Trend 2: Mobile data services will continue to grow rapidly

There has been a de-coupling of revenue from traffic growth as the price of data falls and operators become increasingly bypassed from the emerging mobile services value chain. Whilst it is true that customer adoption of mobile data services has increased rapidly over the past 18 months, increasing data usage and data customer acquisition will not necessarily replace declining voice revenues.

Operators have benefited from the increased demand for mobile connectivity but have struggled to replicate this success in value added services. [✂].

Whilst stimulating overall demand for mobile data services, the rapid emergence of manufacturer based application stores is putting further downward pressure on mobile operator data revenues. Applications can now be delivered direct to the mobile handset; bypassing operator controls for both content and payment (Apple uses its own payment service via iTunes).

Mobile broadband growth is also likely to slow in the short-term as investments in fixed network infrastructure (BT FTTC and Virgin Media DOCSIS3.0) enhance fixed network speed and capacity and make mobile connectivity less attractive relative to fixed.

Trend 3: Mobile content and applications will become internet based

T-Mobile agrees with Ofcom's observations regarding the increasing importance of Internet based services, which are already playing a major role in the evolution of the mobile content and applications market, with fixed internet services increasingly available on the mobile device.[9]

With the latest generation of devices delivering seamless integration of Internet based services and downloaded applications into the handset user interface, operators could very quickly be relegated to providing simple connectivity services and little else. These Internet based applications and services will allow the major online brands to bypass mobile operators and offer services directly to the end user. The traditional argument has been that Internet brands will need to work with local mobile operators in order to create compelling national services for end users, but increasingly Internet brands are building technology solutions that

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[9] Facebook for example, has over 2m UK mobile users, representing over 10% of its UK active user base.

eliminate the need for an operator relationship (e.g. the Google database of cell locations bypassing the need to use operator locations feeds to pinpoint customer locations).

Furthermore, many of the mobile services offered by global Internet brands are becoming a substitute to existing mobile operator services and could further cannibalise operator revenue (e.g. Twitter updates online replacing SMS usage). Furthermore, global internet brands acknowledge the importance of the mobile screen as the next major growth opportunity, particularly in the area of customer insight. The mobile device offers a uniquely valuable mechanism to capture customer data than can then be monetised via targeted advertising. Over time, internet brands could use this advertising revenue stream to subsidise service offerings, including basic voice and text services.

The important conclusion which must be drawn from these observations (which is missing in Ofcom's document) is that regulation of the market must change significantly if mobile operators are not to be placed at a considerable disadvantage when attempting to compete with these unregulated "new entrants". While Internet based services are becoming an important means of communication between subscribers, these are not regulated at a retail level by Ofcom, whereas the mobile operators are subject to a plethora of regulations regarding their own retail services. Ofcom must therefore consider deregulating the retail market and concentrating on wholesale regulation, and/or ensure that any retail regulation does not place traditional operators at a disadvantage. The clearest way to do this is to move towards the enforcement of general consumer regulation.

Trend 4: mobile networks will become Next Generation Networks (NGNs)

Ofcom is right to observe that networks will move to NGN technology and their importance to Internet based services. However, Ofcom does not appear to recognise that in order for these benefits to accrue to consumers, companies will have to make significant investments, which will be contingent on the ability of mobile operators to generate a reasonable rate of return on their investment.

The UK is currently the least profitable major market in Europe, with the UK mobile subsidiaries of all of the major groups struggling to cover the cost of capital employed. In the post-financial crisis, credit constrained world, the UK offers the least attractive risk-reward profile for NGN investment in Europe, and this is likely to adversely impact the timing and scale of operator investment in next generation infrastructure.

Operators will look to mitigate risk where possible, and this is likely to encourage further RAN sharing in the UK. **[✂]**.

Trend 5: prospects for fixed-mobile convergence are growing

The blurring of boundaries between fixed and mobile services is largely being driven at the software and applications layer, with major brands replicating the fixed service experience on the mobile device. Developments in the fixed internet will increasingly create new opportunities in the mobile services space.

A key emerging trend in FMC is the growth of cloud-based storage and applications - customers will be able to access content and services from any internet enabled device, stimulating demand for always-on connectivity. As such, developments in the fixed Internet will increasingly create new opportunities in the mobile services space.

Furthermore, with the majority of smart phones being Wi-Fi enabled and with the connectivity being controlled by the device and end user, there is a risk that fixed operators could cherry-pick traffic in busy areas, leveraging the capacity and cost advantage of fixed infrastructure compared to mobile. The accelerated roll-out of Wi-Fi hotspots by BT in the UK (500k public hotspots at June 2009) could have a detrimental impact on mobile operator revenues, with customers substituting mobile broadband for Wi-Fi as coverage and capacity improves.

T-Mobile Trends

The 5 main trends identified by Ofcom capture many of the key issues likely to influence the development of the mobile industry in the next 5 to 10 years. The list is not exhaustive however, and T-Mobile has identified several other trends that are not directly considered in Ofcom's analysis that will influence mobile industry evolution in the medium to long term.

(A) New Revenue Streams and Business Models

Ofcom's analysis does not explicitly discuss the emergence of new revenue streams and business models – with growth in traditional telecoms services slowing, mobile operators are looking to leverage existing customer relationships to move into adjacent, complimentary markets.

UK operators are already looking beyond traditional voice and data services, moving into new opportunity areas such as:

- payments - O2 Payment Card;
- advertising - Orange acquisition of Unanimis, the largest digital only UK ad agency;
- ticketing - O2 NFC trial with TFL; and
- traffic information - Vodafone and TomTom.

Over time, the diversification of activity is likely to accelerate as operators seek to enhance customer relationships and tenure. New business models will emerge; the UK market is already seeing the first tentative steps towards two-sided business models with Blyk helping its network partners to extract revenues from both end-users and advertising partners, albeit unsuccessfully in its initial attempt as an MVNO in the UK.

Increasing numbers of partnerships across a diverse range of industries will emerge, with mobile operators selling capabilities and expertise to 3rd parties, who will in turn use it to enhance their own service offering or productivity. Examples already emerging include NFC based payments and ticketing, remote meter reading for utility companies and footfall monitoring in shopping centres.

These new business models will create a range of issues that will need to be addressed by the regulator, including information security, privacy and payments fraud.

(B) Declining Profitability

The continued decline in UK mobile market profitability will be a key contributor to the shape of the mobile market over the next 5-10 years. The UK is already the least profitable major mobile market in Europe and this low level is likely to come under further pressure in the short to medium term from both new entrant activity (MVNOs and new spectrum licensees) and ongoing regulatory action.

Against this backdrop, operators will inevitably examine the case for consolidation and business rationalisation in order to maximise the return for their shareholders. As discussed earlier, low levels of profitability could also have a detrimental impact on infrastructure investment, resulting in the UK falling behind other major European markets.

(C) Device Exclusivity

The growing trend for device exclusivity has already created a significant shift in the dynamics of the UK market. O2's long-term exclusive distribution agreement with Apple for the iPhone in the UK has forced customers who want the widely-acclaimed device to take O2 connectivity, limiting customer choice. Recent analyst reports indicate that O2's recent growth in the UK market has solely been the result of this exclusivity agreement. It represents 6% of subscribers, 14% of service revenue and 13% of EBITDA. If O2 did not have access to this handset, it is likely that their service revenue growth would have been comparable to the other operators.[10]

Q 3.2: Have we identified the right regulatory challenges?

T-Mobile does not consider that Ofcom has drawn the appropriate conclusions from the trends it has identified. Ofcom has equated new trends with new problems and the need for new regulation. This is simplistic and fails to embody any recognition of Ofcom's apparent regulatory principles of a bias against intervention, "using the markets where we can" etc.

Ofcom has confused the challenge of adapting regulation with the need for additional regulation. Other than spectrum scarcity, T-Mobile considers that each of the trends identified are opportunities for consumers and are therefore positive messages that do not de facto embody regulatory challenges necessitating further regulation. Rather, they are developments that suggest that current regulation is becoming outdated and must be revised to address the service competition that characterises the mobile market and the services accessed by consumers using mobile devices. A change in the market does not equate to an issue requiring new regulatory intervention.

In essence, Ofcom has largely defined regulatory challenges as areas where regulation will be required. However, Ofcom generally provides little evidence that the trends identified equate to market failure, or consumer harm, and crucially that regulation is the appropriate response. T-Mobile views the regulatory challenges to Ofcom as the need to adopt regulation rather than to increase it. Furthermore "regulation" needs to come to embrace both formal statutory statements, and an increased emphasis on enforcement.

- ***"with the growth of online services in the mobile environment, the role of mobile in delivering services to citizens and consumers will grow further, making consumer protection, as well as questions of access and inclusion, and coverage, even more important than they are today"***

This statement embodies three distinct services: (i) online services; (ii) internet access; and (iii) network coverage. These require separate treatment and should not be conflated.

Online services

T-Mobile does not perceive a reason for which online services delivered in the mobile environment require additional regulation. The principles of technology and service neutrality would suggest that it should not, and the evidence is that the growth of online services is in fact a major positive for consumers.

[10] Bernstein Research, 3 September 2009.

T-Mobile considers that the challenge for Ofcom is therefore not the need for additional mobile Internet regulation, but to ensure that any regulation of online content is applied consistently across all access bearers. The challenge for Ofcom is therefore to:

- **justify such regulation:** Ofcom must identify market failure and consumer harm specific to the online delivery of services that require specific regulation over and above the UK's existing fulsome consumer regulation; and
- **enforce such regulation:** online services are typically retail services delivered directly between the service/content provider, and the consumer, potentially via a mobile network, but potentially via a fixed, or Wi-Fi network also. Regulation and its enforcement need to address the retail provider of the relevant service. If Ofcom is intent on regulating consumer services, then it must adjust to regulating across all retail service providers, as well as providers of connectivity, and ensure that its regulation is capable of being enforced directly, without imposing on connectivity providers that are not part of the service provision. Consumer protection will become complicated by the increasing number of access points, bearers and devices used by consumers and the increasingly ineffectual use of controls in any one network[11].

Internet access

The retail market for Internet access, whether fixed or mobile, is fiercely competitive. Consumers are able to access the Internet at increasing speeds, at decreasing prices, across a greater choice and constantly improving array of devices. With Mobile Internet access now available on both a contract and PAYG basis, consumers are able to choose the extent of their commitment, and the amount they spend, at price points that typically provide un-metered Internet access within a fair usage policy.

It is unclear therefore whether there is any market failure, or consumer harm justifying regulation. Wholesale and retail access is provided on a commercial basis by companies, and absent adequate alternative sources of revenue (e.g. advertising etc) to cover the cost, the provision of access will necessarily be chargeable. This does not equate to a regulatory problem unless it becomes clear that services are being unfairly priced or consumers are suffering material harm etc. Absent such a finding, any issues of access and inclusion become questions of social policy and subsidisation/taxation. These are better addressed by central government and projects such as Digital Britain.

Network coverage

As the boundaries between fixed and mobile services blur with mobile increasingly replicating the fixed broadband service experience, the question of coverage and access will increasingly become "does the individual have access to online services?", irrespective of whether they are delivered via fixed or mobile access technologies. Beyond what is available on a commercial basis, the provision of network coverage (fixed/mobile, broadband/super fast broadband etc) becomes an issue of government policy and is being addressed as part of the Digital Britain process.
As such, T-Mobile does not consider that this raises issues of regulation per se.

- ***"mobile services will become more complex for consumers – and while many will benefit, others will find the complexity challenging"***

T-Mobile is concerned at Ofcom's attitude to the provision of choice and the products of innovation. It is well established that a competitive market, functioning in the interests of

[11] As devices switch seamlessly between fixed and mobile networks, regulation of access providers will become increasingly unnecessary (as they do not provide the online service itself) and redundant (since none of them will have exclusive control, or records, of a consumers online access). This will be exacerbated with the continued adoption of short-range radio technology in next-generation devices (e.g. Near Field Communication (NFC) technology) with which consumers will be able to transfer content and payments machine to machine/device to device in a matter of seconds.

consumers, is one in which companies strive to develop innovative products and services, and a range with which to address as many customers as possible. Indeed, Ofcom's core finding is that competition in the mobile sector is generally working well.[12]

Nevertheless, Ofcom considers that the market has provided too much choice and innovation, notably in tariffs and that this complexity will challenge consumers. While it is acknowledged that there is trade-off between offering customers what they want through greater product choice and ensuring that customers understand the full range of products on offer, Ofcom does not address why, when it develops in the mobile sector, this requires regulatory intervention.

First, Ofcom has not distinguished the mobile sector from other retail service sectors where consumers are faced with a wide choice of products and services, and why choice in the mobile sector is problematic whereas it is not in others. For example, consumers face a huge array of chicken-based products in supermarkets (whole, breast, wing, leg, corn-fed, free range, curried, jerk, on a pizza etc) but mange to navigate this, and a vastly more complicated array of choices in respect of insurance products, holiday packages, cars and car financing etc. Ofcom has not identified the reason for which it considers that consumers of mobile services require protection in a way that they do not require for other consumer services.

Second, even if choice and innovation is problematic for some consumers, Ofcom has still overlooked considering whether this is not something that the market can address. T-Mobile would suggest that it is, and there are several examples of this:

(i) Online comparison and switching services are proliferating.

As in many other sectors providing consumer services, mobile services are increasingly being addressed by independent third party comparison and switching services that allow customers to search for the most appropriate deal for their particular circumstances, providing results in an easy to understand format and enabling the consumer to quickly identify an appropriate tariff across all potential service providers. For example:

- www.billmonitor.com (The price comparison calculator approved by Ofcom)
- www.moneysupermarket.com/MobilePhones
- www.uswitch.com/mobiles/
- www.best-mobile-contracts.co.uk/
- www.bestcontractmobilephonedeals.co.uk/

A large number of independent third party retail stores also provide advice to consumers.

(ii) Mobile service providers are increasingly competing to provide an easier shopping experience to their current and potential customers.

T-Mobile offers many products which attempt to make decisions simpler for consumers:

- Our Flext tariffs have been refreshed, updated and improved. Now customers can make international calls, call 08 numbers and listen to voicemail messages as part of their monthly allowance. This will simplify pricing for consumers who will no longer need to worry about making expensive calls outside their inclusive call bundles. This change has received a positive reaction from consumer groups in the UK:

[12] Consultation, paragraph 4.5.

"T-Mobile has made some really positive changes to its Flext tariff - the inclusion of 08 numbers and calls to international numbers will help consumers save money on those calls that typically cost extra and sit outside their monthly price plan."[13]

- T-Mobile's mobile broadband products incur no run-on rates. Whilst a fair use policy exists, T-Mobile does not charge customers who go over this 'limit'. Instead we will work with them to bring their usage down to below this limit in future. This compares favourably to other providers, who charge a significant amount for every MB over the download limit, as recently noted by the BBC:

  "Mobile broadband users face stiff penalties for exceeding their download limits even though most aren't aware of what those limits are. A survey conducted by price comparison website Moneysupermarket found that three in four mobile broadband users risk such charges. It found that over half did not know what their limit was, with a further 24% not even realising they had any. O2 charges £200 for every extra gigabyte used and 3 charges over £100. By contrast, Vodafone charges £15 per extra gigabyte with Virgin and Orange offering a £14.95 penalty. Only T-Mobile ***has no charge and will advise heavy downloaders to change tariff.***"[14]

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In each case, this product development and product rationalisation process has come about because of, and not in spite of, healthy competition. The mobile market is very competitive and, in order to attract new customers, operators must ensure that the trade off between product choice and range complexity is correctly balanced. An operator whose product offering is too large or too confusing will lose ground. In this way, the potential problem that Ofcom has identified is one that is self-correcting in this truly competitive market.

The use of services a mobile device is being simplified by emergence of easy-to-use applications, which are accessible directly via an on screen logo. These applications themselves are easily accessible, searchable etc, via applications stores integrated into the mobile device, all of which help to further simplify the mobile service experience

- ***"as mobile becomes more like the wider on-line economy, consumer protection measures may become less effective and the need for generic, tech-aware enforcement of consumer law may grow. Current measures (e.g. protection from mis-selling and scams, security of purchases made using either the mobile bill or a credit card, control of access to adult content etc) rely on mobile operators at the centre of the value chain and may need to be adapted to the new market context"***

T-Mobile considers that this point is the most appropriate conclusion drawn by Ofcom through its consultation process. Although many of Ofcom's other statements appear not to adopt the conclusions inherent in this, it is this recognition of change, and the need for regulation and enforcement to focus on consumer services rather than network operators, that must underpin a change in Ofcom's approach.

As noted above, mobile services are increasingly being provided in an online environment by a myriad of service providers which hold a direct relationship with the consumer. Handsets such as the iPhone, G1 (and its successor Android devices), as well as those from Nokia, Samsung etc, all have large screens and Internet connectivity that enable consumers to access online services much as they would from a desktop or laptop computer. Although the handset

[13] James Parker, Mobile Manager, www.moneysupermarket.com
[14] http://news.bbc.co.uk/1/hi/technology/8174839.stm

and connectivity may have been provided by T-Mobile, the services accessed over the handset are therefore no longer simply traditional voice and SMS mobile services. Rather, mobile handsets are used for voice, SMS, gaming, music, photography, and for accessing the Internet for news, social networking, and shopping etc. While at present such handsets have not penetrated the majority of the subscriber base, the substantial majority of new handsets are 3G devices and smart phones and the trend is clearly established.

Not only are customers accessing an increasing number of consumer retail services, but they are doing so via an increasing number of different bearers, provided by multiple network operators. In particular, almost all newer smart phones are able to connect over 2G, 3G, and Wi-Fi. Given the advantages in speed and coverage of a broadband Wi-Fi connection in the home, airport, workplace, café, subscribers routinely use alternative network operators to access Internet services to the connectivity of the service provider which provides their handset (which may or may not itself be a network operator).

It follows that it is becoming increasingly important that Ofcom ensure that the regulation of network operators and service providers evolves in order to reflect the move to consumer services generally and their access via the Internet specifically. If regulation continues to focus on network operators and to place responsibility on network operators and telecom service providers for the services accessed by consumers, a level playing field will no longer exist. In order to compete with the Googles and Apples of the online world, national network operators and service providers must not be placed under undue wholesale regulation, nor be more closely regulated at a retail level.

This is not to say that T-Mobile advocates that network operators and services providers should have no role in consumer protection however. The mobile device is a key tool that can be used to enforce certain aspects of consumer law in the new online mobile environment. Each device comes with a unique identifier (IMEI) that combined with the personal identifier (SIM) could provide improved security and ID solutions for 3rd parties. This information will form an essential, but incomplete, element to the enforcement process. Nevertheless, while operators will be able to and must play a part, regulation should increasingly reflect the changes in the means by which traditional telecoms services are used and their place in the provision of third party retail services direct to consumers.

- ***"new competition challenges may arise, if operators opt for increased RAN-sharing or if market consolidation occurs"***

With competition increasingly focussed at the service layer, the competitive challenge of RAN-sharing will be limited, particularly as the customer will benefit from improved coverage at a lower cost. The regulatory pressure to engage in RAN sharing will increase with the Digital Britain proposals, requiring 99% coverage with 800 MHz spectrum and long term wholesale access.

- ***"Fixed-mobile convergence also raises the question of the future of mobile call termination rates, in a world where the delivery paths of fixed and mobile services may easily cross over"***

See T-Mobile's separate submission on the Mobile Call Termination market review.

Section 4: General Comments

In chapter 4, Ofcom identifies a number of features of the mobile market, which are not linked to any of the specific consultation questions from the chapter. We have set out below first our comments on those issues before going on to address consultation questions 4.1 to 4.4.

New Entrants

Ofcom notes that some new licensees are finding the market difficult to enter[15]. However, it is important to distinguish between barriers to entry at the wholesale, and retail levels.

It is apparent from the number of service providers and intensity of competition at a retail level that barriers to entry to the market are low where companies are seeking to set up a retail presence. In the mobile sector competition for MVNO business is becoming increasingly intense, to the extent that new MVNE structures and specialist companies are being established to enable smaller and smaller retail operators to provide full national mobile coverage with a far lower threshold of commitment and investment in complex negotiations.

At a wholesale level, barriers to entry are necessarily higher, owing to the significant technical expertise and investment required, and the complexity of establishing interconnectivity with other operators. It is true that it is taking some new network operators longer than expected to establish interconnection and mobile number portability agreements (MNP) with the existing operators. However, as Ofcom mentions, in some cases the new entrants have themselves been responsible for those delays. This has been the case regardless of the size of the new entrant: for example, T-Mobile still awaits final input from BT on a draft MNP contract sent to BT in June this year. In other cases there have been periods of weeks/months where T-Mobile has awaited relevant input from the other party. Furthermore, Ofcom is itself now proposing to create further barriers to new entrants by mandating wholesale traffic routing arrangements that would not include new entrants. While Ofcom has of course not suggested that they should be excluded, by creating a two tier arrangement Ofcom will inevitably create difficulties regarding the administration, admittance, financing and technical arrangements between new and established operators.

Similarly, disputes have arisen between new and existing operators owing to a lack of appropriate guidance and/or regulation by Ofcom on the terms of wholesale interconnection. T-Mobile has been involved in two disputes with new DECT guard-band operators, specifically MCom and Cable & Wireless, concerning interconnection arrangements. These disputes did not result from any desire from T-Mobile to delay their entry (and neither dispute did in fact cause any delay to entry), but rather have arisen because of a vacuum caused by a lack of Ofcom guidance/regulation on the termination rates of new entrants. Whilst the five established MNOs have all been designated as having SMP for call termination on their respective networks and have been subject to ex ante regulation as a result; these new entrants have not been regulated in the same way. This means that they are able to attempt to charge termination rates above their efficient costs, thus cross-subsidising their retail services. T-Mobile submits that permitting termination rates above efficient costs for new entrants, whilst regulating the rest of the industry, breaches Ofcom's duty not to discriminate between communications services or networks, or the means by which these are made available.

It is because of the lack of an appropriate regulation that these new entrants had to go through a long and complicated dispute resolution process to determine, on an ex post basis, the appropriate termination rate. If Ofcom had correctly designated the appropriate regulation for

[15] Consultation, paragraph 4.61 and following.

new market entrants from the start then they could have avoided the delays caused by the dispute resolution process.
It is clear that the essential elements of any call termination market definition apply equally to any operator that terminates calls, irrespective of the size of their network or the technologies employed. T-Mobile's long-held view is that it is not appropriate to define call termination markets by reference to individual networks and that a single market for mobile call termination (on all networks) exists, in which no operator individually has significant market power. However, if Ofcom persists in its view that there is a separate market for calls that terminate on T-Mobile's number range, then equally there must also be a separate market for calls that terminate on any other individual provider's mobile number ranges: call termination is not technology specific. Accordingly, under this approach, there would be markets for call termination on each GSM (including DECT guard-band) operator's network, as well as the individual networks of Wi-Fi and VoIP operators to which Ofcom has allocated mobile numbers. Independent supplier-specific markets also support the position that any remedy should be specific to the efficient costs of supply of using that technology and in that location.

T-Mobile believes strongly that the same approach to assessing SMP status needs to be applied to all providers of mobile call termination, irrespective of their size and the technology employed. In particular, the call termination market review should extend to all providers of wholesale mobile call termination, including new entrants using alternative technologies, such as Mundio Mobile (ex MCom), C&W and Stour Marine/Greenfone.

MVNO market

As Ofcom have correctly noted, MVNOs are playing a major part in the mobile market today. Indeed a few years ago, most people from within the industry expected that the MVNO market had dried up and there were unlikely to be many new players coming into the market. Instead there have been a number of major new MVNOs that have entered the market, including many who are trying to tap into specific ethnic markets. Indeed in today's mature mobile market, MVNOs represent an efficient way of increasing subscriber numbers.

T-Mobile originally had one model for dealing with MVNOs. This worked well for the players that made it to the market but others did not enter, either because they wanted more control over their customers or they were not able to provide the necessary up-front financial investment. In recent years, T-Mobile has redefined how it wishes to interact with wholesale partners. There are now numerous ways in which specific entrants can come into the UK market, depending on their own needs.

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In contrast there are also now MVNEs available in the UK. These "Mobile Virtual Network Enablers" act as an intermediary between MNOs and smaller MVNOs. They help smaller players enter the mobile market and negate the need for them to incur the entire risk that comes with purchasing their own infrastructure. The introduction of these intermediaries therefore will help new entrants come into the market, where otherwise they would hit barriers to entry.

In addition there are hybrid models for dealing with new wholesale partners. These bespoke arrangements, will ensure that every potential entrant will be able to enter. Obviously given this new more open market and increased entry, only some entrants will still succeed whilst others will end up failing. For example Blyk, the MVNO set up offering 16 – 24 year olds free SMS and minutes, in return for targeted advertising has recently ceased its operations in the UK.[16]

Q 4.1: We have outlined a number of factors which may affect the future market structure, including network sharing, spectrum and potential consolidation. Do you agree with this assessment, including risks and benefits that we have outlined?

The UK mobile market has always been a fast-moving industry, which has been necessary given the increasing pressures on costs and technological development. Innovative arrangements, such as network sharing deals, have needed to be necessary to ensure that it continues to develop for the benefits of consumers. When considering the benefits of network sharing, Ofcom understands that such arrangements are available to all network operators and first-movers should not be penalised for looking to become more efficient. T-Mobile has supported the Digital Britain process initiated by the Government that has looked to ensure that the mobile industry will continue to play a major role in providing broadband to the UK. This extensive broadband coverage requires the use of low-frequency spectrum. T-Mobile has long argued against the distortion that exists between the different spectrum holdings of the MNOs. It is essential for the long-term development of mobile broadband that the current level playing field for 3G services continues to exist once the 900 MHz spectrum is liberalised for 3G services. The Digital Britain process, and more particularly the work of the Independent Spectrum Broker, has addressed questions of future regulation in the event of consolidation in the market. Whilst we do not agree with the detail of all of this work it is a useful basis on which to address any issues which might arise.

Spectrum holdings and liberalisation

One issue that has distorted competition in the UK mobile sector in the past is the disadvantage that non-900 MHz operators have faced as a result of their historical spectrum holdings. Vodafone and O2 have been able to offer better mobile coverage at a fraction of the cost of the other operators. This has allowed them a distinct competitive advantage in offering voice services and has entrenched their incumbent position in the UK market, specifically in some segments (e.g. business customers). T-Mobile is concerned that some operators may end up being “tier two” operators, without any opportunity to compete effectively in the future against the “tier one” operators, with access to 900 MHz spectrum. This will undoubtedly be a less efficient market structure and would threaten future investment in this industry. We think that it is essential that all consumers are able to have access to the same level of mobile services, and they are not penalised by a combination of the historical allocation of spectrum and liberalisation. As T-Mobile has discussed with Ofcom the Digital Britain proposals will only re-enforce this advantage.

Within Europe, the UK and Switzerland are the only countries to have allocated their entire 900 MHz spectrum band and yet still have GSM operators without access to any of it. This is therefore a UK-specific problem; spectrum liberalisation is unlikely to lead to similar competitive distortions in other countries across Europe. Unless Ofcom’s spectrum release and liberalisation program takes account of the effects differing spectrum holdings can have on operators’ ability to compete, the UK mobile market could move quickly from being the most competitive market in Europe to one of the least competitive.

The solution to the spectrum liberalisation issue needs to ensure that the current level playing field for 3G services continues to exist once the 900 MHz spectrum is liberalised for 3G services. This will ensure that players who have invested significantly over the last ten or

[16] http://www.theregister.co.uk/2009/07/27/bye_bye_blyk/

more years are not significantly disadvantaged as a result of liberalisation and that they are able to continue to deliver competitive services for consumers.

Network sharing

T-Mobile is a party to a network sharing agreement with H3G. This is a Multi Operator Radio Access Network agreement (utilising a technology known as MORAN) which allows each operator to both radiate its own licensed spectrum and to retain complete control over their own core network. In this type of network sharing, cell level parameters are not shared, allowing the operators sharing a network to offer more tailored optimisation of the air interface performance and thereby to differentiate their performance. In this way, network sharing can bring significant cost savings and efficiencies, without any material impact on competition at the retail level.

There are other potential types of network sharing arrangements, which may limit the ability of each operator to differentiate their products by sharing more than the radio access network. In addition, more parties may engage in network sharing. Ofcom may need to consider these network sharing deals and evaluate whether any reduction in competition is acceptable given the efficiencies that will result from the arrangement. Our strong position is that it mere technology has ceased to be the differentiator it once was. It is products and services we market and not technology and thus Ofcom should be encouraging network sharing.

When considering the benefits of network sharing, Ofcom should be guided by the principle that these network sharing arrangements are in theory available to all network operators. Those operators who have taken the initiative and moved first should not be penalised for having become more efficient. In other words, when estimating the cost of running an efficient network, Ofcom should treat all operators in the same way and not differentiate between those which have entered into network sharing arrangements and those which have not, because all operators had the equal opportunity to do so.

Potential Consolidation

It has been acknowledged for a long time that the UK mobile market structure is ripe for consolidation, given the larger number of operators and lower margins than in comparative European markets. It has become clear in recent weeks that such consolidation is beginning to occur in the market.

Q 4.2: Do you see any risks to competition that we have not highlighted?

T-Mobile is concerned that an uneven playing field is developing between new and existing telecoms operators, and telecoms operators and retail Internet-based service providers, and that this is developing as a result of a failure to adequately regulate and/or apply differing regulatory burdens. With the increasing importance of handsets as a means to access a variety of third party services and applications, as well as their fashion status to many consumers, T-Mobile is also concerned regarding the impact of handset exclusivity deals on the ability of operators to compete.

First, as identified above, the differing regulatory approach taken towards established MNOs vis-à-vis the other players in the mobile sector is a direct risk to competition. As we have explained in our response to question 2.1, the lack of consistent regulation leads to distortions in the market and means that T-Mobile is not allowed to compete with companies on a level-playing field. Ofcom needs to address this inconsistency and ensure that everyone in the mobile sector faces the same regulatory requirements. Once there is equivalence of treatment, free and fair competition and the exercise of consumer choice will determine which firms should ultimately succeed and which will fail.

Second, T-Mobile is currently very concerned about is the increased prevalence of "Over the top" competition i.e. competition from application providers etc who will have a direct relationship with T-Mobile's customers cutting out the network provider middle-man. Due to the regulatory challenges that we face, we cannot match the services that these providers can offer. A specific example of the type of products that Apple or Google could offer to a greater extent is "location based services". In a rapidly developing market, the exact nature of these products is difficult to define; however what is clear is that the potential scope for development and revenue is immense. However it would be very difficult for mobile operators to compete with identical products, within the confines of the regulatory restrictions and privacy concerns which are currently so important for the industry. Other firms, who benefit from less restrictive regulation than we do are likely gain a significant first mover advantage in these products and service areas, as they are not hampered by the same regulatory constraints. This is surely extremely concerning for the UK consumers, who have built up a relationship of trust with the major network operators, following years of sensitivity relating to customer data.

In T-Mobile's response to Question 8.10 to the first MSA consultation, when dealing with access for disabled users, we noted that MNOs are not handset providers:

> *"Networks should not be held accountable for the lack of terminal equipment in the market that can be used by disabled customers. Instead, if they consider there to be a problem, Ofcom should work with the handset manufacturers who make the handsets.* ***The MNOs basically sell airtime and services*** *and these services do not discriminate at all to those with disabilities."*[17]

As we noted here, mobile operators provide services and products that utilise mobile devices. We do not manufacture mobile handsets and do not want to be judged primarily on the strength of the specific devices that are manufactured elsewhere. Rather it would be best to be judged on the strength of the mobile services that are offered.

Third, exclusivity arrangements for specific handsets typically limit the distribution of a particular handset to one specific operator within a particular territory. The most well-known example of this agreement in the UK is O2's exclusive deal for the iPhone. Similar exclusivity arrangements exist for other handsets, such as the G1, for example, which is exclusive to T-Mobile in the UK. However these utilise an open Android platform and already the UK has 3 such devices on the market, with each handset having very different exclusivity arrangements. By contrast, all three iPhone handsets, released on an annual basis, have been exclusive to O2.

The increased use of these exclusive arrangements has led to consumers choosing a particular network purely on the basis of the handset available, rather than for reasons of price, network quality or level customer service. The recent growth in O2's market share is largely attributable to it being the only UK network which could offer customers Apple's iPhone. Now may be an appropriate time for Ofcom to consider whether these types of agreements bring benefits to consumers or give rise to consumer harm. The US Department of Justice is currently conducting a similar review, and exclusive distribution deals have already come under the spotlight in France. If customers place the greatest importance on handsets, then operators may cease to focus so much on improving coverage, customer service and their tariff offerings, and instead focus more on setting up the best handset exclusivity deals.

[17] T-Mobile, response to MSA I, 20 November 2008, p95

However if exclusivity deals were prohibited, and all handsets were made available to all operators, operators would instead put all their energy and investment into improving the services that they actually offer.

Q 4.3: Do you agree that a market review in the mobile sector (other than in the call termination market) is not currently required?

T-Mobile agrees that a market review of the mobile sector is not required. We support Ofcom's conclusions regarding the level of competition that exists in the mobile market. The number and variety of MVNOs and service providers that exist in the UK shows that wholesale access requirements are not necessary. Over recent years there has been an upsurge in the number of new MVNOs in the UK market as well as an increased range of differing wholesale agreements. This demonstrates that the wholesale market is working effectively and no access requirements are necessary.

T-Mobile does not consider that network sharing or consolidation will necessarily affect the current high levels of competition in the wholesale market.

Q 4.4: We have concluded that competition in the mobile sector is currently addressing access concerns adequately. Do you agree?

T-Mobile agrees that competition is working effectively in the mobile sector. As set out below, UK consumers benefit from one of the most competitive markets in Europe, such that there is a growing threat to future investment in the UK. As illustrated by many surveys, price competition, tariff innovation and mobile penetration are together among the highest not only in Europe, but the world. As such, the UK market provides access to as many consumers, in as many options, as would appear commercially sustainable. As such, there is little that a regulator can do to address these further other than to increase investment incentives in the long term.

Figure 1 below shows the operating profits and margins of the UK mobile operators, compared to other international mobile operators and selected other UK companies. It is clear that even the most profitable UK mobile operator makes less profit than operators in other markets.

Figure 1: Operating Profit of UK mobile operators and comparative markets

UK MOBILE	Latest Published Accounts	Turnover	Operating Profit	Operating Profit Margin
T-Mobile UK	31/12/2007	£3,293.1	-£9.1	-0.3%
Orange UK	31/12/2007	£4,395.0	£295.0	6.7%
Telefonica O2 UK	31/12/2007	£5,057.0	£660.0	13.1%
Hutchison 3G UK	31/12/2007	£1,268.3	-£791.0	-62.4%
Vodafone UK	31/03/2008	£5,260.3	£346.6	6.6%
INDUSTRY TOTAL		£19,273.7	£501.5	2.6%
INTERNATIONAL MOBILE	**Latest Published Accounts**	**Turnover**	**Operating Profit**	**Operating Profit Margin**
Vodafone Germany	31/03/2008	£6,866.0	£1,490.0	21.7%
Vodafone Italy	31/03/2008	£4,435.0	£1,573.0	35.5%
Vodafone Spain	31/03/2008	£5,063.0	£1,282.0	25.3%
Orange France	31/12/2007	€ 23,295.0	€ 6,998.0	30.0%
OTHER UK COMPANIES	**Latest Published Accounts**	**Turnover**	**Operating Profit**	**Operating Profit Margin**
BT Retail	31/03/2009	£8,471.0	£1,227.0	14.5%
Sky	9m to 31/3/09	£3,996.0	£622.0	15.6%
Lloyds Banking Group	31/12/2008	£9,872.0	£807.0	8.2%
Tesco - UK Turnover	28/02/2009	£38,191.0	£2,381.0	6.2%

The consequence of this is that the incentive for companies to make further investments is reduced, since the ROCE is significantly lower in the UK than it is in other markets in which the UK mobile operator's parent companies also compete. For example, if a parent company can earn twice the return on network asset investments in [x] country than it does in the UK, then given its limited resources it is more likely to allocate funds in precedence to other territories. In essence, the UK divisions of T-Mobile, Vodafone etc, compete internationally with other group subsidiaries for resources, which will be allocated by the Group according to its best interests as a business entity.

As a consequence, (i) it is appropriate to amend Ofcom's primary duties so as to include a focus on efficient investment in communications infrastructure as this is likely to be a major concern in coming years; and (ii) consolidation in the UK market among network operators is likely to arise in order to enable parent companies to continue to earn an adequate return on capital employed.

Q 5.1: Do you agree with our assessment of investment in the UK mobile market and our priorities to secure future efficient investment?

We agree with Ofcom's assessment that the most important contribution which it can make to ensure timely and efficient investment in the mobile market is to promote free and fair competition and to ensure than any regulation that it imposes does not hinder or delay investment. Providing regulatory certainty remains essential to the encouragement of investment and a strong support for deregulation would help to deliver this.

The UK mobile sector has low profit margins (see Figure 1 above) when compared to other European countries or to other sectors of the UK economy. These low margins, combined with the huge investments which have already been made in the UK mobile sector in the past, are likely to lead to reductions in capital expenditure in future as operators seek to deploy limited capital in markets in which a return on investment can be generated more quickly. It would be a mistake for Ofcom to dismiss the risk of reduced investment in future. Ofcom would be ill-advised to rely too heavily on evidence of past investments to provide reassurance that future investment is equally likely. Conditions in the market and in the economy generally have changed significantly and the goalposts have now moved. Our own recent experience has seen a focus on widespread cost-cutting in the business. In difficult economic times, large scale economic investments in uncertain markets are inherently less likely.

Investment in networks will inevitably be contingent on spectrum allocations. T-Mobile has been disadvantaged from day one as a result of not having access to 900 MHz spectrum. Whilst a level playing field for 3G services did exist the spectre of refarming of 2G spectrum will further reinforce the existing disadvantage. Unless and until this distortion is addressed, T-Mobile will continue to suffer a competitive disadvantage which impacts on our ability to invest efficiently.

The strong competition and low profitability of the UK market is, we think, likely to lead to more innovative models of network investment such as an increase in network sharing, a move to full network sharing arrangements as opposed to partial network sharing, and potentially the structural separation of mobile networks from the consumer-facing business.

The Government is currently consulting on amending Ofcom's duties so as to expressly include the duty to promote efficient investment in infrastructure. We support these proposals. We are of the view that Ofcom has on occasion in the past not given due weight to the importance to industry participants of being able to achieve a suitable return on any investments in infrastructure. The proposed new duty should address that imbalance, allowing Ofcom to weigh the needs of consumers against the requirements of long-term investment in a sustainable communications sector. As the government notes in its consultation document,

> "…amending Ofcom's duties to give greater importance to investment… may serve to help the UK Government deliver its ambitious upgrade and extend the existing communications infrastructure"

and

> "From an economic perspective, changing Ofcom's duties in this way may serve to raise the total level of benefits to consumers and businesses in the economy."

It would be useful for Ofcom to set out explicitly how it expects its regulatory approach to change as a result of these amended duties. We would expect this significant change in duties to result in major changes to Ofcom's working arrangements and consultation processes. It would be inappropriate for the resultant practical changes to be only inconsequential.

Q 6.1: Ofcom considers that regulatory intervention to protect and empower consumers continues to be needed in the mobile sector and that competition alone is not necessarily sufficient to secure this. Do you agree?

In summary, T-Mobile does not agree with Ofcom's approach to consumer regulation in the UK mobile market. As we have previously stated, in our view Ofcom has been taking an increasingly interventionist approach and has been scrutinising each individual aspect of the mobile market separately despite there being fierce competition in the market overall. Ofcom appears to overlook high consumer satisfaction levels and focus unduly on the negative. Consumer satisfaction for mobile services is very high and while it cannot be expected that a market produces perfect results for all end users, Ofcom's use of formal and increasingly intrusive regulation over often transitory shortcomings affecting a minority of consumers is not the natural corollary. Formal regulatory intervention should be backed up by evidence of real consumer harm and any action should be proportionate.[18] Ofcom should also have explicit regard to the need for regulatory certainty to encourage investment and thus benefit consumers. However, T-Mobile does support Ofcom's proposal to make more use of general consumer law and the Enterprise Act, rather than sector specific regulation, and to respond where there is clear evidence of consumer detriment. Nevertheless, a clear distinction must be drawn between the introduction of new regulation and the enforcement of existing consumer regulation. As the focus of the industry moves towards retail competition and online services, so the focus of Ofcom's supervision of the market must move towards the latter.

As Ofcom has recognised, the UK mobile market works well and is highly competitive. The consequence is that consumer benefit from a wide choice of services, with which they are typically very satisfied. In particular, UK consumers can choose from among a plethora of tariffs and handsets, provided by a large number of competing operators. As we stated in our response to the first MSA consultation, the current market can no longer be defined just by separate prepay and contract tariff groups; there is a large grey area which comprises SIM-only and U-FIX tariffs which allow consumers to benefit from both types of tariffs. This is the nature of the dynamic mobile market and operators continuously need to react to customers' demands and choices.

Customers want the flexibility to choose. We disagree that consumers find it difficult to make price comparisons between mobile suppliers and between the qualities of service of the different networks. Ofcom seems to think that consumers feel tariffs are complex and consumer concerns in this area are rising because they perceive there to be hidden charges such as rounding, non-inclusion of non-geographical numbers in call allowances, no roll-over of unused allowances and minimum call charges. We disagree. First of all, many UK consumers are savvy and sophisticated and well able to assess the choice of products and services available and choose the product which best suits their particular needs.
Furthermore, regulation aimed at increasing tariff transparency is unnecessary. To the extent that there are some consumers that find the choice provided by the market a challenge, the market is providing solutions itself. Not only are there an increasing number of comparison websites, but also operators, including T-Mobile, are seeking to improve and simplify the decision making process so as to attract those customers[19].

More generally Ofcom appears to be tempted to introduce burdensome permanent regulation in respect of a number of areas for which such an approach is clearly ill suited:

- **Transitory issues:** a small number of traders introduced pyramid schemes offering cashback which affected a significant but ultimately relatively small number of individuals. Industry reacted promptly and introduced additional self regulation and the unfortunate phenomenon rapidly abated. Ofcom nevertheless introduced permanent and burdensome regulation via the General Conditions, before self-regulation had exhibited its full effect and at a point at which the underlying cause appeared to be subsiding. This regulation also has no sunset or review clause, and so is open-ended.
- **Operational issues:** Ofcom is increasingly looking to regulate customer services, in a highly competitive market that already delivers high customer satisfaction. Consumers are themselves well able to make their own decisions on price/service, as for other retail propositions, and it is a performance point on which mobile operators vigorously compete[20]. Despite the lack of dissatisfaction or demand for additional information

[18] T-Mobile has argued in the past that Ofcom has often reacted in a knee-jerk fashion or where it is not necessary to do so, e.g. additional charges.

[19] The T-Mobile website is being updated to make it clearer and more customer-friendly, so from October the new website will be easier for customers to self-serve.

[20] A re-organisation of Customer Services is underway which will lead to less back office support functions and more efficient front line processes and procedures, resulting in improved services to customers.

Ofcom nevertheless considers regulation of an operational area, regarding which consumers show little concern, to be appropriate.

- **Advertising**: this is already well regulated, both formally and by industry, and is in no need of sector specific rules introducing additional requirements. The Numbering Plan and General Conditions were clearly never intended for such purposes.

In its drive to regulate, Ofcom also appears to be introducing duplication within its own excessive use of formal regulation. For example, within the consumer protection arena Ofcom is so concerned about it has already introduced regulation under General Condition 23. Similarly, Ofcom is concerned to regulate silent and nuisance calls but seeks to introduce regulation not on the entities that are the root cause of the problem, but on the mobile networks.

As set out in response to question 6.2 below, T-Mobile considers that Ofcom's approach to retail and consumer regulation is out of step with both its stated and proposed regulatory principles. Ofcom needs to re-consider its approach to regulation, and to adopt a more flexible and proportionate approach to the regulation of consumer issues, with a greater emphasis on the enforcement of existing legislation and regulation, and use of options other than additional formal statutory regulation. Ofcom must better recognise that formal regulation and the introduction of additional regulatory burdens is an approach that is inappropriately inflexible and prescriptive in the context of a rapidly changing and innovative technology and service based market.

Q 6.2: We believe that the approach we take to consumer protection and empowerment in the mobile sector strikes the right balance between taking timely action when necessary, and the need to apply regulation only when effective and proportionate. Do you agree?

Ofcom is under a duty to review the statutory burden on its stakeholders and to ensure that it does not impose or maintain regulation that is unnecessary. Indeed, Ofcom states that it has a “bias against intervention” and "will always seek the least intrusive regulatory mechanisms to achieve its policy objectives”

Nevertheless, the trend in Ofcom's approach is moving in the opposite direction to its stated duties and policies. Despite the continued intensification of competition and increasing consumer satisfaction, Ofcom is intent on introducing greater, not less regulation, and to regulate matters at an increasingly micro, rather than macro, level. Ofcom's approach to regulation is becoming increasingly disproportionate and decreasingly evidence-based.

Ofcom needs to decide whether consumers' interests are reasonably protected by general consumer law or whether there is a need to regulate through encouraging self-regulatory and co-regulatory initiatives – which have been successful in the UK mobile market. Our view is that of the issues mentioned, there is no need for formal regulation however Ofcom has chosen to formally intervene in all of them (MNP, additional charges, mobile broadband speeds, reviews of quality of service, complaints handling and ADR) which demonstrates how much of an interventionist approach Ofcom has taken over recent years.

There is a cost to this approach. Not only is it unclear in principal how direct intervention by the regulator can improve the overall level of service experienced by consumers in a competitive market, but there is a significant danger of this intervention constraining competition in the long term. By increasing costs increasing complexity and fixing the parameters of competition, Ofcom is reducing investment incentives, and reducing the funds available for investment. The result will inevitably be reduced competition and poorer consumer service in the long run. As noted above, customers can already switch between suppliers with ease as customers search for better deals and according to Ofcom's own research, customer satisfaction remains at 94%. Indeed, *"Mobile telephony again scored highest out of the five communications services included in our research, with 94% of consumers either 'satisfied' or 'very satisfied' with their mobile service…"*[21]. Similarly, the overall number of complaints have reduced since 2008 (Jan 2008 = c2,500; Mar 2009 = c1,600) and Ofcom still refers to mis-selling and cashback which has now been dealt with.

However, Ofcom must not interpret this as just a predictable statement by a regulated company that less regulation is required. T-Mobile considers that there are areas where increased regulation may be required and others where it is absolutely not required. Above all however, T-Mobile considers that Ofcom needs to take a fresh and more rounded look at its approach to the market as it evolves in to a service driven general consumer market:

- Focussed and widely applied wholesale regulation that ensures that a level and competitive underpinning for the retail market is necessary. Formal regulatory intervention should be backed up by evidence of real consumer harm and any action should be proportionate.
- In the retail market however a different approach is likely to be required, with less sector specific regulation and but a wider use of existing general consumer law and the Enterprise Act rather than of General Conditions. This must be applied equally to all types of service provider, regardless of whether they provide the connectivity behind the retail service.

Q 6.3: Are there any areas relating to mobile services that Ofcom is not currently addressing but which it needs to address in order to achieve its consumer policy objectives? Are there other areas where regulation could be scaled back?

T-Mobile does not consider that there are any issues in the consumer market that require additional regulation. As noted above, T-Mobile believes that Ofcom needs to actively consider a move away from sector specific retail regulation, towards the uniform exercise of its existing general powers to enforce consumer law.

At a high level there are two reasons for this:

(i) the market is working well for consumers; and
(ii) the retail market is moving towards retail competition on "over the top" services: it is no longer simply about voice and text services.

As Ofcom has observed, customer satisfaction in the mobile market is high, higher than in the case of fixed telephony services, and higher than in a large number of other consumer industries. This consumer satisfaction is driven by vigorous competition, which has led to very low profits margins and return on capital. As the prospect of consolidation illustrates, there is little or no margin for additional investment or regulatory burden.

Companies compete avidly to ensure their good reputation among consumers for the service they provide. High customer satisfaction is driven through the provision of the greatest possible coverage (given financial, spectrum and planning constraints), range of services, tariffs, and handsets. For example, low income customers can access mobile broadband on an un-metered basis for £1. Equally, customers can obtain handsets or laptops worth hundreds of pounds, for free, with a range of combinations of inclusive minutes and per minute costs etc.

[21] Ofcom's Communications Market Report 2009.

and are content to enter in to a contractual commitment of a length that will enable this subsidy to be recovered. Customers wishing to make shorter commitments can choose to contribute to the cost of the handset, via PAYG or lower value contracts.

The level of competition is well illustrated by the high levels of churn that characterise the UK market, with approximately 15% of consumer switching each year[22]. Indeed, consumers in the UK switch more than in most other European countries, regardless of the system of MNP in place (79% of UK consumers report finding MNP easy).[23]

Competition in retail services is changing however, with a significant downward trend in traditional voice and text revenues. Consumers are increasingly using their mobile devices to access other retail services, notably those offered by Internet based service providers and application providers. In this growing market the traditional operators are increasingly being sidelined as these new competitors build direct relationships with their customers (including billing) and are essentially relegated to being the providers of connectivity and subsidised equipment to third parties. If the existing operators are to compete with such service providers, and if the providers of wholesale access are to compete in the retail market with MVNOs and service aggregators, then Ofcom must move away from regulating retail service by imposing obligations on networks, and instead create a level playing field and use its existing consumer enforcement powers against all market participants.

[22] TNS, Omnibus Survey, December 2008
[23] Ofcom, Communications Market Report, August 2008.

Section 7 – Access and inclusion of disabled

Ofcom does not think that regulation is necessary in this area as networks are already moving towards a more open architecture. We strongly support this.

T-Mobile is committed to improving the products and services it offers to customers with disabilities and to ensuring that the legal requirements of Part III of the Disability Discrimination Act 1995 (DDA) are met.

Our obligation to ensure equal access to all our products and services for customers with disabilities established in our Disability Services Programme to meet the needs of disabled people - visually, mobility, hearing, dexterity and speech impaired customers, as well as those customers with learning disabilities. Many of the services offered by T-Mobile are particularly useful to customers with disabilities. Examples include text messaging, mobile email, WAP, voicemail, and fax messaging. Many of our handsets offer voice activated dialling, which is advantageous to customers who have limited dexterity or who are visually impaired. Handsets that offer vibration alert are suitable for hearing impaired customers. We also offer a unique Flext tariff which allows customers to substitute SMS for voice calls if they are hard of hearing. We also offer the following: alternative format literature, priority fault repair service, free directory enquiries, a third party scheme, text phones, operator connected calls and inductive loop sets for hearing impaired customers. We have a dedicated team of people within the customer services department who deal with customers who are disabled. T-Mobile is participating in the 999 SMS project which is already underway and which is currently being trialled by industry. Full commercial launch is expected to be in 2010.

However, as regards handsets, we are limited in what we can do with handset specifications because mobile networks are not responsible for device specifications and issues with interference or incompatibility. Manufacturers should be engaged in this process if Ofcom believes that more should be done in this area. This is another area where it is not appropriate for Ofcom to try to regulate by proxy via the mobile network operators.

We have always stated that real-time text would fail to meet objectives and so we would welcome the review of General Condition 15. In our view, GC 15 should either be removed (as the DDA covers everything necessary) or the requirement to have real-time text should be removed and replaced with a more general requirement which allows services to be developed in line with commercial objectives.

Q 8.1: Do you agree that our proposed facilitation role around mobile not-spot issues is a realistic and sensible thing to do?

T-Mobile is in full support of Ofcom taking on this facilitation role. We have long noted the lack of joined up thinking within the planning process. There have been instances where some local authorities have objected to new mobile base stations being built whilst regional bodies covering the same areas have complained that mobile coverage in their regions is insufficient. It is as if they expect that mobile operators should be able to increase coverage in Scotland as a result of building more sites in London!

This new facilitation role should help Ofcom deal with local stakeholders and explain the ways that operators could realistically improve coverage in their area. This 'middleman' role may help the roll out of coverage to be a partnership between the operators and the local community, rather than the current protracted and often bitter arrangements. Hopefully then the local community will appreciate the significant benefits that will come though approving the plans for new sites.

Q 8.2: Do you agree with our general approach set out in the table above? Are there are any other actions we should take and why?

T-Mobile agrees with this general approach taken by Ofcom. We have been working extensively with the Digital Britain project team to help improve coverage in the future. We would expect to continue to work effectively with Ofcom in the future. It is important that coverage obligations are both practical and achievable, whilst ensuring that a burden is not placed on an operator that stifles further investment. It is clear from this report that Ofcom welcomes the impressive role that mobile operators have carried out historically in extending mobile coverage to the majority of the UK and is working to ensure that this historical success can be extended to deal with particular issues in specific areas of the country.

T-Mobile welcomes Ofcom's support for network sharing and is willing to provide any information from our experience of a network sharing deal with H3G. The creation of MBNL as a joint venture company was a remarkable advance and we will be willing to provide Ofcom with feedback on the entire process.

Q 9.1: Are there any additional issues about mobile content and accessing content via mobile that should be considered?

The latest mobile sector assessment recognises that that the UK mobile operators have actively participated in a range of successful self-regulatory initiatives. These initiatives mean that mobile operators remain ahead of the rest of the telecoms industry when it comes to commitments in the area of child protection and there is no reason to treat mobile content as an emerging area of concern.

Since the last mobile sector consultation the UK's mobile operators have updated "the UK Code of Practice for the self regulation of new forms of content on mobile", having conducted a formal review with key stakeholders including children's charities, content providers and Government. The review took account of recommendations from the Byron Review, the independent review by Ofcom in 2008, an assessment conducted by PWC in 2009 of the UK Code's compliance with the European Framework for Safer Mobile Use by Children and Young Teenagers and the public consultation conducted on behalf of the mobile operators by the Mobile Broadband Group. It also took account of the direct experience that operators have had since the Code came into force five years ago.

The overall conclusion of the review is that the Code has been successful in protecting minors from being exposed to inappropriate content on a mobile device and that the protections in place remain fit for purpose for the foreseeable future. This was confirmed by Ofcom's own research published this month which found that there was no evidence that children or young people were obtaining inappropriate content via their mobile network.

Good Practice Guidance

Mobile operators are subject to Codes which have been developed by the broader industry as well as by Codes specifically developed for mobile content. These include the Home Office Task Force's Good Practice Guidance on chat, instant messaging, web based services, moderation, safe search and interactive services which are currently being updated by the UK Child Internet Safety Council.

We are also active members of the IWF, ASA, UK Council for Child Internet Safety, DCSF Cyberbullying Taskforce and Mobile Industry Crime Action Forum.

Interactive Services

As Ofcom recognises the take up of mobile content is increasingly moving away from a walled garden approach and following the same pattern as the fixed internet with a growing popularity of social networking and interactive sites. Consumers value the ability to generate their own content and update their personal social networks wherever and whenever they choose.

Social networking and interactive services can provide users with tremendous benefits. However there are concerns over potentially viewing inappropriate content and bullying. It is harder for fixed and mobile operators to control access and filter out any inappropriate content on these sites due to their dynamic nature. This highlights the need for the providers themselves to take responsibility in implementing measures to safeguard children. T-Mobile recommends the following steps should be taken by all interactive service providers:

1. **A risk based approach should be adopted by all providers** – whilst pre-moderation of all content is not achievable it is possible for social networking providers to undertake risk based moderation of some content. Such moderation

should be targeted at areas of most potential harm including for example, profiles and pictures. There should be greater transparency of the safeguards available on each site so parents and children can make informed choices;

2. **Sign up to and implement Home Office guidance –** all social networking site providers should implement the Home Office Good Practice Guidance for Interactive Services, including that default settings for under-18s profiles are private and non-searchable;

3. **Providers should agree an SLA for notice and take down of inappropriate content.**

The Regulatory Environment

T-Mobile does not agree that existing regulation and legislation in this area is potentially confusing for customers or providers. Whilst there are a number of different bodies involved in overseeing regulation in this area each has primary responsibility in its own expert area. This structure is the same for both the fixed and mobile communications sector and we are not aware of any significant problems with these arrangements. However, we believe that it is important that the scope of each regulatory body's activities is clearly defined so as to avoid possible 'mission-creep' and/or any unnecessary overlaps, and it is also important for the regulatory bodies to have a good working relationship with each other so they can effectively manage issues where responsibilities do overlap.

Q 9.2: We have set out some differences between accessing content via the fixed internet and via mobile. Are there any further differences?

The consultation paper raises three areas where content delivered on mobile devices may give rise to greater concerns than when the same content is delivered on the fixed internet. T-Mobile strongly refutes these arguments. Taking each point in turn:

i) Mobile is portable and parents are unable to supervise their children's access to content.

As with most media there are various strategies used by parents for mediating their children's online activities. These include:

1. Imposing rules and restrictions;
2. Social approaches – watching, sharing, talking about the internet with their children; and
3. Using technical tools such as filtering and monitoring.

However the notion that all parents supervise their children's internet access by placing the family computer in a communal room in the home is no longer valid. Whilst this may be a useful tool for parents of younger children recent reports show that increasing numbers of children are going online using their own computer from the privacy of their bedroom. Sonia Livingstone's recent report "EU Kids Online 2009" states that this is a reality for 34% of children. She also reports that when researchers interview children as well as parents there is a substantial gap between the (lower) amount of parental mediation reported by children and the (higher) amount reported by parents."

All mobile operators offer internet filters as required by the UK Content Code and for most operators, including T-Mobile, the filter is set as on by default for all mobile devices and is free of charge. Customers are often better protected against viewing inappropriate content when they have mobile internet access compared to fixed access. The EU Kids Online report found that among parents whose children use the internet at home, 31% have neither installed filtering software nor have monitoring software.

All mobile operators are also actively involved in educating customers about the risks and benefits of using mobiles with clear advice to parents included on websites and leaflets. This work is being supported in the joint industry/Government public awareness campaign undertaken by the UK Child Internet Safety Council.

ii) Location based services raise privacy concerns

The granularity of information mobile operators provide for location based services is based on cell id technology which is suited to the needs of companies tracking commercial assets over a large area, where a rough indication of the location of a device is sufficient. Friend finder services such as Google's Latitude and child tracker services require more accurate location information which is only available from other technologies such as GPS or WLAN "hotspots".

Passive location services based on mobile network location data are all subject to a code of practice developed by the industry in 2005 by a collaboration of location providers, children charities, ACPO and the Home Office. The Code requires that all locators prove their identity and address on registration. This measure guards against the possibility of those with no legitimate interest in the whereabouts of children making use of such services. The Code also requires that regular reminders are sent to 'locatees' so that phones cannot be tracked without their knowledge. These safeguards only apply to mobile location feeds and similar codes are not in place for other types of location providers such as GPS providers who offer greater accuracy.

However the UK Children's Internet Safety Council has recently set up a working group to look into a single standard for location services regardless of the location technology deployed. The group includes the children's charities, Google, Apple, Nokia and the mobile operators. It is essential that all parties in the value chain take responsibility and that the Information Commissioner is ultimately satisfied with the level of privacy from these services.

iii) Greater scope for people to access and distribute content anonymously

There is no evidence to suggest that the lack of registration on prepay devices means that potential criminals choose to use PAYG phones as their main method of accessing or distributing illegal content:

- The consultation acknowledges that remaining anonymous using the fixed internet is relatively easy (e.g. in internet cafes).
- There is also no evidence that where registration is mandatory, databases accurately record names and addresses and this information is kept up to date.
- Research by CEOP shows that the distribution of child abuse images is mainly undertaken by sophisticated organised criminal rings and they already take great care to avoid detection.
- In its response to the All Party Parliamentary inquiry into internet traffic the IWF set out its experience of tackling the problems associated with child sexual abuse content online. "We are aware of a number of issues which may need further consideration within the context of this inquiry, including the increasingly varied routes and technologies allowing access to child sexual abuse images such as peer to peer networks, services that conceal website locations, signposting to content from

> legitimate free hosting websites, newsgroups, commercial operations selling indecent images of children and services where offenders trade and swap images publicly."

It is primarily for these reasons that it is difficult to police the distribution and consumption of illegal content and capture those responsible. There is no evidence of serious concerns among the police (or within the Home Office) that criminal investigations are being prejudiced to a significant extent due a lack of Prepay registration. Nor is there any evidence that a system requiring the mandatory registration of Prepaid mobiles would assist law enforcement investigations. Registration information may well only be valid at the time of registration. It is unlikely to be kept up to date. In July 2009 John Whittingdale MP asked the Secretary of State for the Home Department what plans he has for a compulsory register of mobile telephones; and if he will make a statement." [283858] Mr David Hanson MP replied: "We have no plans to introduce a mandatory registration scheme for mobile phones and would want firm evidence of the effectiveness of any such scheme before deciding whether legislation, as proposed by some European member states, was appropriate."