Response to Ofcom consultation on 'Mobile citizens, mobile consumers'

on behalf of Orange Personal Communications Services Ltd

6 November 2008

Summary

The issues raised in this stage of the Assessment are extremely broad and wide-ranging. Orange believes that in order for it to generate a meaningful outcome, in the next phase Ofcom must define and focus on those issues which it regards as most important or risk missing a huge opportunity or producing sub-optimal outcomes.

Orange believes that the key features of a well-functioning mobile market are related to price and choice, combined with innovation (and these are also the appropriate measures to assess whether the sector is performing well for citizens and consumers). These features are extremely evident in the UK market indicating a high level of effective competition. Number of market players, levels of switching and levels of consumer satisfaction may also be relevant to an extent.

Spectrum, mobile broadband and new ways of delivering voice services will all change the dynamics in market. The availability and cost of spectrum will always be critical. Mobile broadband is fairly new market, but it may well follow the evolution of the mobile voice market in becoming mainstream. New ways of delivering voice services will challenge providers to offer a reliable and good quality service and regulators to consider issues of call termination.

Regulators and policy makers must be conscious that the mobile market currently exhibits very high levels of consumer satisfaction. Where problems arise, they should first look to the market to deliver solutions. Regulation in the interests of consumer protection risks is limited in what it can achieve, risks disincentivising future self-regulation and could be potentially harmful, where Ofcom's knowledge of a subject is limited. Orange believes that providers are best placed in terms of knowledge and incentives to address consumer issues. Ofcom should adopt the role as facilitator bringing stakeholders together, rather than assuming that regulation is its only option.

There are a number of questions which Ofcom needs to consider in striking a balance between protecting consumers and allowing markets to work flexibly. It should only even consider regulation if answers to those questions suggest that it is the best solution, rather than adopting a 'something must be done' approach to every issue it faces.

There are citizen issues related to the use of mobile technology, although there is currently limited use of mobile services within the public sector. The risks that exist are being addressed, but the biggest issue of improving coverage in rural areas depends on the impact of regulation on operators' ability and willingness to invest.

The most influential trends and features of future mobile markets may well centre on challenges to operators profitability Decreasing EBITDA and the continual need to reduce costs is crticial. Whilst voice will remain central to mobile operators' business models, Orange believes that predictions of fixed line displacement are somewhat misplaced. Orange's strategy is based upon complementary fixed and mobile services which we believe will shape the market. Whether or not mobile operators will become 'data pipes' in the future mobile broadband market is unknown and will depend on their commercial strategies. Whatever scenarios occur will create regulatory and policy challenges, the most important of which is a need not to over-regulate and thereby disincentivise future investment and innovation.

The UK mobile market is clearly extremely competitive and therefore not obviously in need of regulatory action further to promote competition. In deciding how to promote competition at the deepest level of infrastructure, Ofcom should apply basic principles of competition law, acknowledging that the fixed and mobile markets are fundamentally different. But the market is working well and so there is no need for this to be a priority for Ofcom at this time. Similarly, the market can be trusted to provide an open and flexible environment for mobile internet services and so there is no need for regulation to ensure net neutrality.

Competition can play a central role in providing information to consumers, but suppliers will always have a sufficient incentive to provide the information which their customers genuinely want as a matter of good business practice and in order to reduce incoming queries. Regulation should not seek to ensure that consumers are provided with as much information as possible, as prominently as possible, because it does not reflect their genuine wishes.

Content standards and privacy protection are certainly important issues, but they are currently well managed by operators, although consumers also need to accept a level of personal responsibility.

Whilst Orange believes it will be necessary to discuss future arrangements for call termination, there are live appeals currently before the Competition Appeals Tribunal and therefore the debate in the UK should occur once the outcome of those appeals is known. In essence, however, Orange supports the existing approach to call termination and does not believe that there is a need for any revised methodology to be applied in the UK.

The question of international roaming charges is not one that Ofcom need address within the scope of this assessment as regulation under Article 95 is already in place and due to be extended until at least 2013. Ofcom's powers to influence future regulation beyond that date are limited and so there seems little purpose in pursuing the issue in this context.

Orange does not believe that mobile currently has a significant role to play in the delivery of universal service. By its very nature mobile is not (and cannot be) a universal service and although it may have a supplementary role to play in the delivery of any future broadband universal service obligation, there should not be any obligation applying to mobile technology alone.

The question of how to address areas of poor mobile coverage is closely linked. Ofcom must acknowledge that it will never be possible to provide 100% coverage and therefore to eliminate 'not-spots' and so the issue becomes how to improve and extend coverage as far as possible, particularly in rural and sparsely populated areas. The principal limitations are environmental and financial. Whilst the former should not be underestimated, Ofcom can have significant influence over the latter in terms of the decisions it makes in imposing revenue impacting price regulation. Ofcom seldom seems to make a connection between the imposition of regulation and the ability and incentives of operators to invest in extending their networks. From an operator perspective, the connection is critical and unambiguous.

Next Phase of the Assessment

Although Ofcom asks for views on this issue in question 8.11, Orange feels that it is so central to the entire process that it is best addressed at the start.

Orange acknowledges Ofcom's intention to undertake a very broad and all-encompassing review of the mobile sector. We welcome the fact that in this consultation Ofcom is seeking to develop its understanding of every aspect of market in order to identify what regulatory and policy issues may emerge. However, there is a very clear risk that by looking too broadly at too many issues, Ofcom will fail to focus properly on anything and the final outcome will therefore be a huge wasted opportunity.

This consultation touches on virtually every conceivable regulatory or policy issue related to the mobile sector (many of which Ofcom is actively considering elsewhere) and as such, it presents significant challenges to stakeholders. This response attempts to address the majority of those issues, but owing to breadth of subjects which Ofcom has raised, it has only been possible to do so fairly briefly.

In the next phase of the Assessment it is critical that Ofcom focuses on a much narrower defined range of issues which it believes are the most important to the future of the sector. Neither Ofcom, nor Orange (nor we suspect any other stakeholder) has sufficient resources to address the full gambit of issues raised in this consultation in any meaningful way. If Ofcom seeks to address or make regulatory proposals on too many issues, it will be impossible meaningfully to engage with interested stakeholders or affected parties on all (or potentially any) of them.

Consequently, Ofcom risks producing sub-optimal outcomes (and possibly formal regulation) through a lack of sufficiently detailed understanding of the issues on which it proposes to take action. In view of the importance of this Assessment to Ofcom's long-term strategy for regulating the market, any mistakes or ill-founded conclusions may have a very significant adverse impact on the sector for some considerable time.

Specific Questions

Section 1

Orange does not intend to provide answers to questions 1.1 to 1.4 specifically.

We understand that these are the four primary questions which govern the Assessment in its entirety, but they are so broad as to make meaningful responses somewhat difficult. As all of the issues raised are included within more specific questions contained elsewhere, we believe it is more appropriate to segment our views into response to those 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?

We assume that Ofcom would agree that a well-functioning market is a competitive market (and vice versa) so we will use the terms inter-changeably. Orange believes that the two most important features of a well-functioning mobile market are 'price' and 'choice', which we discuss in greater detail below together with our views on some other features which Ofcom may be considering.

Price

Orange believes that the price of products and services paid by consumers (and by extension wholesale purchasers) is the single most important factor in assessing how well the mobile market is functioning. Of course, the 'price' of any product or service cannot be viewed in isolation and must be seen within context and by comparison. We will consider various factors.

Most obviously, prices should show a decrease over time. This need not necessarily be smooth and gradual as various factors might cause decreases to be steep at certain points, followed by a levelling-off. It is also important to note that price decreases in the mobile market might not necessarily manifest themselves purely by reductions in the headline rates. The market is characterised by all inclusive bundles and so price reductions may well occur by greater value (voice minutes, SMS, data or value added services) being included within existing bundles. As usage of mobile continues to increase (largely at the expense of fixed services) the inclusion of more value within existing bundles is in direct response to customer demand.

It should also be noted that within the mobile market, price should not be viewed solely in terms of the price of individual services. Even though some services may not specifically be included within a bundle e.g. call termination or roaming, they are still part of an overall package or 'basket' of services purchased by the consumer. Consumers do not purchase individual mobile services from individual mobile networks and therefore in assessing how well the market is functioning, regulators should not focus on the price of those individual services. They must look more broadly at the overall price paid by consumers for all of the services purchased. Although Ofcom's research in section 4 e.g. figure 60 reflects this approach, unfortunately its approach to regulation does not always do so.

So whilst it is not a simple matter of measuring headline rates, one way or another, a well-functioning mobile market would be characterised by a year on year (if not quarter on quarter) reduction in average rates.

It is of course worth noting that the degree to which price reductions are affordable will be determined by a number of factors. In this context, regulation is critical because it can both reduce revenue and increase costs. Even in a competitive market, if regulation (e.g. roaming or call termination) is reducing revenue for a specific set of services determined by a regulator, it will leave less scope i.e. cash for the operator to make price reduces on other services driven by the market. In that context, regulation can undoubtedly have an adverse impact on competition in the market.

Revenue impacting regulation aside, Ofcom must still recognise that costs must be reduced in order for prices to do likewise. That may be through decreasing equipment costs, reductions in staff or general efficiencies, but saving need to be found if they are to be passed on to the customer. In this context, regulation is also relevant as it has the potential significantly to increase the overall costs to the business. For example Ofcom's proposals for regulation of complaints handling and ADR, mis-selling and quality of service indicators all add cost which therefore cannot be passed on to the customer by way of reductions in prices. Indeed, Orange does not believe that regulation in these areas is required at all and that the market should be left to resolve the problems.

Another relevant feature of price, may be international comparators. The most well-functioning competitive mobile markets are likely to exhibit prices which are below international averages in equivalent markets. Of those, there are major caveats in making such comparisons because no two markets are ever the same so direct comparisons are never possible and extreme caution must be applied. Nevertheless, international comparators are likely to give an indication as to which markets are more competitive, especially if one considers which markets demonstrate a greater level of price reductions.

Of course, Ofcom closely monitors the price of mobile services in the UK and makes relevant international comparisons. Ofcom will therefore be fully aware that the market is characterised by steeply falling year on year price reductions and/or added value. Orange believes that on this indicator there can be no question that the mobile market is well-functioning and highly competitive.

Choice

Orange believes that choice is the second most important factor in assessing how well the mobile market is functioning and it is closely linked to the issue of price. In this context, choice applies both to what we define as products i.e. handsets and devices as well as services, which includes tariffs applicable to those services. Innovation is also a key element in choice, because it is the critical component which will continue to drive greater choice for the benefit of consumers.

Product Choice

The issue of choice of products is very straightforward. There is a huge range covering every price range, from fairly basic models to the extremely sophisticated and innovation is key aspect of this market. There are an increasing number of global manufacturers selling products within the UK who release new models at an alarming rate and far more quickly than was the case a few years ago. As well as established brands such as Nokia and Motorola, newer and smaller manufacturers such as HTC and LG are very active in the market. No operator stocks every available handset (even from these manufacturers) because there are simply too many and the turnover is so fast. So the biggest named handsets tend to be available from all operators, with others being chosen according to what the operator believes is most likely to appeal to its customer base.

It is unlikely that Ofcom has ever received a complaint about a lack of choice in the handset market. Indeed complaints tend to be the opposite that choice is too broad and therefore potentially confusing for customers. The handset market is therefore clearly competitive and well-functioning.

Tariff Choice

The other aspect of choice, concerns choice of service. This we define as including both the service offered and the allied tariff choice.

Looking first at tariffs, it is immediately clear that there is a vast choice available to consumers. Most obviously, there is the choice between post-pay and pre-pay.

Orange alone has 36 post-pay consumer tariffs (not including separate business tariffs), 9 of which have further sub-options within them. On top of this, there are further choices regarding roaming tariffs, photo messaging and data usage.

For the first time, Orange has also recently introduced a range of pre-pay tariffs to replace the 'one size fits all' approach which has characterised the market to date. When pre-pay was first introduced it revolutionised the market, led to a huge increase in penetration and it remains the preferred option for the majority of mobile consumers. Therefore, the introduction of a range of different pre-pay tariffs is in direct response to the demands of customers who prefer that model of charging. Once again, this is another example of innovation which is clear evidence of a competitive and well-functioning market.

When one multiplies the choice of tariffs available on Orange by the number of players in the market, it is clear just how incredibly diverse the options are. The number and variety of available tariffs has increased exponentially in recent years. Of course there is a downside and that downside is that the market has become significantly more confusing for consumers. As with handsets, it is highly unlikely that Ofcom has ever received a complaint about lack of tariff options, but Orange is acutely aware that the confusion caused by such a wide range is a concern. To put it simply, there is just too much choice.

Although each individual operator will try and design its tariff structure to be as simple and straightforward as possible, when they are viewed collectively, it clearly adds a level of complexity for the customer. Undoubtedly, that is an issue and it is dealt with elsewhere in this consultation.

However, what is undeniable is that this choice of tariffs (and resulting confusion) is a direct result of competition. Operators have no incentive intentionally to confuse customers, but they do have a very strong incentive to offer such a variety such that no customer will ever have a reason to choose a competitor on the basis of a particular tariff option or combination. As the market matures, personalisation of tariffs becomes a key differentiator, which means that particular tariffs are increasingly sub-divided to suit every conceivable need and request.

The increased range and complexity of tariffs over recent years has directly mirrored the increased competitiveness of the market. It has disadvantages, but once again it is clearly the case that this aspect of the mobile market is extremely competitive and well-functioning.

Faced with this dilemma, it is undoubtedly tempting for Ofcom not to restrict the range and choice of tariffs available, but to seek to regulate the way in which available tariffs are marketed and communicated to customers to try and address the issue of confusion. This is a mistake.

As a basic principle, regulation should only be imposed where there is clear evidence of market failure and a lack of incentive on the part of the market players, but that is not the case here. In acquiring and retaining customers operators have every incentive to present their tariffs in the clearest possible way. To the extent to which they fail, they will fail in the market.

With respect, Ofcom is not best placed to determine how tariffs should be marketed and communicated, as it does not have sufficient experience or understanding of those media. It risks imposing requirements (as we have seen in General Condition 14) that do not take account of the restrictions of advertising and may therefore actually result either in customers received less information or becoming more confused.

Service Choice

Aside from tariff, it is also worth briefly mentioning the choice of service available to the customer.

The concept of service choice is very broad. At a basic level, it includes the core components of a mobile service, namely voice, SMS, MMS, video-calling and web/data. But it also extends into the availability of various applications and content within those services. Importantly, choice of service would also include choice between network operators in terms of the level of coverage which each provides. As a result, the availability of range of services sits with a variety of players in the market from manufacturers at one end through network operators to content providers at the other end.

The issue of network coverage is dealt with elsewhere in the consultation and in this response, but it is worth mentioning briefly here. Whilst all of the operators are able to offer 2G coverage in areas in which virtually the entire population live, there are still very localised gaps in the coverage provided by individual operators, particularly in-building coverage. In addition, 3G coverage is not nearly so widespread as 2G coverage. As a result, the choice of mobile networks (the coverage of each of which does vary) is of critical importance to the functioning of the mobile market and of significant benefit to individual consumers. The availability of 5 UK networks with different levels of coverage is evidence that this aspect of the market is working very efficiently.

More generally, Orange believes that customers have access to a wide choice of services. The introduction of a huge range of data services has moved the market way beyond voice and text which dominated it for over 20 years. With a potential market of nearly 50 million customers in the UK alone, the rewards of finding any 'killer application' on mobile are clearly very significant. As a result, there is no lack of incentive (and no significant barriers to entry) for anyone wishing to develop new mobile services.

Here innovation is absolutely central to a well-functioning market. Orange (and France Telecom) invest large sums in research and development to provide continued choice and new services to customers, which we believe is critical to maintaining a competitive edge. The degree to which innovation is evident in a market, is therefore a strong indicator of how well it is functioning.

However, from Orange's perspective, it is never enough. Our business is based upon driving increased usage of mobile services and so the greater the range of available services, the greater the potential for increased usage. However, as a network operator, we are only one link in the chain and one possible source of service innovation and choice. So whilst we would always welcome yet more compelling services, if such services have not yet been developed, it is certainly not for want of trying on anyone's part and it is clearly not an area in which regulation can be of any assistance.

Number of Market Players

The number of players in any market is closely linked to the issue of choice (as well as price) discussed above, as more players will obviously generate a wider choice of products and service and exert continual downward pressure on prices. However, it is worth considering the issue briefly on its own.

At a fairly basic level, the level of competitiveness in a market can be judged by the number of participants in that market (together with their market shares). In that sense, the UK is market is unusually competitive in that it has 5 network operators serving a relatively 'small' population of 60 million and those network operators present in the UK are part of some of the largest European (and global) telecoms companies. Those larger groups have considerable financial resources to support their UK operations and this undoubtedly adds to the level of competitiveness witnessed in the UK market, as they are able to provide significant levels of investment across their respective businesses. The presence of global players is also part of the reason why the UK market has not witnessed consolidation at this level (which could potentially reduce competition) to the benefit of consumers. It is also worth noting that all of the current UK operators are very well established having been operating for between 5 and 25 years and so there are no issues of new entrants attempting to establish a market presence.

In addition to the 5 network operators, Ofcom will be aware that there is a very active and increasingly competitive market for MVNOs (as well as DECT guardband/VOIP/Wifi) operators. Companies such as BT, Virgin and Tesco are very well known and established brands outside of the mobile market and they are now able to leverage their considerable brand strength in that market. Aside from the big names, there are a range of smaller niche players entering the market with service offerings designed to appeal to a specific sector of the market. Orange alone has signed deals with six MVNOs, whilst others are still under consideration.

The small start-up mentality of some MVNOs increases product and service choice for consumers beyond what larger established operators may offer. The advertising funded service of Blyk is an obvious example, but there are a range of similar innovative ideas from new entrants.

As well as choice, the existence of MVNOs has a direct impact on price. As discussed further in response to question 8.2, the MVNO market is competitive at both levels. There is intense wholesale competition between network operators to sign the MVNOs. This allows those MVNOs to obtain very competitive commercial terms, which in turn they are able to pass onto consumers by way of competitive retail prices. The existence of an increasingly number of MVNOs therefore places continued downward pressure on retail prices across the board, further intensifying competition.

So in summary, the number of market players does give a fairly good indication as to the level of competition and how well the market is functioning. It is a fairly basic measure and so should be viewed with caution, but nevertheless on this measure, the UK market is highly competitive. There are also no dominant players and market shares are fairly evenly spread. The market has moved away from a four operators multiplied by 25% market share to a more complex division. This indicates an increased level of effective competition, whereby overtime, some operators have established themselves are more successful than others and as a result have slowly increased their share.

Levels of Customer Switching and Porting

Orange is aware that Ofcom often views the level of switching (and related level of porting) as an indication of how well the mobile market is functioning. However, Orange believes that this is a poor and unreliable indicator.

It is undoubtedly true that a competitive market, may well exhibit high levels of switching and an uncompetitive market may not do so. There is certainly a connection between switching and competition, but it is insufficiently clear to act as a reliable indicator.

Ofcom's basic contention has always been that if levels of switching appear to be low, the market is demonstrating a lack of competition and therefore regulatory intervention is warranted e.g. to move to a recipient-led process for porting with shorter port lead times. Orange fundamentally disagrees and believes that the opposite could be argued.

Ofcom's premise is based on the fact that in order to take advantage of competition a customer must switch operator, but that cannot be correct as the mobile market is far more complex. However competitive a market may be, any consumer might justifiably conclude that his current provider offers the best available deal (purely in terms of price). This is particularly the case given that in such a competitive market the current provider may offer the customer an incentive to stay if he is considering switching. So far from being evidence of lack of competition, a customer's decision not to switch may be evidence of increased competition, because the current provider has been forced to improve on a deal offered by a competitor in order to retain the customer.

Secondly, as Ofcom is aware, the mobile market is not driven entirely by price. Factors such as customer service and network coverage are extremely important in attracting and retaining customers. So regardless of whether a better deal (on price) may be found elsewhere, a customer may decide not to switch operator for one of these reasons. The issue of brand loyalty should also not be underestimated. Ever since before its commercial launch, Orange has invested huge sums in building its brand and encouraging customers to be loyal to it. The hope is that loyal customers will always opt for Orange as a first choice. As a result, Orange's brand is very strong and this plays an important role in retaining customers.

The fundamental principle which Ofcom consistently appears to overlook is that customers may choose not to switch, because they are satisfied with the service which they are currently receiving. This is not evidence of a lack of competition (about which Ofcom may be concerned) but rather it is evidence of a high level of consumer satisfaction (which Ofcom should welcome). Ofcom's evidence that only 3% of mobile consumers are dissatisfied with their service (together with similar evidence from its number portability review) very strongly suggests that this is the case.

Looked at the other way, a very high level of switching in the market is likely to provide evidence of a high level of consumer dissatisfaction. Undoubtedly, there may be an element of apathy in the decision of some customers not to switch, despite better offers being available elsewhere. But apathy will only play a part where customers are content and will certainly disappear at the point at which they have any strong reason to be dissatisfied with their current provider.

In summary, whilst Orange believes that the UK mobile market does exhibit fairly high levels of switching, the level should not be taken as a reliable indicator as to how well the market is functioning. There are many legitimate reasons why consumers may decide not to switch unrelated to whether the market is competitive or the ease of the switching process. Other factors discussed above are therefore far better indicators.

Levels of Customer Satisfaction

The levels of customer satisfaction is another factor which may be viewed as providing evidence of how well the mobile market is functioning and it is obviously closely aligned to issues of switching discussed above.

The basic premise might be that in a well-functioning market one would expect to see high levels of customer satisfaction, because providers have a strong incentive to deliver it in order to retain (and to a lesser extent attract) customers. Orange agrees that in a well-functioning market, providers do have a very strong incentive to satisfy their customers, but unfortunately achieving those levels of satisfaction may not always be quite so straightforward particularly where the dissatisfaction is a result of poor customer service experience.

Ofcom's research indicates that 94% of mobile consumers are satisfied and only 3% are dissatisfied, so prima facie that is evidence of a well-functioning market. However, Orange is aware that Ofcom has highlighted an increasing level of complaints and evidence of dissatisfaction amongst a small minority of customers, mainly as a result of some element of customer service.

The issue of how to ensure high standards of customer service is discussed in greater detail in our response to question 4.2, but fundamentally Orange believes that operators have every incentive necessary to optimise it, but it can be an extremely difficult object to achieve. Therefore to the extent to which it does not always achieved the desired standards, it is not a failure of competition, but rather it is a failure of operational effectiveness.

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

Orange recognises that this question may best be answered by citizens and consumers themselves. However, whilst they may view the issue from a slightly different angle, fundamentally Orange believes that the answer to this question is (or should be) the same as the answer to question 3.1 above. So the most important measures to assess whether the mobile sector is performing well for citizens and consumers are price and choice, combined with levels of innovation.

The benefit to consumers from lower prices is obvious and does not require further explanation. The benefits of choice are also clear, particularly regarding the variety of available handsets and associated tariffs to suit every type of user.

However, it is worth highlighting from a citizen's perspective the issue of choice of network providing different levels of coverage can be of critical importance. Even in fairly urban residential areas, comprehensive in-building coverage cannot be guaranteed, but very many consumers want to be able to use their mobile handset in doors and specifically, at home. Many consumers will therefore choose their network operator on the basis of coverage provided in the area (and in the home) in which they live. The existence of 5 network operators from which to choose is of significant benefit to them in that context. Of course there is a finite number of operators which the market could support before fundamentally undermining the ability of those operators to make a profit and continue to invest, in the interests of consumers.

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?

The question is extremely broad and each of the areas which Ofcom has highlighted could be the subject of a detailed and lengthy discussion. From a pragmatic perspective, we will therefore limit our reply to some high-level points.

Spectrum

The availability of new spectrum will of course have a fundamental impact on the dynamics of the market. The increased use of mobile broadband places ever greater demands on spectrum, beyond those that can be met by existing UMTS licences. Any new entrants will further increase competition and may have a significant impact on the business models of existing players. However, Ofcom will be mindful that there is a limit to how many players the market can stand and ever increasing levels of competition is very likely to lead to commercial failure for some. Even for those who survive, margins will be squeezed, leaving less cash available for investment which will obviously be to consumers' long term detriment even if they welcome slightly reduced retail prices in the short term.

In addition, Ofcom will also be aware that the timing of various spectrum awards is also of critical importance. As the value of one type of spectrum can only be determined according to the availability and cost of other (potentially competing) spectrum, the order and timing in which decisions and awards are made will fundamentally influence any operator's interest in a piece of spectrum and how much they are willing to pay for it. Issues of spectrum re-farming are also of great importance to Orange and other existing mobile network operators.

Orange is aware that spectrum issues are not included within the Assessment (although they are mentioned in several places). The issues at stake are complex and wide-ranging and deserve separate detailed consideration. Whilst we understand that Ofcom wants to take account of all relevant factors, we recommend that it does not continue to address spectrum within this process.

Mobile Broadband

Mobile broadband is in the fairly early stages of its development. Although data cards have been available for some time, it is only relatively recently with the advent of 'dongles', combined with cheap/free laptops and the extension of 3G/HSDPA networks that take-up has really begun to increase.

Naturally, it is Orange's hope that the market will prove to be extremely successful in the future. Whether or not that happens is likely to depend on a number of factors including; cost; ease of use; customer service support; reliability of service/network; availability of subsidised hardware etc.

This final point is likely to be of critical importance. The huge investment that operators make in handset subsidies has been of paramount importance in driving take-up of mobile voice devices. The market is just witnessing the start of the same model being applied to laptops which is driving a whole new level of competition. If that continues, it will make the hardware available to those who have previously been unable to afford it and could be critical in driving wide-scale mass market take-up, beyond the current business/early adopters. Spectrum issues are again important, as it will be more beneficial for consumers for available spectrum to be made available to players serving an existing customer base, rather than those having to build one from zero.

In that sense, the mobile broadband market may well mirror the evolution of the mobile voice market. As with voice, there is already a well established demand for the service (based on the widespread take-up of the equivalent fixed service). The question is therefore whether consumers believe that the benefits of mobility warrant the slightly higher costs and less reliable network quality that are inherent and unavoidable within mobile networks. From a voice perspective that is undoubtedly the case and we hope that broadband will follow the same path.

For those reasons, it seems likely that the development of mobile broadband will have at least as much impact on the fixed broadband market as it does on the mobile market, if fixed line displacement begins to occur to any significant degree. As a converged communications provider, Orange believes that mobile broadband is more likely to prove complementary to fixed broadband than to replace it and that forms the basis of Orange core business strategy.

However, the market develops, it is undoubtedly set on a course of increased competition and wider availability of products and services to the obvious benefit of consumers. Ofcom may wish to understand this market, but there is certainly no need for it to intervene in it.

<u>New ways of delivering voice services</u>

Ofcom has drawn attention to what may prove to be a significant issue in the future for consumers, but perhaps even more so for providers and regulators.

The traditional model of separate fixed and mobile networks with basic interconnect between them is being eroded. From consumer's perspective this can only be positive. A wider range of services delivered by a greater number competing suppliers, accessible over a variety of types of hardware at a potentially lower cost. For those who like to 'keep it simple' that option will always be available, but for those who wish to take advantage of these developments, the opportunities and benefits are potentially endless.

From a provider's perspective the challenges are very clear. Principally, they must provide a reliable and good quality service which is attractive to the consumer and easy to use. Whilst that may sound straightforward, it will require significant technical hurdles to be overcome. The second challenge for any provider is to maintain market share and a profitable business model. As networks converge, new entrants emerge and competition flourishes, that is likely to be the most difficult challenge of all and some will undoubtedly fail. However, as an existing converged communications supplier, Orange believes that it is very well placed to succeed and meet customers' expectations in this market.

The challenge for regulators is potentially no less daunting. The convergence of fixed and mobile networks will require an entirely new approach to regulation, with call termination regulation perhaps being the greatest challenge. But at every level where core or access network regulation exists or is being contemplated, Ofcom will have to consider whether it remains appropriate in view of how networks are developing.

For all of these reasons, the impact on the broader communications of new ways of delivering voice services will be fundamental and perhaps unprecedented in the medium to long term. Undoubtedly, there will be work for Ofcom to do, but it must always maintain its principles of intervening only where necessary, where there has been a clear failure of the market to deliver.

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

"*94 per cent of UK consumers are satisfied with their mobile service. This figure is higher than the comparable measure for either fixed or broadband services …….Of the six per cent who did not form part of the 94 per cent of satisfied users, three per cent of those surveyed in 2008 reported being dissatisfied ….*"

Above all else, this fact should be the guiding principle in all of Ofcom's consumer policy work. It demonstrates beyond question that the vast majority of mobile consumers are satisfied with the service they receive. So the clear message is that the market is working and regulation is not required.

Naturally, the answer to this question must depend upon the nature of the market in which the concerns are being raised. If the market is monopolistic or dominated by one or two providers, there is clearly a risk that competition may not be sufficient to give consumers a choice of alternative provider and it may not provide adequate incentives to poor performing providers to improve.

In these circumstances regulators have a duty to consider whether regulatory intervention is required to address a market failure which is adversely impacting consumers and which providers in the market are showing no signs of addressing themselves. This last point is important, because even where regulators suspect market failure, they must still allow sufficient time to see if the market will react and address whatever issue is generating consumer concern, which we discuss further below.

However, the situation in the UK mobile market is quite different. For reasons outlined throughout this response, the market is extremely competitive. In these circumstances, Ofcom should not simply have a bias against intervention, but a presumption against it. Ofcom does not merely have a duty to further the interests of consumers, but to do so "*by promoting competition*". Whilst it does much to promote competition in the mobile market generally, it appears increasingly reluctant to adopt that approach in its consumer protection policy, despite its clear statutory duty to do so.

Having created a competitive market, Ofcom must trust the market to deliver and resist the urge to intervene at the first sign of any dissatisfaction. Where an issue generating consumer concern is identified, it is quite right that Ofcom should seek to monitor and investigate the issue. It should seek to understand the causes, the level of consumer harm being created and what action providers are taking to resolve it. There will be some exceptional cases in which the potential for significant consumer harm is so great that immediate action must be taken, but that will generally be where some level of fraud or otherwise unlawful activity is involved. However, for the majority of cases which do not fall into that category Ofcom should not view regulation as the first or only option.

Competition (possibly combined with self-regulation) must be allowed time to address the problem. Ofcom cannot expect every problem to be solved instantly, but it must trust that in a competitive market, providers have sufficient incentive to address those problems or risk losing customers as a result. The telecoms market is unforgiving in that respect and providers who do not meet their customers' expectations inevitably suffer.

Unfortunately, Orange is now witnessing many examples of Ofcom consumer policy initiatives which adopt a very different approach. Regulation is imposed or threatened in circumstances where consumer detriment appears to be low or where the operators and the market have been given insufficient time to address the problems.

The flaws in this approach are three-fold.

Firstly, in certain areas of consumer harm, regulation is simply not the best or most effective solution. Regulation takes time to impose and is limited in what it can achieve. Not every problem can be solved the drafting of a General Condition and Ofcom must acknowledge its limits in that regard. Sometimes the market and self-regulation can achieve what formal regulation cannot.

Secondly, the continual threat or imposition of formal regulation creates a serious disincentive to operators ever agreeing to self-regulatory solutions. We believe that self-regulation has significant benefits for consumers, Ofcom and industry alike, but operators will not consider it, if they believe that there is a high risk that regulation will be imposed regardless.

Thirdly, inappropriate regulation can be positively harmful. Ofcom must also acknowledge the limits of its understanding of the relationship between providers and their customers and that some of its proposals for regulation may be either impractical or not address consumers real needs

Case Study – Proposed General Condition 23 on Mobile Mis-selling & Cashback

Ofcom will be acutely aware of this issue, but it warrants highlighting in this context.

In spring 2007 Ofcom identified a rise in consumer complaints concerning mobile mis-selling and cashback. It highlighted its concern to the network operators who acted swiftly to agree a voluntary Code of Practice to address the problem and that Code was published on 31 July 2007.

In order for the Code to be effective in reducing customer complaints, two things needed to occur. Firstly, the operators needed time to implement its requirements, which would impact literally thousands of independent retailers and therefore would not be quick or simple to achieve. Secondly, account needed to be taken of the fact that the very nature of cashback means that there is inevitably a time lag between the point at which the problem occurs i.e. when the sale is made and the point at which the consumer complaint is generated i.e. when the cashback is paid (or not paid) which may be several months later. As many cashback complaints only occur when the retailer goes out of business, there may be no correlation between when the sale takes place and subsequent complaint arises.

Despite these obvious issues, it was a matter of weeks before Ofcom concluded that the Code had been ineffective and there was a need to consider imposing regulation (even though the majority of complaints Ofcom was receiving at the time were known to have been generated by the commercial failure of a single cashback dealer). There then followed information requests and 6 months later a consultation published in March and closing in April 2008. A further 7 months after the consultation closed, a final statement has still not been published, but a further information request has now been achieved. Ofcom is clearly still several months from finalising its regulation.

In the meantime, as this consultation acknowledges, the level of mobile cashback complaints has fallen dramatically. Indeed, Ofcom Chairman Lord Currie stated that the problem "*was cracked in weeks*". And yet over a year later, the regulatory process grinds on with no immediate end in sight.

This issue highlights in the clearest possible way the flaws in Ofcom's consumer policy. It has spent months trying unsuccessfully to impose regulation to address a problem which has now largely disappeared, when it could have trusted the market to deliver a solution. It seems extremely unlikely that if it was receiving the number of complaints in mid-2007, which it is receiving now, that it would ever have embarked on this course of action.

Furthermore, Ofcom's action has fundamentally undermined trust with the network operators. Collectively, we had understood that if a self-regulatory solution was implemented, Ofcom would not impose formal regulation and yet within a matter of weeks the formal regulatory process had begun. As a result there is very little reason for operators to believe that Ofcom will forbear from regulation in the future, if a similar issue arises and consequently for little reason for them to agree to self-regulatory alternatives. Unfortunately, Ofcom's actions have made it far less likely that we will agree to self-regulatory initiatives in the future.

<u>Where do knowledge and incentives lie?</u>

An issue which Ofcom appears reluctant to address is whether it is best placed to determine the most appropriate solution or 'fix' to problem generating consumer concern.

Ofcom employs a relatively small consumer policy team tasked with determining consumer policy and regulation across the entire communications sector. The team have a variety of backgrounds, but it is unrealistic to expect them to have a detailed understanding of all of the sectors which they are proposing to regulate. This is particularly the case, given that the impact of consumer regulation is often in operational areas of the business in which the consumer policy team may have no relevant experience or understanding, the most obvious example being customer service operations.

By contrast, the providers who are being regulated employ staff undertaking a variety of very specific operational roles within consumer facing areas, who will therefore have an unrivalled understanding of the issues concerned and how best to address problems that may arise.

Indeed these staff are likely to have spent their entire careers in these sectors e.g. customer service operations or marketing/communications.

The question therefore is who is best placed to determine the most appropriate response to any issue generating consumer concern? In Orange's view the specialists employed by providers are unquestionably better placed than the generalist consumer policy team employed by Ofcom, who cannot possibly understand the detailed operational impact of regulation that they propose.

Of course, there is also a question of whether the providers have a sufficient incentive to address the issues which Ofcom believes are generating consumer harm. In a market as competitive as the mobile market, Orange believes that incentive undoubtedly exists. Customer service is a key market differentiator in which providers will try to obtain a competitive edge. Earlier this year, Orange announced its new strategy entirely focussed on the demands of the customer with particular emphasis on improving customer service.

As a result, Orange believes that it has every necessary incentive to optimise performance for our customers. To be blunt, we do not believe that regulation or a regulator can make us more customer focussed than we would otherwise strive to be. Our priorities may be different to Ofcom's, but we believe that we focus on those areas which are of greatest interest, concern and benefit to our customers.

Beyond knowledge and incentives on the part of Ofcom and industry, there is a wider question as to what consumer protection regulation can actually achieve. As is mentioned above, Ofcom's power in this area is largely limited to the drafting of General Conditions (as well as the enforcement of some existing legislation). Philosophically, it does not seem sensible to assume that some fairly major issues which may be generating consumer concern can be solved simply by writing some requirements to fix them.

Once again, customer service operations provide the obvious example. In common with all providers, Orange sometimes experiences difficulties in providing the highest standards of service which we would wish, which can generate some complaints being made to Ofcom. Accepting that that is the problem, the question is whether it can be solved by the drafting of a General Condition and the answer is surely that if it were that simple, the problem would already have been solved.

The reality is that some problems are simply very hard to resolve, regardless of incentives, willingness and experience on the part of providers. The scale of a business operation serving millions of customer and employing thousands of people means that there can be an 'oil tanker' difficulty in turning the problem around. So in spite of a fervent desire to respond to an issue of rising consumer concern, providers may still struggle to meet those objectives. In these circumstances, regulation is most unlikely to help and Ofcom must acknowledge that critical fact in determining an appropriate response.

Ofcom as a facilitator

Whilst not supporting the imposition of formal regulation, Orange also does not propose that Ofcom should adopt a 'do-nothing' approach to issues which are clearly giving rise to consumer concern.

Orange believes there is a middle way that would be appropriate in some (but by no means all) circumstances. It would be a form of ongoing 'active engagement' which would allow Ofcom to continue to be actively involved in addressing a problem (beyond simply monitoring it), but in a way that falls short of imposing formal regulation.

Ofcom would engage regularly and meaningfully with all the relevant parties (not simply those that it has the power to regulate), which in the case of mis-selling would include network operators, distributors, dealers, retailers, consumer groups and trading standards etc. It would facilitate discussions between these parties in order to understand where the problems lie and what can be done to address them. There would be an element of 'trial and error', but the intention would be that parties would reach a consensus on what action needed to be taken and by whom. The focus would be on what actually needs to be done to help consumers and not on what form of regulation Ofcom is empowered to impose. Our proposed approach would also ensure that one of Ofcom's stated policy objectives - "*to ensure any proposed solution is targeted at those undertaking mis-selling activity, and is a proportionate response in line with Ofcom's regulatory principles*" (2.10) – is met. Ofcom's preferred option imposes regulation systematically on all operators and their dealers, whereas our proposed approach would allow for a more targeted and proportionate solution.

Although Ofcom always consults prior to imposing regulation, the process falls far short of this type of active engagement and bringing parties together. We appreciate that what we have suggested would be unusual and unfamiliar to Ofcom and may not fit easily within its established project processes, but we genuinely believe it would be the most effective way of addressing many consumer problems.

There are two clear advantages of this approach over formal regulation:-

Firstly, it is more dynamic, flexible and adaptable and will allow the parties to discuss and try different approaches in order to find what works best. Regulation is unavoidably black and white and cannot easily be adapted to suit changing circumstances or refocused if it is found to be ineffective and not targeting the right areas.

Secondly, it would allow network operators (and others) to spend time concentrating on really addressing the root cause of the problem, rather than becoming weighed down in the bureaucracy of process and paperwork, which is the inevitable result of formal regulation. By its very nature, the regulation which Ofcom imposes often leads operators down a path of paperwork, in order to demonstrate their compliance. The question of whether or not this is actually addressing consumer detriment will become largely irrelevant.

The alternative is that a continued path of detailed process will be unavoidable. Ofcom will continue to commence formal investigations in order to measure compliance with regulation. It will send detailed information requests requiring the provision of large quantities of 'paper' and it will then use that information to decide whether compliance is being achieved, but in a way that is entirely (and artificially) process driven, rather than by considering what the impact is on consumers. The greater the quantity of documentation an operator produces, the more likely it will be to satisfy Ofcom as to its compliance, but Orange questions whether that is really the most effective means of addressing consumer detriment.

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?

For all of the reasons outlined above, Orange does not believe that Ofcom currently has the balance right, but more importantly and more worryingly, we believe that Ofcom is clearly moving in the wrong direction.

Any attempt to list "*the important factors to consider*" does somewhat risk over-simplifying what should be a complex decision as to whether or not regulation may be appropriate. At a basic level Ofcom should of course closely monitor the degree of consumer harm being caused, which will rightly be its principal guide in determining whether action should be taken. Having identified a level of harm, Ofcom will have to decide what (if any) action it should take and when it should do so. In making that decision, it should ask itself (and those it proposes to regulate) the following questions:-

- What is the level of harm being caused to consumers and how does that compare to other issues and priorities for action, with which Ofcom is currently dealing?
- What are the root causes of the problem and specifically do they sit with those whom Ofcom has the power to regulate?

- If so, are the providers aware of the issue which Ofcom has identified?
- Do the providers have a commercial incentive to address the problem e.g. to reduce the volume of complaints that they are receiving; address negative media coverage; prevent customers from leaving?
- Will regulation actually address the root cause of the problem and what clear benefits will it bring?
- What are the costs of any regulation and are they significantly outweighed by the benefits?
- Might there be any unintended consequences to imposing the regulation, which will have an adverse effect either on consumers or providers?
- Can regulation be imposed quickly enough to address the problem?
- Over what time period is it reasonable to expect that the problem can be addressed and consumer concerns/complaints will begin to reduce?
- Is self-regulation likely to be a more effective solution either in terms of what it can actually achieve or the timescales in which it can be imposed?
- Would it be more effective for Ofcom to take a facilitative role, bringing together all interested stakeholders to find the best solution, rather than adopting a more process driven binary approach 'to regulate or not to regulate'?

So the factors involved are complex and inter-linked and every issue must be dealt with on its own merits. But as a basic principle, Ofcom should only consider regulatory intervention if answers to all of the questions above lead it to the conclusion that that is the best and most appropriate response.

Orange is most concerned that Ofcom is increasingly adopting a knee-jerk 'something must be done' approach to a very wide range of consumer policy issues, without due regard to the wider implications of what it is proposing. This is resulting in Ofcom taking action across all of these areas, without a sufficiently clear sense of purpose or priority. The harsh reality is that neither Ofcom, nor the providers in question, have sufficient resources to address all of these issues simultaneously which means that nothing is prioritised and very little is ultimately achieved.

This cannot be in the best interests of consumers, Ofcom or industry. Ofcom must urgently adapt its approach if it is to maintain an effective consumer policy programme.

Section 5 – Citizens

Many of the issues raised in this section are dealt with elsewhere in the consultation and this response, specifically in section 8 which considers implications. We therefore do not intend to answer these questions in detail, but will make some broad observations.

Orange agrees with much of the 'citizen dimension' which Ofcom has identified. We believe that there are significant opportunities for the public sector to utilise mobile technology both to increase its own efficiency and its interaction with citizens. Unfortunately, these benefits are only being very slowly realised. Orange has been in discussion with Government (at both central and local level) for many years about the potential use of mobile technology and yet examples of its effective use in the public sector are still few and far between. The problem appears to be both a lack of any co-ordinated strategy and the fact that Government technology projects inevitably seem to encounter significant operational difficulties and delays.

The potential is huge, but to date it is almost entirely unrealised. Whilst this isn't an issue for Ofcom per se it is important to be aware of the current limited public sector use of mobile technology.

Orange also agrees with Ofcom's view of the risks that may be associated with mobile technology. Both individually and in conjunction in other industry stakeholders, Orange is active in addressing many of those issues. Industry Codes of Practice on both location based services and adult content have been in place for several years and are working well and mobile operators have had a co-ordinated approach to addressing health concerns (and providing research funding) for nearly 10 years. In addition, Orange does a great deal of work promoting various 'safety' issues related to our mobile and broadband services. The issues which Ofcom has identified are undoubtedly very real, but they are being well managed and actively addressed by the industry.

Issues surrounding exclusion and non-ownership of mobile devices are slightly more complex. Ofcom's view (with which we would not disagree) is that involuntary exclusion is largely driven by lack of mobile coverage in rural areas in which these citizens live. We deal with these issues in greater detail below in response to questions 8.8 and 8.9.

For these purposes, it is sufficient to note that (short of state subsidy) the existence of a 5 financially well backed global telecoms companies competing in the access market, is the best and most effective way to ensure that network coverage extends as far as possible. Mobile services are not well suited to universal service obligations, so Ofcom should trust the market. At the same time, it should be mindful that the imposition of revenue impacting (price) regulation will have a very real impact on mobile operators' ability, willingness and incentive to invest in network rollout. So if Ofcom is genuinely concerned by the impact of involuntary exclusion on some citizens due to insufficient mobile coverage, it can influence operators' investment strategies to quite a significant degree. For Orange, the link between price regulation and investment in network rollout is very apparent, but Ofcom seldom appears to take it into account.

Finally, we would just note that we do not believe that affordability of mobile services is an issue about which Ofcom need be concerned. The pre-pay charging model is ideal for low-usage consumers who wish to closely control their spend. Some handsets are now available for £5-£10 and call costs are just 15p per minute, which makes it affordable to virtually anyone. Certainly any form of regulation or universal service obligation could not reasonably expect to reduce these charges any further. So there does not appear to be any reason for involuntary exclusion owing to cost, although consumers could still legitimately decide that a fixed line telephony charging model, better suits their individual needs.

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

As Ofcom acknowledges, the scenarios outlined are very likely to co-exist to some (and possibly a great) extent. No-one can know how the market will develop, so we will provide some broad observations and describe how they align with Orange's broader strategy.

Orange believes that much of what is described in scenario 1 may well prove accurate in the short to medium term. The intense level of competition is driving lower prices and better value all inclusive bundles for consumers. That trend has been evident for some time and is surely set to continue for an indefinite period.

Lower prices (combined with increasing regulation) are leading to a decline in operators' profitability. EBITDA has been decreasing for several years and Ofcom acknowledges that UK operators have consistently had the lowest EBITDA margins of their international competitors for the past 8 years. Decreasing EBITDA has an adverse effect on Return on Capital Employed which is also dropping considerably and is now negative when compared with the Weighted Average Cost of Capital.

The result of declining profitability is that operators are forced into a cycle of continual and relentless cost reduction. It is worth noting that one manifestation of this is likely to be in the high street where operators will increasingly seek to move away from indirect retailers, driving more sales through their own direct sales channels. The cost of acquiring and retaining customers through the indirect channels is vast, in view of the high level of commissions paid and so operators have no choice but to try and reduce those costs.

The need to reduce costs will also inevitably have an adverse impact on operators' ability and willingness to invest and innovate. Although consumers may welcome lower prices in the short term, these 'hidden' longer term effects, will inevitably have an adverse impact.

It is also worth noting that for a converged communications provider such as Orange, the impact of declining profitability and the need to reduce costs has wider impacts. The current ADSL regulatory framework does not allow Orange to operate a profitable standalone fixed broadband business. So we can only support a loss making broadband business with the profits generated by the mobile business, but as mobile profitability shrinks, it threatens the sustainability and investment potential of both businesses.

Whilst we agree with the description in scenario 1 that voice will remain central to mobile operators' business models, we do not agree with scenario 2 that it will become so dominant as to largely displace fixed line voice. As Ofcom acknowledges elsewhere, as convergence becomes a reality, the distinction between mobile and fixed services is likely to become increasingly blurred, so the point may be somewhat academic.

However, as a general principle, Orange believes that mobile and fixed line services will remain complementary for the long-term as regards both voice and data services. As a fully converged communications provider, Orange's core strategy is based on providing consumers with a seamless converged offering across mobile, fixed, broadband (and TV). We believe strongly that it will provide the most compelling consumer offering and will therefore determine the future development of the market.

In terms of mobile data, Orange disagrees with the description in scenario 1 that it is likely to remain 'early adopter' usage only, with data pricing acting as a barrier to usage. We believe that the current indications in the mobile data market indicate the contrary. Data pricing is following the model of voice and is moving towards larger/all inclusive bundles offering ever better value. Whilst usage can probably still be described as 'early adopter', Orange believes that it will soon move towards mass market particularly if the trend towards subsidised laptops continues.

Although we believe mobile data usage will inevitably increase, it is impossible to say how accurate scenario 3 will prove to be in terms of the role of network operators in that market. Of course it is not a scenario which Orange would welcome and we will work hard to ensure that we do not become 'data pipes'. The extent to which we will or will not succeed will depend on a variety of factors, not least the third party content which we are able to provide and the way in which it is collectively packaged. In this context, the availability of simple payment mechanisms may prove important. As mobile payments increase, consumers will want a single payment mechanism and operators are best placed to offer this.

More broadly, the key to an operator avoiding scenario 3 will be its ability to add value for its customers. Orange believes that there is undoubtedly scope to do so, but it will be a significant commercial challenge. Much will depend on the nature of content agreements and the respective bargaining power which exists. In this context, it will be important for Ofcom to ensure open access to premium content. The pay TV market provides a worrying example of what may occur if a content provider is allowed to become dominant and limit access to its content. It inevitably leads to restricted access for consumers and at higher prices than a competitive market would generate.

Finally, we do not believe that scenario 4 is likely to prove to be a mainstream trend in the medium term. Undoubtedly, there will be some further developments in that direction and operators will be keen to explore any potential areas of new business and increased revenue. It is very likely that wholesale business will prove to be increasingly important to operator's business models, but Orange believes that machine to machine applications are likely to remain fairly niche for the foreseeable future.

Certainly, it is not a central element of Orange's core business strategy and therefore we not envisage that it will be a source of significant additional revenue in the foreseeable future, although some incremental revenue is likely. However, as operators' wholesale businesses develop, the possibility that this may lead to a future in which consumers of a range of devices with embedded SIMs do not have a direct relationship with the network operator is certainly very real.

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

Orange broadly agrees with Ofcom's assessment of the likely policy and regulatory challenges.

Naturally, availability of spectrum will be a critical regulatory issue for the mobile and wireless sector. Whether licensed or unlicensed, auctioned or re-farmed, access to the right spectrum at the right price will always be a critical consideration for any new or existing participant in the sector.

Similarly, under any scenario, the nature of call termination (and any possible related regulation) will inevitably be a key issue going forwards. It is already an area in which Ofcom and the European Commission are actively engaged and the nature of call termination regulation in the UK beyond 2011 is currently a very open question.

As handset functionality increases and content develops, children's access to inappropriate content is also likely to continue to be an issue, although as discussed above, it is one on which the industry is already actively engaged.

Whilst we agree that greater bundling and 'triple play' packages will become more commonplace and any change in the market such as this is likely to raise some issues, we do not agree that this will give rise to "*regulatory or competition law concerns*". Assuming that access to premium content is made available across all platforms, we believe that the market can be relied upon to deliver in the best interests of consumers.

So, whilst Orange agree with much of Ofcom's analysis, we believe that Ofcom has overlooked potentially the greatest regulatory challenge of all, although it may not view it as such.

As Ofcom acknowledges (and as we have explained in answer to question 7.1 above and elsewhere), network operators are facing declining profitability and this trend looks set to continue (and perhaps intensify) under many of the scenarios which Ofcom has outlined. The regulatory challenge for Ofcom, therefore, is that it should not accelerate that decline. Whilst we acknowledge of course, that it is not the role of regulator to sustain the business models of any participants in a market, Ofcom does have a duty to be mindful of the impact of its regulation on the viability of the operators that it regulates and any wider effect which that may have on competition.

At one extreme Ofcom will not wish to see significant levels of market exit or consolidation, which may reduce competition. But more generally, Ofcom will want to ensure that operators are able to maintain a level of profitability which will allow them to invest and innovate in the wider and longer term interests of consumers. One of the issues about which Ofcom appears concerned is areas of poor coverage and (as we discuss elsewhere in greater detail), addressing that issue is very largely a question of network operators ability and willingness to invest. Ofcom must acknowledge that there is a direct correlation between the regulation that it imposes and operators' ability to invest in the interests of consumers. The issue is very real and is clearly already being felt in the investment decisions being made by global telecoms operators.

Orange believes that this is the single greatest regulatory challenge facing Ofcom both today and under any of the future scenarios which it has outlined.

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

Ofcom will be aware that the promotion of competition is not an end in itself, but rather a means of furthering the interests of citizen-consumers.

So each and every action which Ofcom proposes to take should first address three fundamental questions:-

1. What is the harm or detriment to consumers which Ofcom is seeking to address?
2. Will the action which Ofcom proposes to take be effective in addressing that harm or detriment?
3. Are there any unintended consequences that might ultimately or indirectly cause other forms of harm to consumers?

Orange of course believes that competition is fundamentally beneficial, but the extent to which Ofcom should take positive interventionist action is not quite so clear cut. In this context, point 3 is critical as any form of regulatory intervention is likely to have unintended consequences. Most obviously it may impose costs which are not justified by the intended benefits.

The recent Ofcom proposals to reform the process of number portability and the routeing of ported traffic are an obvious example. Ofcom proposed changes which it felt would promote competition, but the Competition Appeals Tribunal found that Ofcom had not sufficiently understood or quantified either the costs or the benefits and therefore the changes were unjustified. So whilst the changes may have enhanced competition to some extent, the CAT did not believe on the evidence before it that regulation was warranted.

A second potential unintended consequence of action to promote competition is the impact that it may have on the financial viability of existing players in the market. As Ofcom acknowledges (and we discuss at length elsewhere in this response), mobile operators are in a position of deteriorating profitability. It is not in the interests of competition, the market or consumers, for operators not to be able or willing to invest. Certainly, any significant level of consolidation or market exit could have an adverse impact on competition.

The more general point, however, is that many unintended and potentially harmful consequences of regulation are likely to be unforeseen. In a market as obviously well functioning and competitive as the mobile market and which exhibits such high levels of consumer satisfaction, there must be a major question as to whether any further significant regulatory action is warranted.

Ofcom must resist the temptation to 'regulate for the sake of regulating' where there is no evidence that market is failing to deliver as it stands. So at the risk of over-simplifying the question, Orange does not believe that action i.e. regulation is currently required in order further to promote competition in the mobile market.

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?

Basic principles

Orange sees no reason to depart from the basic principles of competition in determining whether, when or how such regulation may be warranted. As Ofcom acknowledges, access regulation is the most intrusive and potentially distorting form of regulation available. It should only be imposed in cases of clear market failure and where the provider in question has been found to have significant market power in a clearly defined market.

Ofcom outlines some possible future developments, which may have a bearing on this question, but apart from being entirely hypothetical, it is far from clear that even if they did occur, they would warrant any form of intrusive intervention. The current market is made up of five competing network operators, none of which is anywhere close to occupying a position of significant market power or dominance. Despite speculation for several years there does not appear to be any indication of consolidation amongst network operators and therefore no reason to believe that any operator will move towards a position of significant market power or dominance.

Ofcom contrasts BT's dominance of fixed networks with the competition between the five network operators. The point is obvious, but yet cannot be overstated. The differences between the nature of the fixed and mobile access markets are so fundamental that it is completely impossible to draw any useful or meaningful comparisons between the two. It is inconceivable that the mobile market could ever be dominated by a single provider in the way that BT dominates the fixed market and so it should be equally inconceivable for Ofcom even to consider imposing any comparable form of regulation.

RAN Sharing

Ofcom implies that if RAN-sharing were to become more widespread, it could change the conditions of competition to the extent that it might justify some form of access regulation. Orange disagrees.

RAN-sharing is a somewhat generic term and there are many forms which it could take from both a technical and commercial perspective. The conditions of any RAN-share would of course be a matter for the relevant parties to decide, but there is no automatic reason to assume that full nationwide sharing would be a necessary pre-condition and therefore that the number of competing access networks would be reduced. RAN-sharing is a great deal more complex than Ofcom appears to describe and any effect on competition could only be judged on a case by case basis according to the nature of any individual agreement.

National Roaming and MVNOs

Ofcom discusses the related issues of national roaming and MVNOs. Orange believes that the wholesale market for providing these services is extremely competitive and likely to become even more so in the future.

As retail revenues and margins flatten, or even decrease, operators will increasingly look for alternative sources of revenue and the wholesale market provides one such obvious opportunity. Furthermore, as the mobile market saturates and customers become accustomed to the standard offers of the established network operators, any further switching and growth may be prompted by the alternative and niche offerings of MVNOs. It is likely that MVNOs (particularly those with well known trusted brands outside of the mobile sector and significant marketing power) will continue to increase their market share.

For those reasons, since signing a national roaming agreement with H3G, Orange has established a well resourced wholesale new business department and aggressively pursued a number of other similar opportunities. As a result, several MVNOs are now live on the Orange network and commercial discussions are ongoing with others.

Orange expects this trend to continue and competition in the wholesale market will intensify. Therefore, it is hard to envisage a situation in which access regulation will be required in order to assist new entrants into the market. If ever such regulation were needed, it would have been several years ago before the wholesale market had become established and when there were very few potential new entrants in existence. That time has passed and Orange believes that there is no risk that any new entrant would be unable to enter commercial negotiations. In any case, as outlined above, there is no reason to depart from the general principles of competition in determining whether regulation would ever be required.

Conclusion

In view of the very wide scope of this assessment and some of the more pressing and 'real' issues which Ofcom has identified, Orange does not believe that it is helpful for Ofcom to focus its time and resources (and the time and resources of other stakeholders) on this question. We appreciate that Ofcom wants to take a wide view of all aspects of the market and whilst we do not disagree with that approach in principle, in practice we believe that there are other issues which could more usefully be explored at this stage.

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?

Fundamentally, Orange agrees with Ofcom's position that in a competitive market the existence and consumer acceptance of net neutrality and open access can be left to the market to determine. There are sufficient retail providers to give consumers a wide choice of supplier from whom to obtain a service that gives them a wide choice of available content.

In the highly unlikely event that several providers do decide to restrict access, that will simply create opportunities for competitors to exploit in providing those services which others deny. It is inconceivable that consumers would ever be denied that choice in the UK market. H3G's launch of the Skype handset provides a case in point, as it obviously saw a commercial opportunity in bringing Skype to mobile in a way that no-one else had previously chosen to do. Although it may appear to cannibalise its own voice revenues, H3G presumably calculated that the benefits it would obtain from acquiring additional customers outweighed any allied loss of revenue.

However, whilst Orange is reassured by Ofcom's current policy, it should be noted that there are wider considerations that must be borne in mind. Specifically the entire mobile post-paid market (and to some extent the pre-paid market) is based on handset subsidies, sales incentives, very high customer acquisition and retention costs and related fixed term contracts. Essentially, the 'deal' provided to customers is that they obtain a high level of value at the start of the contract (in the form of free handset and potentially other gifts and incentives) in return for which the operator expects to obtain a 'guaranteed' level of revenue throughout the term of the contract. Traditionally, that revenue has been very largely based on voice and SMS traffic, but increasingly it now also includes data/internet usage.

If any regulated requirements for net neutrality begin to have an impact on voice and data revenues, operators will inevitably have to reconsider their business models. Device subsidies and line rental discounts are only economically sustainable if operators subsequently obtain the revenues to pay for them. If the revenues disappear so will the subsidies.

The UK mobile market has moved to the position where (post pay) customers see little value in their handset as they can obtain a new one every 12-18 months at zero cost to them. The situation will rapidly change (to the consumer's obvious detriment) if operators ability to generate revenues is limited by a requirement to provide unrestricted free access to any available content. If customers come to view their handset simply as a means of accessing content provided by third parties, they must also expect to pay a fair price for it.

So in summary, competition can be relied upon to deliver an open and flexible environment for the development of the mobile internet and access to a wide range of content and services for consumers. As such there is a no need for Ofcom to explore open access requirements and it should be mindful that any form of regulatory intervention is far more likely to hamper innovation than to encourage it. At the same time, Ofcom must also be mindful that any intervention that affected operators ability freely to generate revenues would be highly likely to lead to changes in business models that are unlikely to be to the overall benefit of consumers.

Question 8.4: What role can 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?

Of all the consumer issues with which Ofcom is concerned, it is interesting to note that it has focussed this question on the provision of information, which Ofcom does not generally highlight as a subject on which it receives a large number of complaints (although it is unclear how widely Ofcom is viewing the issue).

<u>What information is important?</u>

Orange believes that there are basically two types of information with which Ofcom may be concerned.

Firstly, there is 'core' information which is likely to affect a customer's purchasing decision and choice of network, the availability of which is therefore critical to the effective functioning of a competitive market. It includes information such as handset price, line rental charges, length of contract, volume of inclusive bundles etc

Secondly, there is 'non-core' information which is most unlikely to affect the purchasing decision and choice of network of the vast majority of customers. Nevertheless, existing subscribers to a particular network may be interested in obtaining that information from time e.g. to check the accuracy of a bill in respect of a particular call made. It includes, for example, information such as the charges for NTS, PRS or 070 calls or 'additional charges' (as outlined in Ofcom's consultation on the subject).

Core information is essentially uncontroversial. For reasons discussed below, in a competitive market suppliers have a clear incentive to provide this information in order to attract and retain customers and there is no need for regulation to interfere in that process.

Non-core information is more difficult. For reasons discussed below, even in a competitive market, suppliers may not have sufficient incentive to provide this information as clearly or comprehensively as Ofcom may wish and therefore regulatory intervention may be warranted.
In either case, the information should and will be provided to consumers, but the distinction between whether or not consumers use this information as part of their purchasing decision is nonetheless critical. This is because it should determine where and how that information is provided and the degree of prominence given to it.

In simple terms, there should be no need for a high degree of prominence (particularly in advertising and promotional material) to be given to information which is not relevant to most consumers' purchasing decision. The point should self-evident, but unfortunately Ofcom is increasingly imposing regulation requiring greater prominence of non-core information, which is not relevant to purchasing decisions.

Competition might not deliver sufficient information

As a general principle, consumers are of course entitled to receive clear and accurate information on "*prices, services and contractual conditions*". That is not in question.

Furthermore, (for reasons described below) Orange would agree (if it is Ofcom's contention) that this is not an issue on which competition per se, can necessarily be relied upon to deliver full transparency across the board. It is important to note that this is not due to any malice or intention to deceive on the part of the operators, but rather it is due entirely to the vast range of possible information that could be included (and how much of it customers are genuinely interested in receiving).

The provision of information is not in itself subject to significant competitive forces i.e. all other things being equal, most customers will not choose one operator over another, simply because one provides clearer or greater levels of information.

However, the "*prices, services and contractual conditions*" to which the information relates are of course subject to very significant competitive forces. As such, it is self-evidently in the operators' interests to provide clear information on those aspects which are of most importance to customers and therefore most likely to attract or retain them, which we have described above as 'core' information. Competition can certainly be relied upon to ensure that customers always have adequate clear information on these elements of the package.

However, Ofcom is obviously aware that that potentially still leaves a gap. Namely those types of information which may not be core to a customer's choice of provider, but which they nevertheless are entitled and may be interested to know about from time to time, particularly once they have signed up to a particular network, which we have described above as 'non-core' information. Orange accepts that competition may not create any clear incentive to provide that information but would contend that most providers would do so nevertheless as a matter of good business practice because they are aware that it is the type of information that customers will periodically request.

Most obviously, they are incentivised to provide the information as a way of reducing unnecessary calls to customer service contact centres. A good and efficient customer service operation is based on minimising the need for customers to call, if their query or concern can be dealt with elsewhere. That reduces costs and allows for resources to be directed at problems that can only be resolved by direct contact. Orange is constantly assessing the reasons why customers call customer service to determine whether call volumes can be reduced by providing information through other means. We therefore have a clear incentive to provide the type of information to which Ofcom refers.

Nevertheless, we recognise that system is not perfect and there may be types of information which operators do not provide as clearly or comprehensively as Ofcom may wish. In those instances, there may be a role for regulation to provide a safeguard backstop. That is the essential purpose of General Conditions 9, 10 and 14. Orange has no objection to a basic level of regulation, but we do have strong concerns about Ofcom's increasing tendency to extend the detail of regulation in this area and attempt to micro-manage this area of operators' businesses.

What role should regulation play?

Ofcom's basic premise appears to be that consumers' interests are best served by being presented with as much information as possible, as prominently as possible.

Orange fundamentally disagrees.

Ofcom must surely accept that there is an optimum amount of information which customers are able to absorb or should be presented with on a pushed/unprompted basis. When that level of information is exceeded, not only does it not have any additional benefit in ensuring that customers are better informed, but it actually has a detrimental effect by meaning that the customers are less able to absorb/are less inclined to read any of the information. As a result, they are actually less well informed than they would have been had less information been presented.

Consumers of communications services are not simply consumers of communications services. They are individuals who purchase a very wide range of goods and services from a multitude of suppliers. Ofcom must recognise that in general they do not have the time or inclination to conduct extensive research prior to choosing a mobile network provider, particularly as regards non-core information.

To be blunt, in making their choice, most consumers are simply not interested in the breadth of information which Ofcom feels they should take into account.

As regulating consumers to read more information is not an option available to Ofcom, it should instead take a pragmatic view as to what information is most important to consumers, ensuring that such core information is clear and prominent. Further non-core information should of course be available, but Ofcom should not regulate to ensure that it is forced in front of consumers, who may have no particular interest in it.

Case Study – Annex 2 to General Condition 14

Annex 2 to General Condition 14 requires communications providers to establish a code of practice for NTS calls, which Orange believes is non-core information that will not affect the purchasing decisions of the vast majority of consumers. Nevertheless, the most significant and onerous part of the obligations is section 4 entitled "*Customer information and advice: advertising, promotional material and new customers*" which require references to the cost of NTS calls to be included in all advertising and promotional material. In addition section 3 entitled "*Customer information and advice: published price lists and websites*" requires that equal prominence be given to the cost of those calls in published prices and on websites.

We regret to say that Orange regards this as the very worst form of regulation.

- it imposes burdens on business
- it restricts commercial freedom (in advertising and promotional activity)
- it may lead to advertising/promotional material be amended to contain less information, purely as a means of avoiding regulatory requirements
- it demands significant resources from Ofcom and operators in compliance monitoring
- it generates no benefits to consumers

This final point is critical as the regulation requires that non-core information be provided in advertising and promotional material, despite the fact that it is not relevant to the purchasing decision (as Ofcom as conceded in private conversations with Orange).

Whilst Orange does not believe that Annex 2 to General Condition 14 in itself represents a very major burden (in comparison with many other forms of regulation to which we are subject) we have highlighted it because it seems to signify the start of a move by Ofcom towards a much more prescriptive approach to regulating the way in which every conceivable type of information is presented to customers. Not only is this unwelcome from Orange's perspective, but it also provides no benefit to customers and may actually confuse them owing to the quantity and manner in which the information must be provided.

Ofcom must surely recognise that the reason that advertisers do not fill billboard, newspaper or web adverts will large quantities of text is not because they do not wish customers to be well informed about their products and services. Rather it is because they recognise that the nature of advertising is such that people will only spend a few seconds reading a very limited amount of text. Ofcom should accept this obvious point and not regulate to require an ever greater degree of small print (in some already small adverts) which will simply never be read.

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?

Ofcom has provided very limited commentary on these issues, so it is not clear what it wishes to discuss or receive comment on. Accordingly, we will respond in brief.

As Ofcom acknowledges, self-regulation of content available on mobile devices has been highly effective. Mobile operators were several years 'ahead of the curve' (and any level of public or political concern) when they first began to work on their 'Code of Practice for the self-regulation of new forms of content on mobiles' in 2003. The process of implementing age verification processes and content filters was neither quick nor easy, but it was nonetheless completed well in advance of the issue gaining any resonance in public or political spheres.

The UK Code of Practice went on to form the basis of a wider European Framework and it has also acted as a model for a variety of other content and media literacy work which has taken place since.

As a result of all the work done, the level of complaints received by Orange regarding children's access to inappropriate/adult content in incredibly small. The issue does now have a major wider level of awareness amongst political, policy, regulatory and media stakeholders, but the critical point is that vulnerable consumers have been well protected from the start.

Ofcom has recently reviewed the Code and found it to be working well, although it has made a number of recommendations which operators are reviewing. The operators themselves are just now concluding a consultation on a review of the Code, before considering what, if any, changes need to be made. We are acutely aware that this remains very much a live issue, but believe we have amply demonstrated that it is one that the industry is best placed to handle without regulatory intervention.

The subject of privacy is potentially somewhat more complex. It is an issue in which the device manufacturers need to play a more active role, but more importantly it is for consumers themselves to recognise the importance of protecting their own personal data. Most obviously, they should routinely use handset PIN/passwords to guard access to their device, in the same way as they are routinely used to stop unauthorised access to credit/debit cards. A significant mental shift is required to move most customers from their current laid-back approach to the importance of the information held on their handset.

Although it may sound somewhat trivial, one of the most important factors is that consumers must report any breaches of privacy/security (typically when a handset is lost/stolen) as soon as they become aware of them, as operators can take action to prevent unauthorised access and use. This is not always done, particularly by pre-paid users, on the basis that their loss cannot extend beyond the credit on the handset. Even post-paid customers (who will remain liable for any usage charges) tend not always to appreciate the value of the handset and the information it contains and the consequent urgency to report its loss. That is probably driven in part by the fact that such handsets are usually provided free to subscribers, so they tend not to attribute much value to them.

So whilst the issues of privacy and security are undoubtedly important, it is hard to see what regulation might play. Principal responsibility must lie with consumers themselves to protect their personal data, with support from operators, manufacturers and software developers. Ofcom must resist the urge to regulate in order to protect customers unwilling to protect themselves. Such an approach is most unlikely to lead to a greater level of responsibility being taken and a shift to viewing mobile devices in the same way as they view anything related to financial and banking transactions.

Finally, the consultation briefly mentions the issue of location based services, which allows location information to be stored. Ofcom will be aware that the rights of users to consent (or otherwise) to being located is dealt with in another mobile industry self-regulatory code, namely Mobile Industry Code of Practice for the use of mobile phone technology to provide passive location services in the UK. Although the Code does not deal specifically with the usage and storage of the information, that should be dealt with under existing data protection legislation.

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

Ofcom believes that it is appropriate and timely to start the debate on the appropriate approach for call termination. Whilst we support this view in principle, we would draw attention to the ongoing BT and H3G appeals to the Ofcom Call Termination Statement. These appeals are currently being heard by the Competition Appeals Tribunal (CAT) and the Competition Commission (CC) and we anticipate Final Determinations to both appeals being made public early next year. As both appeals, the H3G appeal in particular, consider alternative call termination models, we believe it would be more appropriate to have detailed debate on this subject subsequent to publication of the judgments by the CAT.

However, in essence, Orange fully supports the existing call termination approach and we see absolutely no need for there to be any revised methodology to be implemented in the UK. The current Ofcom methodology calculates the efficient path of cost recovery ie it front loads costs so that expected revenues are equal to expected costs. Economic regulation should mimic the most efficient outcome in a competitive market which is represented in our view by the current Ofcom model. Cost-based termination will ensure the most efficient use of our network resources and in turn will ensure that our products are efficiently priced. In this way, ensuring that the most efficient model is used will ensure the maximum benefits to the consumer.

Ofcom should avoid creating a regulated situation, whereby mobile operators are forced to offer termination services below cost, as this will lead to discrimination against a mobile operator in the use of its own network by suffering a cost whereas others (competitors in the market including fixed operators) can terminate on the network free of charge. In addition, it is extremely likely that such a move (where termination rates are less than cost) would lead to increased retail prices as mobile operators struggle to recover the costs of equipment and services.

The UK currently has one of the most vibrant and interesting MVNO markets in the EU. Any moves to regulate below cost termination services, would be likely to lead to a decreased number of MVNOs as there will be little or no opportunity to recover set up costs.

This is all likely to lead to increased prices for consumers as mobile operators struggle to recover efficient costs. This is surely contrary to Ofcom's goals.

In summary, Orange strongly believes that this area needs a detailed and timely debate. We believe that it would be appropriate to receive the CC findings prior to the debate commencing.

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

With respect, Orange believes that this question is somewhat disingenuous bearing in mind the current regulatory position. Whilst we appreciate that Ofcom wants the Mobile Sector Assessment to review the entire mobile market and address as many issues as possible, the question of regulation of international roaming charges does not seem to fit comfortably within that at the present time. Ofcom is of course, fully aware of the situation, but we will summarise it here for clarity.

The wholesale international roaming market was a defined market within the Commission's recommendation on relevant markets. However, Ofcom (in common with various other regulators) believed that the process of NRAs conducting individual market reviews did not provide a suitable or adequate basis upon which to regulate international roaming charges. This is apparently because the international nature of roaming services means that no regulator acting alone in its own country can reduce charges in the interests of its own consumers.

Therefore, in 2006, the European Commission (with the support of Ofcom and the UK Government) brought forward proposals for the regulation of international roaming services under Article 95, which allowed 'harmonising' regulation to be introduced throughout all EU Member States. That regulation entered into force in June 2007 and is currently under review. As a result, it is extremely likely that amendments will be made that extend the regulation both in scope and time until 2013.

Therefore, Orange believes that this question is disingenuous for two reasons.

Firstly, since the UK Government (and Ofcom) consented to the use of Article 95 for the regulation of international roaming services, the power to introduce, amend or remove that regulation no longer resides in this country, as the EU regulation has direct effect in the UK. The UK Government can and does seek to influence the outcome of that regulation, but it cannot control it and a large degree of political negotiation and compromise is required. We would also note that it is the Government and not Ofcom which directly represents the UK in those negotiations (although Ofcom is closely involved).

Secondly, the current regulation is in force until 2010 and the amendments to the regulation will very likely extend it to 2013. Although those amendments are not yet finalised, we already have a very clear idea as to what regulation of international roaming charges will look like for the next 5 years and only relatively minor changes are expected. Furthermore, responsibility for that regulation will remain with the EU (rather than at national level) at least until 2013 and quite possibly a good deal longer.

As an aside, Orange would also wish to register that it is inherently uncomfortable with the fact that wholesale and retail prices caps are being set at levels determined entirely by political bartering and with virtually no consideration being given to principles of economic costing and analysis. We accept that this appears to be unavoidable and is no fault of Ofcom, (which has done more than anyone to try and bring economic reason to the debate) but it is extremely regrettable nonetheless. However, as Ofcom has specifically asked how regulators should respond in order to bring down international roaming charges, we feel that the point must be made. We would urge Ofcom and the Government to continue to do all that they can to try and 'take the politics out' of international roaming regulation, which we are sure they would agree is an extremely unsound basis upon which to proceed.

In summary therefore, whilst we would in no way wish to diminish Ofcom's influential role within the European Regulators Group (or whatever it becomes) or its role in advising the Government, the fact remains that the regulation of international roaming charges will not be within Ofcom's control for the foreseeable future. This is a matter of regret for Orange for a variety of reasons (as we appreciate the economic and evidence-based approach to the issues which Ofcom tries to take), but it is a fact nonetheless.

Therefore, we do not intend in this response to outline in detail our opposition to the current and proposed regulation of international roaming charges, because we do not see it as being in the remit of the Mobile Sector Assessment.

Suffice it to say that Orange feels that the market is competitive and that regulation is therefore unwarranted. In particular, Orange does not believe that regulators should view retail roaming services in isolation (which is an issue that extends beyond roaming), because they are part of a larger basket of services purchased by consumers. When viewed more widely, UK consumers get a very good deal on any measure. In any case, retail charges are falling (particularly for mobile data services) to the obvious benefit of consumers. As a result of the introduction of ever more sophisticated traffic-steering tools the wholesale international roaming services market is becoming increasingly competitive and those savings are being passed on into retail prices.

However, for reasons outlined above, we would strongly recommend that Ofcom does not pursue the issue of international roaming charges within the next phase of the MSA. By the time Ofcom's next consultation is published, the amendments to the regulation (designed to have effect until 2013) will almost certainly have been finalised and may in fact have entered into force. As a result, there should be no further issues to consider for some time.

In view of the very wide-scale nature of the MSA and the very large number of issues which Ofcom is trying to assess, Orange feels that this is one issue which can be set aside and dealt at another time and in another place.

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

Ofcom has provided limited commentary on this section, so it is difficult to determine to what extent Ofcom believes there may genuinely be a role for mobile to play in universal service delivery.

However, at this stage Orange is unconvinced that mobile could play a significant role and the reason is very straightforward. Mobile is not and cannot be a 'universal service' and should not be viewed as such.

2G mobile networks cover virtually the entire area of the UK in which the population lives. 3G mobile networks are not yet at that stage, although coverage is increasing. However, as Ofcom has highlighted there are still fairly significant rural areas in which coverage is poor or non-existent from one or more mobile operators. Those areas are largely, but not entirely uninhabited.

In addition, quoted levels of coverage genuinely refer to outdoor, rather than in-building coverage which is inevitably more limited. Even within urban areas where outdoor coverage is very good, in-building coverage may not always be available.

Taken together, these two issues highlight two obvious difficulties in mobile having any role to play in universal service.

Firstly, the concept of universal service is largely concerned with consumers living in sparsely populated rural areas. It is obviously commercially attractive and economically efficient for operators (fixed or mobile) to provide a service in built-up urban areas. So there is no need or benefit to imposing a universal service obligation on mobile operators in these areas. Unfortunately, universal service only becomes relevant in the areas that mobile operators struggle to reach.

Secondly, the basis of universal service will presumably always be an at home i.e. in-building service. Consumers cannot be told that they have a right to a 'universal' service that does not apply within their own home (or potentially other buildings). This is particularly the case as the nature of the current BT universal service obligation is to provide a telephony service to the consumers' home.

The very different nature (and more importantly, history) of fixed and mobile networks is of course obvious, but must be carefully considered as part of any debate on universal service.

It is virtually (if not completely) technically impossible to provide 100% universal geographic mobile coverage throughout the UK. Even if it were feasible, the amount of additional infrastructure that would be required (even taking into account network sharing/national roaming) would be enormous. Of course the financial costs would also be vast and there is no way in which they could possibly be justified by the benefit which accrued to one or more mobile operators. The infrastructure of additional base stations would also be unsightly in precisely the most unspoilt rural areas, in which any universal service obligation would require that they be built.

Orange has long experience in this regard and we regard it as inconceivable that the public and politicians in these parts of the country will accept the required level of additional infrastructure in return for improved (or even universal) mobile coverage. We know that there are concerns about poor coverage in certain rural areas, but we also know the huge opposition that we face in trying to erect base stations in these areas, regardless of the apparent desire for coverage. So even if it were technically possible to provide coverage throughout all the rural parts of the UK (and funding could be found), Orange believes that in practice it would prove impossible to find locations to erect the base stations on a site by site basis. A universal service obligation might require that a base station be erected in an Area of Outstanding Natural Beauty in order to provide service to a single consumer. We do not believe that this would be sensible or practical.

Beyond coverage and access, Orange is aware that there are wider issues related to universal service, which Ofcom may be considering. Orange is broadly content with those requirements as they currently apply to mobile operators, although we do not feel that there is a need for them to be extended. Affordability is a key aspect of universal service although for reasons outlined in response to section 5, we do not believe that there are any affordability issues with respect to mobile services. The nature and cost of pre-paid services make them ideal for users on low incomes who wish to control and limit their expenditure.

We are also aware of considerable current debate about whether broadband access should be included within the scope of universal service. Whilst mobile technologies may have a role to play in providing broadband in some sparsely populated areas, it is likely that fixed technologies will remain the most suitable means of access, with mobile acting as a limited supplement. However, Orange believes strongly that there should be no question of a 'mobile broadband' universal service obligation, although we do not believe that is what is currently being considered.

In summary, in view of the high level of uptake and usage of mobile services, it is understandable that Ofcom should ask what role mobile might be able to play in providing a universal service. However, for all of the reasons outlined above, we do not believe that mobile services are well suited to a universal service obligation. Even if it were possible the major costs and disadvantages would clearly outweigh any benefits.

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?

The issues here are very similar to those discussed in response to question 8.8 above.

Emergency roaming

The question of emergency access/roaming is very specific and so we will deal with it briefly at the start. Ofcom approached Orange (and the other mobile operators) to discuss the issue. Orange responded positively and actively engaged technical teams to assess the feasibility of Ofcom's proposals. However, all of the mobile operators highlighted concerns (previously expressed by the police) that emergency roaming created potential difficulties in not being able to provide adequate location information or to track hoax calls.

Ofcom has very recently provided evidence of support from the Association of Chief Police Officers for its proposals. Now, that we have received this confirmation, we are able to begin to investigate what type of solution may be best. Therefore, this is not an issue which 'markets commercial agreements' will address, but we hope that an agreement with Ofcom can now be reached.

That aside, we will now consider the issue of 'not spots' more generally.

Will markets deliver?

It is not at all clear what solution Ofcom may be seeking from 'markets and commercial agreements' or indeed regulation. If Ofcom is asking whether competition will eliminate 'not spots' by providing 100% geographic coverage throughout the UK, the answer is clearly 'no'. If Ofcom is asking or considering whether regulation will eliminate 'not spots' by providing 100% geographic coverage throughout the UK, the answer is also 'no'. If Ofcom is asking whether competition provides the best underlying basis for ensuring that networks are rolled out as widely as possible the answer is 'yes' (assuming that state funding to rollout a nationalised network is not available.

As we have discussed above, it is virtually (if not completely) technically impossible to provide 100% universal geographic mobile coverage throughout the UK. The nature of the terrain, the presence of natural vegetation as well as buildings means that radio coverage cannot be provided everywhere. So Ofcom must accept the basic premise that 'not spots' will always exist (particularly in rural areas) and so the question then becomes how far could and should networks be extended to increase coverage further.

Environmental concerns

Ofcom appears to start from the premise that the best option is for network coverage to be provided as widely and comprehensively as possible, particularly in rural areas. Although that may appear to be common sense, Orange does not believe that that view will be shared by all stakeholders, particularly those living within the affected areas.

As we have highlighted above, there is huge opposition from a very wide range of stakeholders to network rollout within scenic rural locations. We appreciate that planning regulations are not within Ofcom's remit and it may therefore be tempted easily to dismiss this as a local NIMBY issue which just needs to be managed and is not therefore relevant to Ofcom's broader policy objectives. Such a view might have some justification, for example, in a particular village where residents want mobile coverage, but without an unsightly mast.

However, the situation in the more sparsely populated rural areas is more complex. Many of the 'not spots' are likely to occur outside of towns or villages in open areas of countryside through which consumers may travel on road, rail or foot. There may be few, if any, people actually living in these areas. Stakeholders including residents, rural protection groups and local and national politicians are very strongly opposed to the erection of 20m-30m high towers to provide coverage in these areas. They argue that the detrimental environmental impact of this infrastructure far outweighs the very small benefit of providing mobile coverage to a very limited number of transient users travelling through the area. The issue becomes particularly acute in Areas of Outstanding National Beauty, National Parks and conservation areas etc.

Therefore any regulation, which Ofcom might even consider, must take account of these factors. Even setting aside local protests and opposition, operators will face very real difficulties in finding locations to erect the necessary infrastructure, where the land is owned or controlled by those who are opposed to it. National Parks are the most obvious example, but in any rural area, large areas of land tend to be owned by small numbers of people. Commercial and access agreements need to be reached, which may be extremely difficult in the rural not-spot areas about which Ofcom is concerned.

Even once those hurdles are overcome, the operator will require planning consent from the local authority. This is invariably the most difficult part of the process and applications are very frequently refused on grounds of the adverse environmental impact of the proposed infrastructure. Regulatory obligations to extend nationwide coverage within rural areas cut no ice with local councillors concerned about protecting the amenity of their local area.

This issue is not mentioned or acknowledged by Ofcom anywhere within the consultation, but it is absolutely critical to consider in any discussion about extending network coverage in rural areas. It potentially undermines Ofcom's central contention that such coverage is unquestionably 'a good thing'. We understand that Ofcom has received representations from its Advisory Committees, but their role is to engage with and advice on issues of access and use of communications services, not on environmental or rural protection. We strongly suspect that Ofcom has not engaged with all stakeholders with an interest in this issue, who may have a very different view. That would include those part of central and devolved Governments responsible for planning issues.

Financial considerations

Ofcom will be well aware that by far the biggest 'obstacle' to any increased network rollout is the huge financial investment required to undertake it. Orange assumes for these purposes that no state funding will be available and that the necessary investment must therefore be made by the network operators themselves on a purely commercial basis.

Assuming that Ofcom understands and accepts that decisions on network investment are made on a commercial basis, the question therefore becomes what can Ofcom do (or not do) in order to encourage operators to invest in UK network rollout.

The answer is that when it is imposing any form of regulation, Ofcom must take a wider view and consider the overall impact that the regulation will have on the market and specifically the climate for investment.

All regulation has a cost, but the greatest costs are obviously generated by price regulation which directly reduces revenue. In the mobile market, call termination and roaming are the markets in which price caps have been imposed. Those are both dealt with briefly elsewhere in this response (and beyond in greater detail) and so we do not intend to discuss them here. Suffice it to say, Ofcom will be acutely aware of the impact which that regulation has had on network operator revenues, as that was of course, the purpose of imposing it.

Ofcom may well feel that the regulation is correct and justified according to its cost-modelling and its view on the impact which it has on retail prices paid by consumers. However, it is far less clear that Ofcom has given due consideration to the impact that the reduction in revenue has had and will have on the wider market and the operators' ability to invest in it, specifically in terms of network rollout.

From Orange's perspective the link is very clear. Call termination and roaming regulation has significantly reduced revenues and therefore less cash is available to invest. Network rollout is the largest single area of investment and therefore will inevitably be adversely affected.

Unfortunately, it appears that Ofcom is asking very generally 'what role might be played by a regulator' in increasing network coverage, without any acknowledgement that decisions it makes elsewhere to impose price caps and reduce revenues are of critical significance and relevance to the answer. That is a very significant failing.

Ofcom may consider that yet further regulation is the answer to increasing network coverage. All operators have met coverage obligations imposed in both 2G and 3G licences and so the possibility of imposing additional obligations in these licences should not arise (and would certainly be subject to legal challenge). As and when further spectrum is auctioned or awarded, Ofcom will no doubt wish to consider what similar obligations should be included in those licences and potential participants in the auction will build their strategies accordingly.

However, whatever role regulation might play will not alter the fundamental principle that operators will still have to fund the investments and therefore must be commercially incentivised to do so. Of course, if regulation requires that investment must be made on network rollout, it will have an adverse impact on other areas e.g. investment in new products and services or customer service, to the obvious detriment of consumers.