



TELEFÓNICA O2 UK LIMITED'S RESPONSE TO OFCOM'S CONSULTATION:
MOBILE CITIZENS, MOBILE CONSUMERS, ADAPTING REGULATION FOR A
MOBILE WIRELESS WORLD

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A *Telefónica* company

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Executive summary

1. Telefónica O2 UK Ltd ("O2") welcomes the opportunity to comment on Ofcom's mobile sector consultation document¹
2. While we accept that an assessment of the prospects for the sector is timely, O2 is concerned at the approach that Ofcom has taken in the assessment. We agree with Ofcom that its statutory general duties (broadly, to further the interests of consumers and citizens) should be at the heart of the review. However, Ofcom seems – without justification - to attach more weight to having regard to the desirability of encouraging innovation, than to its other obligations, and to its obligation to have regard to the desirability of encouraging investment in particular. In O2's view, this is a grave error. Ofcom's own consultants forecast that mobile operators must make annual network investments of billions of pounds, in circumstances where the extent and nature of future mobile usage is far from clear, and the availability of capital is in question. O2 is firmly of the view, therefore, that Ofcom should have at the heart of its review the objective of creating an investment regime under which such investment may be made with confidence by mobile operators. The tumultuous economic and financial global problems that have arisen since the publication of the consultation document serve only to emphasise the desirability of such an objective.
3. A key contribution that Ofcom can make to this goal is to provide for a predictable and proportionate regulatory framework. Now that competition is well established in mobile, O2 believes it would be appropriate for Ofcom to announce that, as a matter of principle, it will generally seek to rely on its concurrent competition law powers rather than exploit the regulatory regime, when it considers the sector. Such an approach would be consistent with the regulatory framework² and Government policy and would, we believe, make a significant contribution to reducing regulatory uncertainty. A greater reliance on competition powers and a withdrawal from sectoral regulation would reduce the possibility of unanticipated distortions in the market, ensure that competitive pressures are not reduced, promote innovation and provide clarity for firms, which would be subject to only one set of regulations. The mobile sector is responding to customers' preferences through competition, and therefore, Ofcom should withdraw from sectoral

¹ Mobile citizens, mobile consumers. Adapting regulation for a mobile wireless world. Ofcom, 28 August 2008

² Which specifies that ex ante regulation should be imposed only where there is not effective competition (i.e., where there is SMP) and where national and EU competition law remedies are insufficient to address the problem, see recital 27, Framework Directive 2002/21.



regulation wherever possible.

Market entry

4. Ofcom's concerns that the mobile sector is particularly challenging for new entrants³ are misplaced. It is wrong to regard technical standards and infrastructure costs as barriers to enter the market, except in a trivial sense. They simply reflect the nature of the service being provided.

5. As Ofcom says, it has already adopted a policy of releasing additional spectrum. New firms, able to innovate or bring costs down, have entered the sector, successfully. In the circumstances, there would seem little that Ofcom needs to be concerned about.

Mobile broadband is a nascent service

6. As Ofcom observes, mobile broadband is at an early stage of development. In O2's view, it is important to recognise the inter-relationship between fixed and mobile broadband and the services provided over these platforms. It is clearly far too early to be able to draw any conclusions about the extent of substitutability between fixed and mobile broadband services, or, indeed, whether these will be complementary. It may well be that the answer will be different for different customer types. For now, O2 simply observes that this will ultimately be a matter of empirical evidence. In the meantime, we would urge Ofcom to adopt a "wait and see" approach to nascent mobile broadband services.

Have all citizens and consumers benefited?

7. The short answer to this question is a resounding yes. O2 is firmly of the view that it is the dynamic competitive process and the fact that customers can and do switch providers, that creates the proper incentive on firms to attract and retain customers by providing a better service. O2's commercial success is based firmly on this premise. Ofcom itself notes that it receives far fewer complaints about mobile than it does for other telecoms services, even though mobile represents more than half of the telecoms sector by most measures.

8. We also believe that Ofcom's concerns that pre-pay customers have not benefited from a reduction in prices, is a result of Ofcom's misunderstanding of pre-pay tariffs. In fact, pre-pay customers have benefited from the competitive process in the same way that pay monthly customers have, in particular by the advantage of being

³ Paragraph 1.8 refers



offered free voice minutes and text messages if they top up regularly.

9. On coverage, the market has worked well to provide very good breadth and depth. Mobile operators are able to enter into infrastructure and national roaming agreements if they believe it is in their commercial interests to do so (subject, of course, to competition law). This may have the effect of improving coverage further than would otherwise be the case. In our view, coverage levels wider than the market is able to provide for is very much a social policy issue, and one for Governments rather than regulators. For now, we see little evidence of market failure.

10. Nor do we think that Ofcom's concerns about exclusion are well founded. In the consultation document, Ofcom says about one per cent of the population are "involuntarily excluded" from mobile services. However, with prices falling and a range of flexible pre-pay and SIM only offers, there can be little concern that the market is not working well. To the extent that exclusion is a problem, it is part of the wider debate about poverty, which is a matter for Government and not Ofcom⁴.

Continued success

11. In our view, it is the market mechanism that enables scarce resources to be used efficiently to produce and distribute goods and services in order to satisfy best consumers' preferences. Given that the mobile sector is effectively competitive, we believe that Ofcom should trust the market mechanism to deliver for consumers in the future, as it has in the past. Accordingly, in our view, it is the reliance on competitive markets that should be the cornerstone of Ofcom's strategy towards the mobile sector.

12. We would be concerned if Ofcom's "vision" for mobile⁵ has been formed with some pre-conceived notion about what a competitive market would look like without reference to whether or not this notion is in fact realistic. These types of "visions" often imply some form of intervention in the market, even where it is not justified. In our view, the mere hint of such intervention is unhelpful. It serves only to increase regulatory risk, pushing up the cost of capital and discouraging investment. And, as we have set out above, this is precisely the outcome that Ofcom should be striving to avoid.

13. Indeed, given our preference for competition law, it is arguable that Ofcom should have no articulated "vision" for the sector. The existence of "vision" implies a desired outcome, rather than a willingness to let market forces play out.

⁴ O2 has particular concern that putative reform of the voice call termination regulatory regime which may lead to a reduction of charges is likely to have a disproportionate effect on the extent to which the market can provide service to low usage consumers. The CLV of such customers contains a greater contribution (proportionately) from mobile termination rates than for average customers

⁵ See paragraph 1.14



14. We have structured the remainder of this response to correspond with the relevant sections of the consultation document as far as possible (including our response to the majority of the specific questions), with the exception of the first part, in which we consider the principles that we believe should form the basis for Ofcom's analysis. Annex 1 contains our response to the other questions.



Regulatory principles

15. It is clear that any approach that Ofcom adopts in undertaking the mobile sector assessment must be firmly based upon its role and obligations as set out in the Communications Act 2003 (the Act). Ofcom, itself, appears to recognise this, because in paragraph 1.2 of the consultation document, Ofcom states:

1.2. Our principal statutory duties are “(a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition”. These two obligations, as well as our duty to encourage innovation, are at the heart of this Assessment.

16. This is a reference to the General duties of Ofcom, as set out in section 3 of the Act. However, O2 is concerned at the interpretation of the General duties that Ofcom appears to have taken. Specifically, Ofcom says that it has a “duty to encourage innovation” and this, together with its principal statutory duties (the latter faithfully reproduced in paragraph 1.2 of the consultation document) “are at the heart of this Assessment”.

17. It is instructive to consider what the relevant parts of section 3 of the Act actually say. We have reproduced the most pertinent extracts below:

3 General duties of OFCOM

(1) It shall be the principal duty of OFCOM, in carrying out their functions—

(a) to further the interests of citizens in relation to communications matters; and

(b) to further the interests of consumers in relevant markets, where appropriate by promoting competition.

(2) The things which, by virtue of subsection (1), OFCOM are required to secure in the carrying out of their functions include, in particular, ...

(a) the optimal use for wireless telegraphy of the electro-magnetic spectrum;

(b) the availability throughout the United Kingdom of a wide range of electronic communications services; ...



(3) In performing their duties under subsection (1), OFCOM must have regard, in all cases, to—

(a) the principles under which regulatory activities should be transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed; and

(b) any other principles appearing to OFCOM to represent the best regulatory practice.

(4) OFCOM must also have regard, in performing those duties, to such of the following as appear to them to be relevant in the circumstances—

(b) the desirability of promoting competition in relevant markets;

(c) the desirability of promoting and facilitating the development and use of effective forms of self-regulation;

(d) the desirability of encouraging investment and innovation in relevant markets;

(e) the desirability of encouraging the availability and use of high speed data transfer services throughout the United Kingdom;

(f) the different needs and interests, so far as the use of the electro-magnetic spectrum for wireless telegraphy is concerned, of all persons who may wish to make use of it;

(h) the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;

(i) the needs of persons with disabilities, of the elderly and of those on low incomes;

(k) the opinions of consumers in relevant markets and of members of the public generally;

(l) the different interests of persons in the different parts of the United Kingdom, of the different ethnic communities within the United Kingdom and of persons living in rural and in urban areas;



(m) the extent to which, in the circumstances of the case, the furthering or securing of the matters mentioned in subsections (1) and (2) is reasonably practicable.

18. O2 agrees with Ofcom that the principal duties set out in subsection 3(1) must be at the heart of the current Assessment. In carrying out its functions, Ofcom is under obligations not only to secure (amongst other things) the availability of a wide range of electronic communications services, but also to have regard to broadly, good regulatory principles (subsection 3(3)). Further, when carrying out its functions, Ofcom must also have regard, (if relevant in the circumstances) to the desirability of encouraging innovation, under subsection 3(4). In the present circumstances (i.e., the mobile sector assessment), O2 agrees that it is desirable to encourage innovation – as Ofcom observes in the consultation document, the mobile market has provided tremendous innovation which has been good for consumers, and it seems only reasonable that future innovation is likely to have the same result.

19. Nevertheless, Ofcom has made two fundamental errors in interpreting its general duties.

20. Firstly, Ofcom appears to have misunderstood its obligation to have regard to the desirability of encouraging innovation, if relevant, when performing its duties (broadly) to further the interests of consumers and citizens. Ofcom appears to believe that, instead, it has a “duty to encourage innovation”. In fact, it has no such duty.

21. Secondly, Ofcom has selected just this one criterion – “encourag[ing] innovation” – and placed it “at the heart of this Assessment”. There is no mention of its other obligations, including the requirements in subsection 3(3) (principles of good regulation), nor of other things that Ofcom might reasonably be expected to have regard to in the mobile sector assessment. O2 believes that many other factors set out in section 3(4) are just as relevant to the mobile sector assessment, for example, the desirability of promoting competition (s3(4)(b)) and self regulation (s3(4)(c)), or the opinions of consumers (s3(4)(k)).

22. However, what is of most concern is that Ofcom does not appear to attach importance to its obligation to have regard to the desirability of encouraging investment (the other criterion set out in s3(4)(d) of the Act) in the context of the mobile sector assessment. In its report to Ofcom of 28 August 2008, Analysys Mason estimates that mobile operators will need to spend between £1bn and £2.4bn per annum on network equipment (depending on which scenario is relevant). That is a considerable investment for mobile operators to make, and O2 believes that Ofcom has a role to play in establishing a stable, predictable and proportionate regulatory environment in which such investment can be made with confidence. The failure to provide such an environment will serve only to increase uncertainty (in circumstances where, as Ofcom observes, the nature of future mobile usage is very uncertain), and that will push up the



cost of capital, jeopardising investment. The global financial and economic crisis that has occurred since publication of the consultation document increases further the importance of creating a regulatory regime for mobile in which investments can be made with confidence. As Lord Currie put it, in the recent Ofcom annual lecture⁶:

“But the sector faces these challenges against a very difficult economic backdrop: capital market constraints, a recession affecting personal and business consumer spending; and an advertising market in free-fall. Against that difficult backdrop, for Ofcom encouraging investment means, among other things:

- *Predictability of regulatory framework so investors can at least remove that uncertainty from their calculations. An example is cable, currently rolling out high speed broadband. Others have lobbied for open access to their network. We have given cable the predictability that, absent a Market Review and a finding of Significant Market Power- highly unlikely in the foreseeable future- network access is a commercial decision for Virgin not a regulatory one for us.”*

23. O2 agrees entirely with this proposition, which seems to us to be entirely applicable to mobile.

24. Ofcom's failure to have regard to obligations other than the desirability of encouraging innovation permeates the consultation document⁷ demonstrating how it has manifestly misunderstood its role, and skewing its analysis and preliminary conclusions. We return to this theme later in this response.

25. The other key point to make is that, as Ofcom acknowledges, it has concurrent powers under UK and European competition law and domestic consumer protection law. As a matter of principle, and because the mobile market is effectively competitive, O2 believes that it is those powers that Ofcom should generally seek to rely on to tackle any competition or consumer protection problems that might arise in the mobile sector.

26. This is a commonly held view. For example, in its review of concurrent competition powers in sectoral regulation⁸, the DTI envisaged the prospect of rolling back sectoral regulation in markets in which competition had been established:

4.11 However, a greater reliance on competition powers and a withdrawal from sectoral regulation may have a number of possible benefits, including:

⁶ See http://www.ofcom.org.uk/media/speeches/2008/10/annual_lecture

⁷ See paragraph 8.60, for example

⁸ <http://www.berr.gov.uk/files/file29454.pdf>



- the presence of sectoral regulation introduces the possibility of unanticipated distortions in the market arising due to new restrictions or licence conditions being imposed by the regulator;
- perhaps as a consequence, the existence of sectoral regulation which requires firms to act in particular ways can reduce the scope for competitive pressures to work on firms in regulated markets, resulting in a sub-optimal outcome for the market as a whole (particularly if regulation protects competitors, rather than protecting the competitive process);
- relying to a greater extent on general competition law and the subsequent absence of specific constraints allows firms greater flexibility and provides stronger incentives to innovate in ways which may be beneficial to consumers and which may improve sector productivity;
- competition law sets a higher hurdle for intervention which can help avoid undue regulatory intervention in a market that is broadly competitive;
- the Competition Act allows greater third party scrutiny of regulatory decisions;
- competition law principles provide a framework that can and should be used by companies to guide their compliance and provides companies with incentives to ensure that they do not act anti-competitively even in the absence of clearly defined *ex ante* rules; and
- withdrawing from sectoral regulation means that firms are only subject to one set of regulations.

and

4.17 The fact that we have sector-specific regulation reflects the fact that there is a role for the sectoral regulator as the facilitator of market reform, where appropriate. *Because of this we would expect that once competition had become established in a market, specific sectoral regulation could start to be withdrawn, and licence conditions removed from companies that now operate in a competitive market.* (emphasis added)

27. Indeed, Ofcom itself agrees with this position, writing in its response to the review⁹:

⁹ In a letter dated 12 January 2007, written by David Stewart



Ofcom is committed to using the Competition Act where appropriate. As noted above, Ofcom considers that it is in the interests of citizens and consumers that regulation is kept to a minimum and that the costs saved by removing additional or unnecessary regulation are passed back to consumers in the form of lower prices or better services, as a result of competition.

Section 317 of the Communications Act prescribes the approach Ofcom must take in using the Broadcasting Act powers rather than the Competition Act in relation broadcasting matters:

“Before exercising any of their Broadcasting Act powers for a competition purpose, Ofcom must consider whether a more appropriate way of proceeding in relation to some or all of the matters in question would be under the Competition Act 1998.

If Ofcom decide that a more appropriate way of proceeding in relation to a matter would be under the Competition Act 1998, they are not, to the extent of that decision, to exercise their Broadcasting Act powers in relation to that matter.

If Ofcom have decided to exercise any of their Broadcasting Act powers for a competition purpose, they must, on or before doing so, give a notification of their decision”.

Accordingly, Ofcom considers whether to use the Broadcasting Act or the Competition Act in investigations involving broadcasting on each occasion. I can confirm that the policy remains in place and is an effective prompt to ensure that opportunities to explore the use of the Competition Act are not overlooked in relation to broadcasting matters.

Ofcom has adopted the same approach in relation to electronic communications networks and services and use of the Communications Act or the Competition Act as it is required to do in relation to broadcasting. On each occasion before using its powers under the Communications Act for competition purposes, Ofcom considers whether a more appropriate way of proceeding would be under the Competition Act, and will proceed under the Competition Act if it considers that it is more appropriate to do so. These commitments are published in our enforcement guidelines.

and

As set out in our response to Recommendation 4, it is Ofcom's policy to use competition law in preference to other regulatory solutions wherever it is appropriate to do so.



28. As required under the regulatory framework, O2 believes that ex ante regulatory powers should be considered only where there is not effective competition (i.e., where there is SMP) and where it can be demonstrated that concurrent powers are not sufficient to remedy a particular problem. We think that Ofcom should reiterate its position on the use of concurrent and sector specific powers. We believe that this would make a positive contribution to creating a predictable and proportionate regulatory environment which, would encourage the substantial investment that mobile providers will need to make in the future. Again, we return to this theme later.



Today's UK mobile markets

Market entry

29. O2 notes what Ofcom has said about market entry¹⁰. In O2's view, Ofcom's concerns that the mobile sector is difficult for new entrants are misplaced. It would be wrong to regard R&D and manufacturing costs, technical standards, infrastructure costs, brand and distribution costs, etc as barriers to enter the market, except in a trivial sense. They simply reflect the nature of the service being provided.

30. Further, as Ofcom notes, new entrants have, in fact, entered several of the different markets in the mobile sector. Those able to add value have flourished, while those with flawed business plans have not. This is precisely what one would expect to see in a well functioning market.

31. As Ofcom says, it has already adopted a policy of releasing additional spectrum. New firms, able to innovate or bring costs down, have entered the sector, successfully. It is not Ofcom's role either overtly to encourage market entry or restrict the exiting of markets – to do so would distort markets. In the circumstances, there would seem little that Ofcom needs to be concerned about.

Growth of mobile broadband

32. Ofcom notes that mobile broadband is in its early stage of development, but comments that *"if these patterns of take-up become widely established, mobile broadband services could well become a significant influence in the wider picture of the UK broadband market"*.¹¹

33. Ofcom should not lose sight of the fact that that mobile broadband, one of the main subjects of this consultation, cannot be disassociated from other market developments, and wider broadband services (comprising services provided over fixed, wireless and mobile networks) in particular. Mobile broadband services are at an early stage of development, and their evolution remains unclear at this stage.

34. However, what is clear is that mobile broadband has the capability to address a range of customer needs. We expect that customers will take advantage of the choices of services available to them, in order to satisfy needs in accordance with their usage profiles, budget restrictions, and so on. Some sets of customers may believe that a mobile connected laptop is enough to meet their needs, while others may consider that mobile would complement the service provided over high speed fibre-based

¹⁰ Paragraphs 3.53 – 3.64 refer

¹¹ Paragraph 3.101 refers



connections. Some may believe that voice services as they know them are enough; some may prefer other technological choices.

35. On the supply side, O2 believes that there is no such as thing as a “typical” operator. Different players are likely to behave in different ways according to their strategic views.

36. We agree with Ofcom that mobile broadband is at an early stage in its development. Customers are still getting used to mobile broadband services and how they compare with fixed services. Related markets, such as content and application services, are also developing and their impact (or otherwise) on the wider broadband market also remains unclear. The impact of mobile on broadband (for example, the extent to which mobile and fixed broadband services are or become substitutes or complementary services over time) is, of course, a matter to be determined based on empirical evidence. Accordingly, at this early stage, Ofcom must be wary of basing any regulatory decisions on untested assertions such as:

- The possibility of there being a common broadband market;
- The existence or otherwise of a chain of substitutability existing between fixed and mobile broadband products; or
- Fixed and mobile broadband being entirely separate markets.

37. For now, O2 can see no reason why Ofcom should be concerned with particular market outcomes insofar as there is no demonstrable market failure. O2 would be concerned if Ofcom were to see mobile broadband as isolated from other, related services, or were to fail to appreciate how mobile and fixed broadband interplay. A failure to understand how competition operates for different customer segments would put Ofcom at risk of intervening inappropriately, resulting in suboptimal outcomes.

38. Mobile providers have different strategic goals and mobile broadband services are at a nascent stage in their development. Accordingly, Ofcom should adopt a “wait and see” policy at this stage to see how the market develops, rather than seeking to intervene, prematurely.

Questions

Question 3.1: What do you think are the features of a well-functioning mobile market? What evidence do you see that those features are present in the UK market?



In O2's view, well functioning markets have a number of characteristics, including:

- competition in price and quality of service
- good levels of choice and value for money
- innovation
- responsiveness to customers' preferences
- the capability for customers to switch suppliers easily
- high levels of customer satisfaction
- stable investment environment, which provides for a reasonable rate of return
- compliance with competition law
- access and call origination market effectively competitive

O2 believes that the UK mobile market displays all of these characteristics.

Question 3.2: What measures are most appropriate to assess whether the mobile sector is performing well for citizens and consumers?

We believe that a profound and rigorous analysis of the facts relating to the criteria listed above would need to be undertaken. It is important that Ofcom appreciates that competition is a *dynamic* concept; Ofcom should consider the extent to which market players and new entrants are able to respond to market developments. O2 believes that intervention can be justifiable only if a market is not effectively competitive, which is not the case in the mobile sector.

Question 3.3: How will market dynamics change as a result of trends such as availability of new spectrum, mobile broadband and new ways of delivering voice services?

That is very difficult to predict. However, from Ofcom's perspective, we think that it is important that the market is capable of responding to consumers' preferences, in terms of price, innovation, quality of service, etc.

The availability of spectrum, on terms that do not distort competition or investment incentives, can only enhance the dynamic competitive process in mobile.



Consumers

Pre-pay prices

39. We note what Ofcom has said about prepay charges¹². However, it appears to us that Ofcom has failed to consider properly the nature of the pre-pay tariffs, specifically “free” minutes and text messages provided for regular top-ups. When this is taken into account, it is clear that real average prices have fallen significantly.

40. Pre-pay tariffs have changed dramatically over the period of Ofcom’s analysis. In response to customer demand, operators now typically provide customers that “top up” regularly “free” minutes and text messages, which customers can use without their pre-pay balance being decremented¹³.

[<]

¹² Paragraphs 4.44 – 4.53

¹³ See, for example, <http://www.o2.co.uk/mobilestariffs/tariffs/paygo/paygotariffs>



44. In O2's view, the competitive process is as effective for pre-pay customers as it is for post pay customers. O2 must respond to competitor offers to win and retain connections in the customer segments it targets. The graphs above reflect a highly competitive pre-pay sector delivering real benefits for consumers.

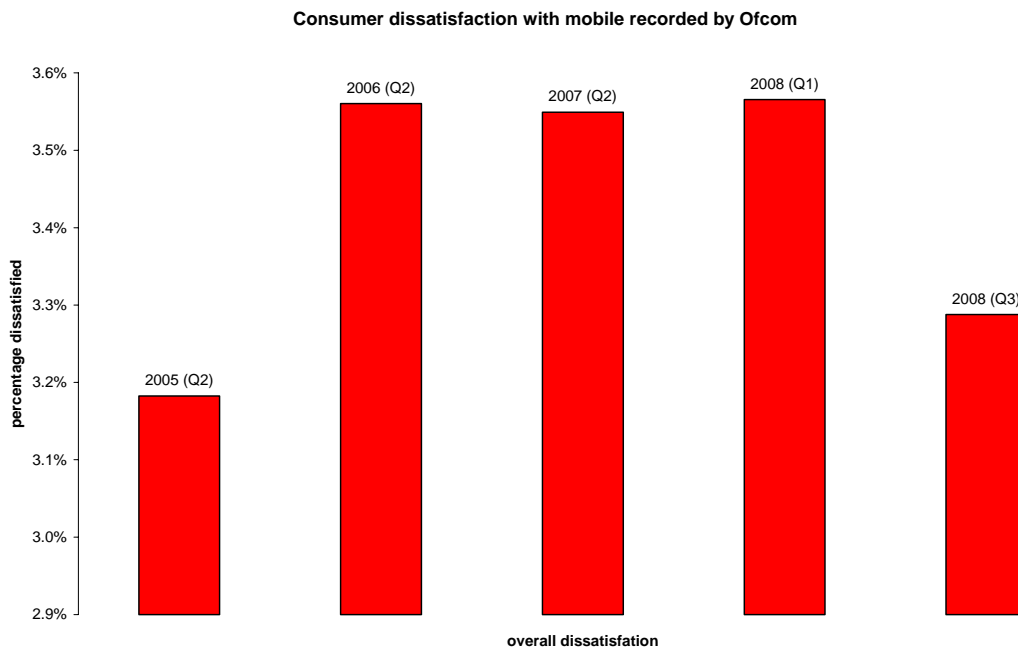
[X]

46. Accordingly, O2 is firmly of the view that UK mobile pre-pay customers are reaping the benefits of an extremely competitive market and that prices have, in fact, fallen for those customers, just as they have done for post pay customers.



Complaints and dissatisfaction

47. O2 notes what Ofcom has said about customer satisfaction and complaints levels¹⁴. O2 is pleased that Ofcom has recognised that customer satisfaction with mobile is high and increasing. Further, according to Ofcom's (unpublished) data, dissatisfaction levels have remained low and, in its most recent survey, have fallen:



48. O2 acknowledges that a dissatisfaction level of three percentage points, in a market with tens of millions of customers, represents a large number of users. However, we believe that it is important to analyse the reasons for dissatisfaction in closer detail, and the opportunities that the market provides for dissatisfied customers to get a better deal. So, for example, are dissatisfied customers distributed evenly amongst mobile operators, or are they more likely to be customers of any particular operator or operators? What are the reasons for dissatisfaction? How effective is the dynamic competitive process in offering dissatisfied customers a better deal? O2 believes that further analysis needs to be carried out before any conclusions may be drawn.

49. O2 also notes the evidence that Ofcom has presented on complaints and has the following observations:

¹⁴ Paragraphs 4.61 – 4.79



- It is positive to note that even though there are more mobile than other telecoms connections, that spend in mobile is more than half of all telecoms spend, and that household penetration is higher for mobile than for fixed or internet, Figure A1 on page 148 of the consultation document reveals that the number of complaints to Ofcom about mobile is about a fifth of the number of other telecoms complaints. [3<]
- As Ofcom observes, policy proposals to deal with specific problems are currently the subject of consultation by Ofcom and PhonepayPlus. O2 believes that it is entirely legitimate for regulatory authorities to respond to specific problems, either by enforcement (where existing rules have been broken) or by proposing new measures, if existing rules are found to be inadequate (subject to the statutory requirements that any regulation must be proportionate, objectively justifiable, transparent and non discriminatory). In our view, that is a far more productive approach than merely remarking on the volume of all mobile complaints, however they are caused.
- O2 notes the number of complaints received by Consumer Direct. However, if complaints about cashback are removed (on the basis that Ofcom is already dealing with the issue), then the increase in complaints about mobile, received by Consumer Direct, is broadly in line with the general increase. Further, O2 believes that there may be considerable differences in operators' performances and that blanket statements about the performance of "the industry" unfairly disparages those operators that are in fact performing well in responding to complaints and undermines their competitive efforts to differentiate themselves from the pack.

50. In general, O2 believes that it is the competitive process that is best geared to improve customer satisfaction, because mobile customers can and do vote with their feet. Ofcom itself recognises the large number of mobile customers that have switched provider (41%)¹⁵. Mobile compares very favourably with both fixed and broadband in terms of "positive" reasons for not switching. There would seem to be little reason why this should be a priority issue for Ofcom. Furthermore, it is instructive to note the small proportion of customers that have not switched due to "negative" factors. Only 3% of customers have not switched because of the perception that it is "too much hassle to change". 2% reported themselves as "too busy" and 1% thought that shopping around was "too much hassle". There is no explanation of whether the 4% who had not switched because they were "tied to contract" thought that this was a problem in any way

¹⁵ Paragraph 4.20 refers



(presumably this is the outcome of their previous decisions, for example when they had benefited from free handsets at the outset of their agreements in exchange for a contractual commitment).

51. The fact that switching is simple, straightforward and prevalent, provides a strong commercial incentive on providers to satisfy customers. There is a commercial incentive to improve quality, in particular customer experience and customer service, and there is vibrant competition in this area¹⁶. O2 is firmly of the view that high customer satisfaction levels translate directly into commercial success. Accordingly, O2's customer satisfaction is a key performance indicator for the company, and managers are incentivised on this criterion. O2's customer satisfaction rating is higher than that of its network competitors and has been for some time. We are firmly of the view that this has been a major factor in O2's commercial success.

[X]

¹⁶ See <http://www.independent.co.uk/news/business/news/orange-repatriates-its-call-centres-to-improve-service-1002761.html> for example



54. Although O2 is firmly of the view that it is the competitive market, and not regulation, that is the best means of generating better service, that is not to say that Ofcom does not have a role play in this area. It has various statutory responsibilities, for example, giving effect to the statutory obligation to provide for an alternative dispute resolution mechanism and a code of practice for premium rate services.

55. Ofcom may also have a role to play in addressing specific problems as and when they arise. O2 believes that Ofcom can enhance the competitive process by using its existing powers selectively on individual companies in regard to specific misdemeanours¹⁷. This forces the bad apples to improve and rewards those operators that seek to differentiate themselves in their treatment of customers by clearly identifying which market players cause consumer detriment. Blanket provisions, such as the proposed General Condition 23, penalise all for the ill-judged behaviour of the minority. O2 is firmly of the view that Ofcom should seek, wherever possible, to use its Enterprise Act or other general consumer protection powers, more frequently than it appears willing to do today.

56. Ofcom needs to be mindful that any specific intervention it considers must be proportionate, targeted and be consistent with its other statutory duties. Ofcom must not yield to pressure to be seen to “be doing something” in circumstances where intervention is not in fact merited.

Questions

Question 4.2: How should regulators and policy-makers respond to signs of rising consumer concern?

In O2's view, regulators and policy makers need to distil the facts and then analyse the issues properly. An assessment of whether the market is working effectively should be made. One would expect that well functioning markets would ensure suppliers respond to consumer concern, because customers would otherwise switch provider. In O2's view, the mobile market is working effectively and we so no reason for regulatory intervention.

¹⁷ See http://www.ofcom.org.uk/media/news/2008/11/nr_20081110a for example.



Question 4.3: What are the important factors to consider in striking a balance between protecting mobile consumers and enabling markets to work flexibly? Have we got this balance right in today's mobile market?

O2 believes that it is important that Ofcom uses a robust and objective framework to assess consumer protection issues. We see merit in an approach which recognises that it is economically efficient for consumers to make purchasing decisions based on a rational set of information, rather than a complete set (due to the cost of acquiring and processing information). Under such a framework, regulatory intervention may be justified if consumers are making decisions based on an information set less than the rational set (if the benefits of intervention can be shown to be greater than the costs). For mobile, we do not see any evidence in support of intervention.



Citizens

Citizen dimension

57. O2 notes what Ofcom has said about the “citizen dimension”. We recognise and obviously welcome the range of opportunities and benefits that mobile ownership presents to customers. In our view these reflect the success that mobile has been.

58. However, Ofcom’s concerns that people without mobile devices risk being excluded from society, seem rather far-fetched. Little or no evidence is presented to support the hypothesis. For example, while elderly people are less likely to have access to a mobile phone, they are more likely to vote. So fears about access to voting via mobile devices (which would only be possible if concerns about fraud are addressed) seem a little misplaced, at present. And while it is instructive to consider how services and opportunities to participate in society might develop, Ofcom must also appreciate that the extent of access to mobile devices is a moving feast as well.

Involuntary exclusion

59. Ofcom reports that around one per cent of the total population do not use mobile services for “involuntary” reasons. In its Consumer Experience research report¹⁸, Ofcom states that involuntary ownership is primarily due to affordability.

60. As we have set out above, mobile prices having been falling, including for pre-pay customers. As we describe later on in this section, The European Commission has recently decided that consumers have access to affordable mobile services. Accordingly, O2 is of the view that the market is working effectively.

61. The research by the Joseph Rowntree foundation that Ofcom referred to¹⁹ was an attempt to calculate minimum income levels based on what focus groups considered to be a minimum basket of goods and services to enable people to live and participate in society. The research was conducted to inform the debate about poverty, which is a wider social issue than simply the cost of mobile, and one for Governments, not regulators. In O2’s view, this is the appropriate arena to discuss this type of issue.

¹⁸ <http://www.ofcom.org.uk/research/tce/ce07/research07.pdf>

¹⁹ Paragraph 5.11 refers



Coverage

62. There appears to be some confusion about the issues that Ofcom raises in relation to coverage²⁰. Ofcom says that it has considered 3G coverage in more detail as this is the most prominent new technology. According to Ofcom, 3G coverage is a critical issue for the growth of new services, like mobile broadband, that are particularly the subject of the assessment.

63. However, Ofcom goes on to set out two issues that appear to be related to the provision of basic 2G services:

1. Those people living or working in areas which are not served at all by the mobile networks that rely on fixed telephony at their main premises (if available). For businesses, particularly SMEs, the need to operate and market both fixed and mobile contact details may result in increased costs and inefficient communication with their customers and suppliers; and
2. While not always resulting in total exclusion from mobile services; intermittent or unreliable coverage may lead to what Ofcom calls 'partial' exclusion.

64. In O2's view, the competitive mobile market has served the interests of customers well. The four UK GSM operators have rolled out their networks to over 99% population coverage. Further, as Ofcom notes in its International Communications Markets 2008 report, the UK had the highest level of 3G population coverage (92%) of any of the larger European markets²¹. Ofcom states that this reflects the regulatory requirements of the UK's 3G licences, a high level of demand from consumers, and competition between mobile operators to roll-out advanced mobile services. O2 would dismiss the first explanation (3G licence requirements), since the current coverage level is far in excess of the 80% requirement. [X] This dynamic picture is not reflected by Ofcom's snapshot in the consultation document.

65. Further, infrastructure sharing agreements between operators, leading to cost reductions and, therefore, greater levels of coverage, are permitted by competition law, depending on the circumstances (as would, in principle, national roaming arrangements).

66. Policy makers concerned about coverage must quantify the extent of any social benefit associated with a greater rollout – the costs of such intervention must be outweighed by the benefits. This analysis has not been carried out, and the evidence that has been presented thus far suggests that it is unlikely to be significant.

²⁰ See paragraphs 5.40 – 5.49

²¹ See para 5.3.4.10 of <http://www.ofcom.org.uk/research/cm/icmr08/telecoms.pdf>



67. If there are concerns about coverage, then, before intervening to mandate greater coverage, policy makers would need to quantify the benefit (social or otherwise) associated with a greater rollout and ensure that these outweigh the costs. In this context, Ofcom should be very wary of undermining investment incentives through regulatory intervention to impose national roaming. In his recent lecture, Lord Currie made the same point in relation to cable²²:

“Against that difficult backdrop, for Ofcom encouraging investment means, among other things:

- Predictability of regulatory framework so investors can at least remove that uncertainty from their calculations. An example is cable, currently rolling out high speed broadband. Others have lobbied for open access to their network. We have given cable the predictability that, absent a Market Review and a finding of Significant Market Power- highly unlikely in the foreseeable future- network access is a commercial decision for Virgin not a regulatory one for us.”

68. Finally, as a matter of principle, the net cost of any additional network rollout to address the marginal social benefit of greater coverage where this is not commercially viable, should be funded by the public purse, rather than by shareholders, otherwise the additional costs would distort other prices and investments, leading to economically inefficient outcomes.

Universal Service

69. It is the Government, and not Ofcom, that determines policy on Universal Service provision in the UK. That aside, Ofcom appears keen to open a debate on the extension of Universal service to mobile communications, possibly as a way to address its concerns about coverage. However, the Universal Services regime has traditionally been a tool to address issues of accessibility and affordability. As we have set out above, we see little evidence for concern on either issue.

70. In any event, mobile services do not now and, it appears, are unlikely in the near future to form part of a UK Universal Services Order, as, even though there may be some debate in Europe, the Commission has said recently that it does not intend to extend the scope of the Universal Services Directive to mobile, because there is no concern about affordability:

“**Conclusion:** This latest analysis reaffirms the conclusion in the first review that the competitive provision of mobile communications in the EU has resulted in consumers already having widespread affordable access to mobile

²² See http://www.ofcom.org.uk/media/speeches/2008/10/annual_lecture



communications. The considerations for including mobile communications within the scope of universal service (as set out in Annex V of the Directive) are therefore not fulfilled.”²³

O2 agrees with this conclusion, which would seem to limit the scope for intervention by the UK authorities.

National roaming for 999 calls

71. O2 appreciates that there may be benefits associated with national roaming for calls to emergency services. However, there may be disbenefits, as well. O2 understands that national roaming emergency calls would not benefit from the provision of specific location based information. Furthermore, mobile devices would need to be authenticated before they roamed on other networks so misuse could be properly managed, and this could raise capacity issues.

72. This facility was in operation many years ago and we understand that it was the emergency services that asked for it to be switched off. We have very recently seen the letter from the Association of Chief Police Officers in support of emergency roaming (subject to concerns about hoax and nuisance calls) and O2 is therefore happy to explore the issues with all interested stakeholders.

Questions

Question 5.1: How does the use of mobile services affect our participation as citizens in society?

and

Question 5.2: What factors should we take into account in thinking about access and inclusion issues in mobile markets?

That Government and commercial enterprises use mobile as a means of delivering their services, is a mark of the success that mobile has been. This has occurred in a competitive market and O2 sees no reason why the delivery of services using mobile should not continue in the future.

²³ See page 5 of http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/universal_service/572_final_en.pdf



However, we think that concerns that those who choose not to have mobile devices are in some way in danger of excluding themselves from society is far fetched. No real evidence of this has been presented.

In any event, whether or not the provision of any good or service by the market meets some socially optimal level, is a social policy issue rather than a regulatory one, and therefore falls more for government than for Ofcom

Question 5.3: What factors should we take into account in thinking about new services, and how those services may affect issues like protection of children, privacy and security?

O2 believes that industry initiatives, where appropriately deployed, can deliver clear consumer benefit both in terms of protection from harm and transparency of information to help consumers understand their choice and options in relation to parental controls. Indeed, the mobile industry has a strong record of taking self regulatory action, including, in the mobile content and location space, the UK Code of practice for the self regulation of new forms of content on mobile and the UK Code of practice for passive location services. In the privacy and security arena, there might, as Ofcom recognises, be a potential risk to consumers if regulations and consumer protection rules in relation to personal information fell too far behind technological change. However, in many respects, the Data Protection Act sets general principles which are technology neutral and which enable industry privacy and security standards to evolve in a collaborative manner to keep pace with change. So we see this as a beneficial aspect of the current regime and one which again, where appropriate, embraces self regulation.



Implications

Understanding the mobile market

73. Ofcom has often been described as “the converged regulator”. Indeed, it regulates a number of sectors using a common set of legal instruments. However, the structures of the markets that it regulates are very different.

74. Ofcom has a duty to have regard to the principles under which regulatory activities should be consistent²⁴, consequently Ofcom must act consistently when interpreting its duties, not just on an intra-platform basis (i.e. within broadcasting, fixed or mobile) but on an inter-platform basis as well. This may be increasingly important, to the extent that true platform convergence materialises. Whilst O2 believes that what Ofcom does by way of regulation must be consistent, this does not mean that the style and tone of engagement with each industry should be the same. In particular, given the competitive nature of the mobile sector, Ofcom must remain alive to the existing commercial incentives to act efficiently and provide customers with what they actually want (rather than Ofcom’s perception of what consumers want).

Voice call termination

75. O2 notes what Ofcom has said about voice call termination²⁵.

76. The LRIC+ approach, using economic depreciation, has been adopted by the UK authorities every time mobile termination rates have been considered, and is the preferred methodology for setting regulatory prices, because it mimics the outcomes of a competitive market. Ofcom has a statutory duty to have regard to the principles under which regulatory activities should be consistent. It is clear that any departure from this established practice would need to be properly justified, and it would certainly not be appropriate to seek to alter the methodology simply to create certain outcomes in other markets, or to manipulate the development of mobile markets in a certain way, over time.

77. Ofcom appears to be suggesting that it should look at a broader range of methodologies than LRIC+ because this method is becoming too difficult to operate effectively²⁶. However, in our view, once the Competition Commission has reported, most of the contentious issues will have been resolved to the satisfaction of the appeals body. Within that environment, the only issue remaining is the uncertainty about the future, i.e. what forecasts to put into the LRIC model. Fundamentally, just because the

²⁴ s3(3)(a) of the Communications Act 2003 refers

²⁵ See paragraphs 6.24 – 6.31 and 8.38 – 8.45

²⁶ Paragraph 8.41 refers



future is uncertain, does not mean that the regulator cannot exercise its discretion. What is key is that it exercises that discretion consistently or, if it changes its view, it is transparent as to the evidence that has led to that change²⁷. In an uncertain world, this would point against large irreversible regulatory decisions where the risk of regulatory failure predominates over the risk of market failure. We return to this point later with regard to spectrum liberalisation.

78. O2 does not believe that “it is too hard” is a valid reason for a regulator to change the way it has regulated the sector for the last five years. Ofcom has yet to put forward an adequate case for change.

79. O2 notes, and shares, the concern expressed by the UK Government and Ofcom to the Commission’s proposals in relation to mobile termination²⁸. In our view, any departure from the established approach, resulting in even lower termination rates than would be permitted under LRIC+, is likely to have the following consequences:

- A rebalance of retail prices would be required to make up for the reduced termination revenues. This would affect “low value” (i.e. low spending, essentially pre-pay) customers disproportionately. Ofcom has shown that these are predominantly low income consumers. They could expect to pay significantly more for their services going forward.
- consumers more generally will also be negatively affected, as the structure of retail prices will change; unless shareholders alone are to carry the resulting losses.
- mobile users in rural areas will be disproportionately affected, as a reduction in call termination charges removes the link between investment in network coverage and proportionate cost recovery in regulated prices; and
- future incentives for innovation and investment would be damaged.

80. All of these consequences are inconsistent with Ofcom’s statutory duties, as set out in section 3 of the Act.

81. O2 recognises that longer charge controls, whilst providing a stable basis for investment, may reduce the agility of the regulatory regime to adjust to cost movements, such as:

²⁷ The need for regulatory consistency was emphasised most recently in the CAT judgment on porting: “In these circumstances, the Tribunal’s view is that it was incumbent on OFCOM to ensure that the figures they adopted were better justified and more rigorous than was the case. No compelling evidence was adduced by OFCOM as to why they had departed from the costs used in the context of mobile call termination rates.”

See paragraph 123 of http://www.cattribunal.org.uk/documents/Judgment_1094_180908.pdf

²⁸ See <http://www.ofcom.org.uk/telecoms/ioi/eutetermination/response.pdf>



- rapid increase in traffic volumes that would dilute fixed costs within a computed charge;
- increases in spectrum costs, resulting from better changes in the FLOC of spectrum;
- increases in WACC, resulting from the current and potentially enduring contraction of debt markets and a potentially greater reliance on equity finance going forwards; or
- the multi-billion pound exogenous costs to be placed on O2 and Vodafone if Ofcom follows through with its flawed 2007 proposals on mobile spectrum liberalisation.

82. In front of the Competition Commission, Ofcom committed to behave symmetrically to changes in cost inputs. We trust that it will stand by this commitment, in particular where costs arising from its own decisions are concerned. Furthermore, where MTRs rise as a result of Ofcom's own decisions we trust that Ofcom will be transparent in its press releases, identifying clearly that it is regulatory driven input costs (for example spectrum fees paid to HM Treasury) that are the cause of increasing MTRs.

83. One option may be to undertake four year charge controls, but with the final two years open to re-computation under a set of clearly defined circumstances and with a limited variance from the initial decision allowable. Such an approach may allow operators to plan on a two to three year timescale and carry a quantifiable risk on their revenues in the outer years. Ofcom would retain a facility to recompute the charge (within specified limits) in order to react more quickly to what is a highly dynamic market. By reducing the element of uncertainty, such an approach might also lessen the prospect of litigation.

84. In the longer term, if voice does become a relatively small part of interconnect traffic, O2 appreciates that there is likely to be commercial pressure to adopt an IP based interconnection model, in the interests of efficiency. This would not necessarily mean bill and keep – it may be desirable to retain some form of usage reflective charging, if only to send efficient price signals to interconnecting parties. Further, it seems to us that a variety of interconnect regimes for different services, which would reflect differences at the retail level, could operate in parallel.

85. Finally, in section 7 of the consultation document, Ofcom presents a range of possible future scenarios that may (or may not) be played out in the years to come. Ofcom's consultants, Analysys Mason, postulate the implications of such scenarios for, amongst other things, the level of voice call termination charges. O2 notes that the value of the efficient charge for voice call termination services, within the context of a



regime based on LRIC+, is an output value based on the traffic patterns and investment profiles inherent in the scenarios. Such scenarios do not themselves provide the basis to set termination rates in order for regulators to encourage one, or other “desired” market outcome.

86. O2 is happy to participate in the wider debate about the future regulation of mobile termination rates, but it must be acknowledged that this must be carried out in the context of Ofcom’s Community and statutory duties. We believe that such a debate is likely to be better informed after the Competition Commission’s findings are published in the New Year.

Mobile broadband ecosystem

87. O2 notes what Ofcom has said about mobile broadband “ecosystems”²⁹.

88. The first observation we would make is that Ofcom appears to have been guided in its approach to this matter, by its statutory duty to have regard, in certain circumstances, to the desirability of encouraging innovation. O2 appreciates the statutory duty but, as we have pointed out above, it is just one of a number of things to which Ofcom must and should have regard, in the mobile sector assessment. For example, it seems to us that the desirability of encouraging investment is of paramount importance in circumstances where, as Ofcom’s consultants forecast, mobile operators are expected to have to invest in the order of £1bn - £2.4bn per annum to meet network usage demand. Ofcom’s focus on innovation only, to the exclusion of other matters, has skewed its analysis in this area.

89. On the issue of mobile broadband ecosystems, the evidence available at the moment suggests that the market mechanism is working effectively to allow innovative applications and services to be provided over mobile networks. In the consultation document, Ofcom suggests that entry barriers are high. However, new handset manufacturers and operating system providers have entered into the market recently, offering the customers the prospect of access to a wide range of content.³⁰ The competitive process has meant that services, like location based information services, are being provided by entities other than mobile networks³¹ and mobile operators are responding, accordingly³². There is no evidence to suggest that the pace of innovation and entry will slacken.

²⁹ Paragraphs 8.60 – 8.78 refer.

³⁰ See

<http://www.telegraph.co.uk/connected/main.jhtml?xml=/connected/2008/09/23/dlandroid123.xml&page=2>, for example

³¹ See New Media Age article, attached as Annex 2 to this response

³² see http://www.o2.com/12506_14234.asp for example



90. As far as mobile network operators are concerned, mobile data networks are capacity constrained; such constraints are a function of network rollout and the volume of spectrum available to individual operators. Given these constraints, O2 tailors its services to compete with similar services offered by other mobile data service providers.

[<]

92. In O2's view, competition law provides the right framework for authorities to assess whether access obligations ought to be placed on providers. There is well established and understood jurisprudence on the circumstances under which services and facilities should be made available to facilitate competition in downstream markets, and Ofcom should resist the temptation to seek to exploit the electronic communications regulatory regime to achieve some perceived desirable outcome. To do so would be inconsistent with competition law, and increase uncertainty and, therefore, investment costs. This would have the effect of discouraging investment in mobile networks, contrary to Ofcom's statutory duty.

93. There is, therefore, no justification for regulatory intervention to impose access requirements or "net neutrality" obligations on mobile networks.

Access regulation

94. O2 is of a similar view on the issue of access regulation³³. As a matter of principle, Ofcom should rely on competition law when considering the circumstances under which such intervention would be justified.

95. The five UK operators are part of large international groups and consequently compete within their groups for access to capital resources. EBITDA margins in the UK are generally lower than elsewhere within Europe, and Europe is a rapidly maturing market. These groups may often find greater returns on capital in emerging markets such as Africa (Orange & Vodafone), India (Vodafone), Latin America (Telefónica) and China (Telefónica & Vodafone). Capital resources, in what is a capital intensive sector, are therefore at a premium.

96. Within this context, the case for costly regulatory interventions must be clear, unambiguous, well evidenced and subject to a rigorous and transparent cost benefit analysis. Such analysis would enable Ofcom to prioritise the initiatives that it wants the industry to undertake. The opportunity cost of poorly evidenced and justified interventions, or those which result in marginal benefit only, is very high, in a capital constrained world.

³³ Paragraphs 8.79 – 8.87 refer



97. In our view, these capital constraints also require that Ofcom must have regard to the desirability of encouraging investment (see above). O2 is therefore concerned that the subject of investment, and the benefits of maintaining investment going forwards, do not appear to carry much weight in Ofcom's analysis on this issue.

98. With regard to consistency of regulation between platforms, it is revealing to look at Ofcom's approach to investment in the fixed telecoms market compared to the mobile market:

- for example, above we have quoted Lord Currie's recent speech, in which he emphasises that intervention to gain access to Virgin Media's infrastructure could take place only after a full market review under the framework and, in any event, was unlikely. Contrast this with the discussion of regulated access to mobile networks at paragraph 8.87 in the consultation document – we are concerned as to the very different approaches, especially when one considers that, on the one hand, in fixed, there is a “duopoly” infrastructure market, whereas, on the other hand, in mobile, there is a five player infrastructure market which has been found to be effectively competitive. Nevertheless, in respect of the latter, Ofcom appears to be suggesting that it might consider intervention

Similarly, Ofcom's September 2007 spectrum liberalisation consultation envisaged O2 and Vodafone spending [£<], in order to free up 900MHz spectrum for all market players, on the **assertion** that duopoly control of 900MHz spectrum would not naturally lead to the pass-through of purported cost savings to consumers. O2 sees little of the comfort recently provided to Virgin Media in Ofcom's proposals – Ofcom seeks to rely on an assertion, rather than proper analysis, capable of withstanding profound and rigorous scrutiny, that it should carry out under the regulatory framework or the Enterprise Act

- Ofcom has rightly taken a very steady and considered approach to Next Generation (fibre) Access (NGA). In its most recent consultation³⁴ Ofcom makes it abundantly clear that it is seeking to minimise regulatory uncertainty, to the extent that it has been prepared to set out detailed principles governing price controls on regulated products going forward³⁵. O2 notes that, notwithstanding Ofcom's efforts, BT has pledged to invest just £1.5bn to date. To put that into context, it represents less than one year's investment by the UK mobile sector.

By contrast, Ofcom's 2007 spectrum liberalisation proposals would, in reality, impose [£<] costs on O2 and Vodafone, notwithstanding the wholly speculative nature of the benefits identified by Ofcom in that consultation. The September

³⁴ http://www.ofcom.org.uk/consult/condocs/nga_future_broadband/main.pdf

³⁵ See section 7 of the consultation document



2007 consultation provided no or insufficient direction as to Ofcom's future intentions with regard to both 900MHz and 1800MHz (specifically with regard to the issues O2 has raised regarding LTE). Having created this regulatory uncertainty, Ofcom is now seeking to sell 2600MHz spectrum in the market (for LTE). We see little of the regulatory certainty provided to BT, in Ofcom's approach to the 2600MHz auction.

How should Ofcom ensure consumers are protected?

99. Generally, we see no reason why the collaborative approach that has emerged in the UK between industry, government and child protection stakeholders, for example, first under the Home Office Task Force and now under the UK Council for Child Internet Safety (UKCCIS) will not be able to keep pace with technological change. O2 believes that industry initiatives, where appropriately deployed, can deliver clear consumer benefit both in terms of protection from harm and transparency of information to help consumers understand their choice and options in relation to parental controls. Indeed, the mobile industry has a strong record of taking self regulatory action - a full list is set out in Annex 3 to this response, including, in the mobile content and location space, the UK Code of practice for the self regulation of new forms of content on mobile and the UK Code of practice for passive location services. In the privacy and security arena, there might, as Ofcom recognises, be a potential risk to consumers if regulations and consumer protection rules in relation to personal information fell too far behind technological change. However, in many respects, the Data Protection Act sets general principles which are technology neutral and which enable industry privacy and security standards to evolve in a collaborative manner to keep pace with change. So we see this as a beneficial aspect of the current regime and one which again, where appropriate, embraces self regulation.

Provision of information to consumers

100. As a matter of principle, O2 advocates the adoption by Ofcom of a robust analytical framework to consider consumer protection issues. We see merit in an approach that recognises that it is efficient for consumers to make purchasing decisions based not on the attainment of perfect information (because acquiring and processing information is costly), but on the basis of the *rational* set of information. Where the actual information set used by consumers differs from the rational set, and where purchasing decisions are adversely affected, as a result, then O2 accepts that regulatory intervention may be justified, if it would improve matters³⁶.

³⁶ Though this should be subject to the general point that, given constraints capital operators face, Ofcom needs to prioritise those initiatives it wants the industry to undertake



101. On the issue of the provision of quality of service information, O2 is firmly of the view that no evidence has been presented to justify regulatory intervention.

Questions

Promoting competition

Question 8.1: Should Ofcom do more to promote competition in mobile and wireless markets?

No. Competition is already delivering well for consumers and businesses in mobile and wireless markets. Ofcom has concurrent powers under competition law and is required to carry out market reviews. There is no evidence that further regulatory intervention would be merited. Indeed, it would be unwelcome, because it would create an uncertain regulatory environment, inevitably increasing the cost of capital and discouraging investment.

Question 8.2: Ofcom's strategy in telecommunications is to promote competition at the deepest level of infrastructure that is effective and sustainable. How might this strategy be applied, given future developments in the mobile sector? Under what circumstances, if ever, would it make sense to consider access regulation for mobile platforms?

and

Question 8.3: What role can competition play in ensuring that future development of the mobile internet provides an open and flexible environment for a wide range of services? Should Ofcom explore open access requirements to ensure opportunities for innovation? What role might 'net neutrality' play in the mobile sector?

Ofcom should respond to market developments using concurrent competition law powers, as far as possible. This provides it with the ability to punish and stop the abuse of a dominant position and anti-competitive agreements. Further, under the Enterprise Act, Ofcom may ask the Competition Commission to investigate markets where it appears that the structure of the market or the conduct of suppliers or customers is harming competition.

O2 is firmly of the view that Ofcom has sufficient concurrent competition powers to address any development in the mobile market, and that it is these powers that Ofcom should consider in the first instance. It is well established that the regulatory framework itself and government policy require that, where effective competition has developed, as it has in mobile, ex ante regulatory powers should not be used.



On that basis, we cannot envisage circumstances where it would make sense to consider access *regulation* for mobile platforms.

Further, we think that it would be helpful if Ofcom were able to confirm that it is appropriate, given that the mobile sector is effectively competitive, for it to rely on concurrent competition law powers. There is a danger that the mere prospect of regulatory uncertainty might increase the cost of capital, which would be harmful to investment.

Setting clear rules for consumer protection

Question 8.4: What role might competition play in addressing questions about transparency of prices, services and contractual conditions offered to consumers of mobile and wireless services? What role should regulation play in addressing these questions?

Please refer to our answer to q 4,3

Question 8.5: What is the best way to promote content standards and ensure privacy protection for increasingly complex content and transaction services? How will privacy issues fare in a world where services are more personal and more complex?

Please refer to our answer to q 5.3

Adapting regulation to converging markets

Question 8.6: Will the mobile termination rate regime need to evolve or change more fundamentally? What is the best approach to adopt?

O2 is happy to participate in a discussion on the way forward for MTRs but is not convinced, by the evidence to date, that the current approach is in need of reform.

Question 8.7: If competition does not reduce international roaming charges sufficiently, how should regulators respond, if at all?

Competitive markets derive the optimum outcome for consumers and consequently regulators should rely on these to generate the competitive level and structure of prices. The strength and nature of competition in national markets will differ, but the UK market presents the most vigorous level of competition in the European Union. Accordingly, O2 believes that there is no basis for the regulation of roaming charges. That there has



been such intervention and, it seems, likely to be more is, as far as O2 is concerned, evidence that political motivations have outweighed free markets and truly independent regulation³⁷.

Further, the likelihood is that the continued regulation of these markets, by means of price caps will, ironically, lessen rather than increase the scope for competition going forwards.

Question 8.8: How might universal service and universal access need to adapt in a world where we increasingly rely on mobile services? What role might mobile play in universal access delivery in future?

The Universal Services regime is designed to ensure that services deemed necessary, are affordable. As we have set out in this response, the market has been very effective in providing affordable services to consumers – prices have fallen substantially. We see no reason why competition will not continue to improve upon this situation. Accordingly, O2 agrees with the European Commission on this point – we do not see a role for regulation to require access to mobile services at regulated prices.

Question 8.9: Can markets and commercial agreements address issues such as ‘not spots’ and emergency access? If not, what role might be played by a regulator to address these issues?

In O2’s view, the competitive mobile market has served the interests of customers well. The four UK GSM operators have rolled out their networks to over 99% population coverage. [§<] This dynamic picture is not reflected by Ofcom’s snapshot. Infrastructure sharing arrangements, which may have the effect of reducing costs increasing coverage levels, may be permitted by competition law (as would, in principle, national roaming arrangements).

Policy makers concerned about coverage must quantify the extent of any social benefit associated with a greater rollout – the costs of such intervention must be outweighed by the benefits. This analysis has not been carried out, and the evidence that has been presented thus far suggests that it is unlikely to be significant.

As a matter of principle, O2 believes that this type of issue is a question of social policy rather than a regulatory one.

³⁷ “we must also remain true to the key principle at the heart of the Framework: robust, evidence-based and politically independent regulation in the interests of Europe’s citizens and consumers. That requires a system in which independent regulators can make regulatory decisions without interference either from national governments – or from the Commission.” Ed Richards, CEO Ofcom, Brussels 20/10/2008 http://www.ofcom.org.uk/media/speeches/2008/10/eu_framework



Question 8.10: How might access for particular groups (such as the elderly and disabled users) need to evolve in future? What role can competition play in addressing these questions?

O2 provides a range of products and services aimed at elderly and disabled customers³⁸. This is an area that O2 is committed to, and we expect to provide more help and guidance in the future.

Our proposed way forward

Question 8.11: Do you have any comments regarding our proposed way forward and the objectives of the next phase of this Assessment?

O2 is strongly of the view that Ofcom should re-examine the principles that are guiding its approach to the assessment. In our view, it has seriously understated the desirability of encouraging the substantial investment that mobile operators are likely to need to make in the future. Ofcom should be very mindful of the need to provide a stable and predictable regulatory environment which minimises regulatory risk, reducing the cost of capital, in order to encourage investment.

³⁸ See <http://www.o2.co.uk/accessforall>



Answers to remaining questions

Question 1.1: What are the implications of market change for mobile and wireless services?

Question 1.2: How are citizens and consumers affected by developments in the mobile sector?

Question 1.3: What are the purposes of mobile regulation, and where should its focus lie?

and

Question 1.4: What is the scope for deregulation, competition and innovation in the mobile sector?

Please see the Executive Summary of this response

Question 7.1: What do you see as the most influential trends and features of mobile and wireless markets in future?

The evidence suggests that mobile networks will carry an increasing proportion of data traffic. However, the nature of data services and applications is not clear, at this stage.

Question 7.2: What new policy and regulatory challenges could the trends identified in this section bring? Which policy and regulatory challenges could they address?

In O2's view, the key regulatory challenge is the provision and maintenance of a stable and predictable regulatory environment, which minimises regulatory uncertainty, thereby promoting the substantial investment that mobile operators will need to make.

In our view, Ofcom can make a uniquely positive contribution to the creation of such an environment, by making a commitment to using its concurrent (and substantial) competition powers to tackle any issue that might arise in the future in the competitive mobile sector.



Article from new Media Age 13 November 2008

location services

by Sean Hargrave

Where next?

Location-based services have been discussed in the mobile industry for years. But with recent developments, they now look like a real possibility

» Discovering where a device's user is located has always been mooted as a way of opening up a new range of services that would allow people to request services and get content related to where they are. As technologies that locate a user in the real world improve, 2008 could be the tipping point for location-based media.

There are three broad areas of innovation. First, it's now possible to identify the real-world location of computer users accessing the web by a fixed connection. Second, by harnessing GPS technology, mobile services such as restaurant booking sites and mobile social networks can discover a person's location for free rather than paying mobile networks for every lookup request on their network. Third, Wi-Fi technology is on the verge of allowing computers with wireless capabilities to be tracked, whether stationary or on the move. This will be particularly useful for tracking laptops on the move, because currently USB dongles used for mobile broadband only reveal the billing centre of the operator, not the Wi-Fi point or cell tower they're accessing the web from.

Fixing your position

In terms of matching up a fixed computer with the real world, services are evolving. Last month Mozilla announced a Firefox download, called Geode, that can locate users so they can be served more relevant content. This may be built into future releases of Firefox, depending on take-up and feedback. As long as the PC has Wi-Fi turned on, or even if it's using a fixed connection, the software can triangulate the computer's position and reveal it to websites, if the owner gives permission.

The development is being described by Ted Morgan, CEO of location-based services company Skyhook, as part of early moves to track computer users, with their permission, so localised content and advertising can be offered. "We're beginning to see some location-based ad efforts, but these are still early days," he says. "Part of the goal of the Geode project is to put in place the infrastructure so that location-based promotions can be

driven into the mainstream."

This mainstream is currently occupied by fixed-line IP tracking, which has now been improved to city-level accuracy, according to Steve Sawyer, business development director at internet geolocation data company Quova. It's probably best known for its work with the BBC ensuring those viewing online content are identified as being in the UK, so they're not served ads, or abroad, who are served ads relevant to that country. It also works with Channel 4 and Sky to ensure they only serve content in countries they have rights for.

This capability can now define smaller regions, such as individual towns, and is moving into the advertising space. Although Sawyer wouldn't confirm it, Google's geolocation service in AdWords is believed to use Quova to let advertisers pick where in the country their ads appear.

The same tracking technology is also starting to be offered by ad agencies and ad-serving companies. Quantum, for example, has teamed up with its sister agency BLM Local to offer brands display campaigns restricted to specific regions using technologies from Google and Mediaplex. It has recently run display campaigns for Domino's Pizza where ads were only shown in areas to which it could deliver, reducing the average cost per order by 20%.

From the content provider's perspective, music discovery site Last.fm is using IP tracking technology to split its users into geographic regions mirroring the TV regions which big brands, such as Adidas and Ford, wish to reach, according to senior VP of international sales Miles Lewis. "We know that to tap into big-brand advertising you have to be able to replicate the areas they'll be running TV campaigns in," he says. "So we offer the same regions, which is important because our peak usage time is during peak TV viewing hours. We've never been asked to drill down further to city level, the demand is purely for TV regions so the two media can both be used to target the same area at the same time."

Making use of maps



This ability to advertise depending on location is also starting to make an impact with online mapping, allowing consumers to tell a map site where they are to get information on local businesses of interest. Google hasn't yet monetised its use of Google Maps to overlay local companies on maps but Microsoft-owned Multimap has.

It already has local content deals in place for Wagamama and Cottages4You, and these have recently been joined by restaurant booking service TopTable. Its MD, Chris Wood, explains that people searching for a location on Multimap can now select to see nearby restaurants which can be booked through TopTable, a new facility he believes will drive more business.

"Unless you want to try out a particular venue, location will be central to choosing which restaurant you eat at," says Wood. "It's a natural extension for us to be added to Multimap searches. We don't charge our restaurants an extra fee for the service. Instead, we expect the extra revenue from more bookings will make it worthwhile. Our deal is that Multimap also gets a share of commission from bookings made through the service."

Multimap also powers Vodafone's Find and Go mobile navigation service, as well as map searches on MSN Live and MSN Mobile. Jim Cruickshank, head of mapping, local and shopping, predicts location-based services will transform shopping, as well as search, within a year.

"Search is getting local. The proportion of searches pertaining to a location keeps on increasing so mapping is an obvious way for people to discover products and services," he says. "We already allow searching for products and services within a specific area and provide a list of local stores, and are working on showing whether items are in stock and allowing users to compare prices. We see search as moving on from text results to maps combining location with price comparison."

Mobile revolution

The greatest advances in geolocation are being made in mobile, and are likely to continue being so in the short term. With the launch of Apple's iPhone (upgraded this summer to include GPS) as well as other manufacturers' smartphones, combined with Google Maps now locating a user for free, location-based services are starting to take off. Previously a provider of a location service would have to pay the mobile phone network to locate a user, anything from 5p upwards but typically 15p. But new devices and a free positioning service are allowing third parties to implement location-based services for a new breed of smartphones and their users.

The Google Geolocation API, which was made free to use this summer, uses mobile phone mast locations to establish a user's position. Similarly, Skyhook's Geode comes pre-installed on the iPhone. Morgan believes that mobile phones networks have been caught napping and are no longer in control of location services.

"It's the device manufacturers and software developers

that are in charge now, not the networks," he says. "In the past when you wanted to develop a location-based application you had to spend thousands of pounds and several months working on it, then go to each network and seek their approval, which could cost tens of thousands of pounds more and take up to a year. If you got it going, you then had to give a slice of revenue to each network. Start-ups just couldn't afford to do that.

"Apple has completely changed this. The process is very cheap and approvals take a couple of weeks. You still have to give 30% of what you make to Apple but at least it's not money you need upfront. That percentage will have to settle at around 15% or so as competition from App Stores run by Google, Rim and Nokia takes effect."

Cutting out the networks from the approval process and revenue share has given developers a faster, cheaper route to market, as well as access to sales space at each device's app store or download centre. One such service benefitting is Lastminute's Fonefood restaurant booking application. It currently runs on any phone supporting Windows Mobile and will soon be rolled out to Nokia's Symbian platform as well as the iPhone.

Marco Balabanovic, head of innovation at Lastminute, says the ease with which applications can now be added to platforms makes location services viable. "We always knew that booking restaurants would be our first mobile location service because, obviously, when you're in a new city you don't always know where you are or which restaurants are good," he says. "In the past this would have involved separate deals with the networks in each country, but with Google Maps you can use one service to allow the map to find someone and plot where they are without the networks being involved."

As with 'find my nearest' location-based services, several mobile social networks are now hoping their freedom from relying on the networks to place their users will allow their ad-funded services to take off. David Hogben, COO of BuddyPing, points out that mobile social networking would have found it difficult to get off the ground without free location services.

"In the past a location lookup may have cost 15p. So if a user wanted five location updates a day, that would cost them 75p, making a commercial service very difficult," he says. "Being able to access the GPS chip in the phone or working with someone like Skyhook to provide a location has allowed us to grow massively without paying the networks a huge fee. Also the improved handsets and all-you-can-eat data tariffs are producing great opportunities for location-based social networking."

Aside from social networking, there are new marketing services that will be opened up by location services. While these are very much in their infancy, Justyn Lucas, partner at mobile planning/buying agency Yodel, believes they'll become more common next year. "Now you can offer location services without going through the networks, they'll become a huge part of campaigns," he says. "We're already talking about location for mobile ad



campaigns with several clients. We have a big financial services client that we'll be doing a location service for towards the end of the year or early next year, and we've already done a campaign with Mini in which people could click to book a test drive with their nearest dealer. We're expecting to see a lot more of this. We couldn't do this before because the networks' charges for location services were prohibitive and there weren't enough phones with mapping services on them."

Operators' response

With so much start-up activity happening around mobile location, what are the mobile phone networks doing to stake a claim in a new development which has so far bypassed them? O2 is making the biggest move with the launch of its developer platform Litmus, which should be open for business in time for Christmas. Head of the service James Parton believes the free (while in beta) developer platform will give scale through access to Telefónica networks and, one day, all mobile networks.

"With Litmus we're holding our hands up and saying we're better out of the equation and leaving developers to access our customers with our help," he says. "We have to admit we allowed Google to steal a march on us because we only have so many resources and location obviously didn't get high enough priority. With Litmus, though, we're opening up and allowing free access to our customers, who will tell developers what they like and don't like about services before they're launched and then there will be a commercial relationship."

"It's true that developers can go the device route through something like the Apple App Store, but our point is one of quality and access to our customers for testing so they can get the service and pricing right."

Parton believes O2 is the network to have reacted the strongest to Google's early dominance but believes "the big challenge" now is for the operators to pull together and allow an application written for one network to be accepted on another so, in his words, "the mobile becomes as ubiquitous as the internet". For the time being, though, he admits the conversations to roll out an O2 service across parent company Telefónica's multiple networks aren't finalised, so he expects competing networks will take some time to arrange common standards.

So while Google and Apple have caused a reaction from the companies they've mostly cut out of the location loop, a concerted joined-up response from the mobile networks would seem to be far off. ●

quick facts

Location-based services, which map the location of IP-enabled devices, are becoming increasingly accurate.

Mobile networks have talked about location-based services for several years but held back adoption by trying to monetise it on a per-enquiry basis.

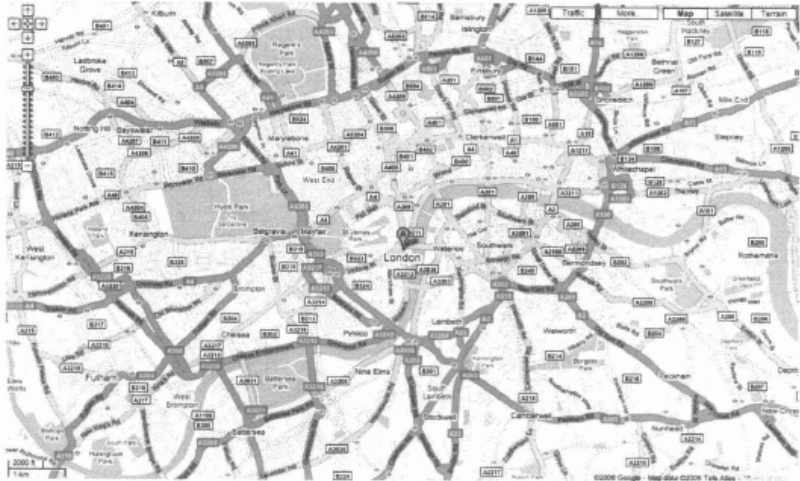
This summer Google launched its free Geolocation application for developers. It uses the same triangulation technique as networks to plot position relative to phone masts.

Top-end mobile phones now have GPS, which can plot position on built-in or downloaded maps.

Mobile networks are now not needed by developers building location apps. They can use the device's own capabilities to plot position and sell the service through the device's own application store.

"The proportion of searches pertaining to a location keeps on increasing so mapping is an obvious way for people to discover services"

Jim Cruickshank, Multimap



VODAFONE's Find and Go service is powered by Multimaps, while Quantum and BLM Media recently ran display campaigns for **DOMINO'S PIZZA** where ads were only run in relevant delivery areas

WOOD "Unless you want to try out a particular venue, location will be central to choosing which restaurant you eat at"



PARTON "We have to admit that we allowed Google to steal a march on us. Location obviously didn't get high enough priority"

MORGAN "It's the device manufacturers and software developers that are in charge now, not the networks"



O₂



MINI used a location-based mobile campaign with Yodel, while below, **WAGAMAMA** ran a location-based campaign with Multimap (below)

The image shows a screenshot of the multimap website. The interface includes a search bar at the top with the text 'multimap' and 'From Microsoft for Search'. Below the search bar, there are navigation links: 'find a map', 'get directions', 'find a business', and 'search the web'. The main content area features a map of London with a red pin and label for 'wagamama' in the Covent Garden area. A black button with white text 'click here for noodles in this area' is positioned above the map. The left sidebar contains various search filters and a search history section. The footer of the page includes the slogan 'Anything's Possible.' and copyright information.



Self Regulatory Codes developed either specifically by UK Mobile Operators or where they have been active participants in a broader industry scheme

- UK Code of practice for the self regulation of new forms of content on mobile
- UK Code of practice for passive location services
- Mobile Industry Good Practice Guide for Service Delivery for Disabled and Elderly Customers in the UK
- Code of Practice for Common Shortcodes
- Code of Practice for the sales and marketing of subscriptions to mobile Networks
- Scheme rules for the Trusted Mobile Payment Framework (Payfort)
- Mobile Operators Ten Commitments to best siting practice
- Internet Watch Foundation Code of Practice
- Home Office Taskforce on Online Child Safety Good Practice Models for chat, Instant Messaging and web based services.
- Home Office Taskforce on Online Child Safety Good Practice Models for moderation services
- Home Office Taskforce on Online Child Safety Good Practice Models for interactive services
- Committee of Advertising Practice Code
- BSG's Common Principles on Content Information
- Mobile Phone Industry Crime Reduction Charter

Source:

http://www.mobilebroadbandgroup.com/documents/mbg_ofcom_self_coreg_090608_fc_logo.pdf