



## **Vodafone's response to Ofcom's first Mobile Sector Assessment (MSA) consultation paper**

As markets change, it can be useful to take stock from time to time, review developments to date and possible future trends in order to assess to what extent the current approach to regulation remains appropriate or alternatively may need to adapt. Vodafone therefore welcomes the opportunity to respond to Ofcom's consultation paper, *Mobile Citizens, Mobile Consumers*.

### **Summary and conclusions**

Looking back over the past 25 years or so, mobile must be regarded as a remarkable success story. Mobile telephony has evolved from a niche, premium service with patchy coverage and handsets the size of house bricks to a mass market proposition available to all. A key factor in this success is that the mobile market has been driven by competition from the very outset. In comparison to fixed line telephony and subsequent development of fixed broadband, regulation has played a limited role.

Future success, of course, cannot be taken for granted. The regulatory environment is clearly part of the competitive landscape, and can either help or hinder in terms of future growth, consumer benefit and contribution to the wider economy. But while regulation clearly influences market outcomes at the margin, it is mistaken to think that desirable policy outcomes can simply be regulated into existence.

This is not, of course, to deny a role for regulation in areas of genuine market failure which cannot be resolved without recourse to formal intervention. But such interventions should always be well focussed, evidence-based and proportionate to the specific problems they are intended to address. Any other approach is not in the long-run interests of citizens or consumers.

In the first section below, we examine digital inclusion and the future of mobile termination rate (MTR) regulation. These may at first appear odd bedfellows, seldom discussed together. However, there are important linkages that need to be understood if current levels of digital inclusion are to be maintained, let alone expanded in new directions. We show how mobile can, and has, played a significant role in meeting universal service policy objectives to date, but also highlight the risks associated with radical change in current business models.

In particular, we believe that while there is a strong case for greater symmetry in MTRs, the case for reducing MTRs below cost is weak. A radical move away from the current model would tend to be bad for prepay, bad for 'not spots' and digital inclusion generally. We believe a wider debate is needed about the future of universal service and associated funding, but in the meantime the right approach to coverage issues is to ease planning constraints, allow infrastructure sharing in appropriate circumstances and seek market-based solutions wherever possible.

In the second section, we discuss the balance between competition and consumer protection in meeting the long term interests of citizens and consumers. We support the rationale behind Ofcom's bias against intervention, and further consider how this principle might be applied in practice to minimise the risk of unnecessary or misdirected intervention, while also enabling greater effectiveness in cases of genuine market failure where competition or self-regulation cannot or will not work. We examine the evidence Ofcom presents suggesting rising concern about mobile issues, and discover a more complex and encouraging picture emerges when looked at in the round.

Despite overtaking fixed and broadband on various measures of size, Ofcom's own data show that mobile attracts far fewer complaints in absolute terms even against a background of growth. Particular issues concerning mis-selling and participation TV have clearly driven specific concerns in these areas, though even in these areas the news is not all bad and there are signs that self-regulation is proving its worth in relation to cashback. We therefore urge a degree of caution before appealing to generalised concern to justify intervention on a broad front, and underline the need to understand more specifically what may be driving particular concerns. In particular, we underline the need to consider case by case whether particular identified concerns are long lived and systemic or transitory and self-righting.

In the third section, we turn to questions of deregulation and convergence. Convergence is a term that means different things to different people. We agree that convergence can be a good thing where it delivers cost savings or new functionality, though it is customers and the market who should decide what degree and forms of convergence they want and value. We agree that artificial regulatory barriers that hamper particular aspects of convergence for no good reason should be reviewed and removed as appropriate. At the same time, however, we note some of the important differences that still remain between fixed and mobile and explain why technological neutrality should not be taken to imply a one-size-fits-all approach that ignores such differences.

We observe how, over time, regulation that had its origins in fixed markets has progressively been transferred to mobile, how mobile is affected just as much by the cumulative rise in regulation across the board as by mobile-specific intervention. We therefore invite Ofcom to consider how its bias against intervention sits with the cumulative increase in regulation over which it has presided, check any reflex to overlay additional regulation on top of what already exists, and progressively prune back intervention that is time expired, has served its purpose or risks doing more harm than good.

We query, however, the suggestion that convergence between fixed and mobile means fixed regulation can safely be dismantled, or that the MSA is an appropriate vehicle for addressing such questions. It is a big step from observing some element of convergence or overlap at the margin to concluding that a single competitive constraint applies such as to completely re-draw previous market boundaries. It is far from clear that this point has yet been reached and in any event, the MSA cannot substitute for or short-circuit the rigorous market review and competition analysis that is clearly required before concluding that fixed and mobile have ceased to be separate markets.

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Ofcom's consultation document covers a very broad range of issues. The main body of this response does not attempt to respond or comment in detail on each and every issue but focuses instead on a few of the more significant ones from Vodafone's perspective. We have chosen to concentrate on a few general themes, notably: the balance between competition and regulation; the extent to which Ofcom can or should try to manage particular outcomes; the need to understand linkages and repercussions between policy in one area and another; threshold tests for intervention, criteria for assessing success, and when to withdraw or forbear.

We hope Ofcom will find this initial submission helpful, and look forward to discussing further as the Mobile Sector Assessment unfolds.

## **Introduction**

Looking back over the past 25 years or so, mobile must be regarded as a remarkable success story. Mobile telephony has evolved from a niche, premium service with patchy coverage and handsets the size of house bricks to a mass market proposition available to all. Handsets come in many shapes and sizes, some with high resolution cameras, colour displays, touch screen navigation and hi-fi audio capability. Voice calls have been joined by the phenomenal popularity of texting, not to mention music downloads, video, and the mobile internet.

What are the factors that have contributed to this success? One key factor is that the mobile market has been driven by competition from the very outset. Unlike fixed telephony with its origins in the nationalised industry days of the Post Office, mobile has been built from scratch, driven by technical innovation, entrepreneurial skill and consumer demand. The success story is overwhelmingly one built on competition and the commercial discipline of the marketplace.

In comparison to fixed line telephony and subsequent development of fixed broadband, regulation has played a limited role. Progressively, regulatory barriers to entry have been rolled back with the licensing of new network operators. The former regulatory mandatory service provider regime that characterised the market's early days has been found to have outlived its usefulness and been overtaken by the growth of commercial MVNOs, including household names with strong brands.

Future success, of course, cannot be taken for granted. The early phase of rapid growth through customer acquisition has made way for growth in usage made possible by scale economies and continued downward pressure on prices, coupled with product and service innovation. Voice remains important, but future growth opportunities may lie elsewhere.

The regulatory environment is clearly part of the competitive landscape, and can either help or hinder in terms of future growth, consumer benefit and contribution to the wider economy. But while regulation clearly influences market outcomes at the margin, it is mistaken to think that desirable policy outcomes can simply be regulated into existence. This is not, of course, to deny a role for regulation in areas of genuine market failure which cannot be resolved without recourse to formal intervention. But such interventions should always be well focussed, evidence-based and proportionate to the specific problems they are intended to address. Any other approach is not in the long-run interests of citizens or consumers.

The remainder of this response is organised as follows.

- Section 1 deals with the business model and the challenges of digital inclusion
- Section 2 discusses the balance between competition and consumer protection
- Section 3 considers questions of convergence and deregulation

This overall commentary should be read in conjunction with the accompanying annex in which we respond to the specific questions Ofcom has posed in the consultation paper. The annex touches on many of the same general themes, but also covers additional ground not discussed in detail in the main body of the response.

### **1. Business model and social objectives**

This section considers in turn two aspects of regulation that, at first sight, may appear very different in nature and not obviously related to one another: namely the future role of mobile in relation to universal service and digital inclusion, and future regulation of mobile call termination.

Mobile termination rate regulation may tend to be seen as the preserve of economic technocrats, concerned with matters of economic efficiency, cost-modelling etc., whereas universal service is

sometimes regarded as a broad brush social policy issue where a much broader range of stakeholders may have views on the shopping list of universal service obligations, and how these are best delivered and funded within a competitive market framework. Possibly for this reason, such issues tend to be considered separately, by different groups of people with different expertise, priorities and concerns.

In the specific context of the MSA, however, Vodafone believes there is merit in considering these two sets of issues alongside one another. While MTR and universal service obligations (USOs) are, in many respects, distinct and separable, a joined-up approach to policy making should acknowledge and take account of linkages to ensure that the broad approach taken in separate realms of policy are compatible rather than in conflict with one another. In particular, Vodafone wishes to draw attention to the potential implications of alternative MTR models for wider policy objectives relating to social inclusion, affordability and coverage.

## Future of universal service

A number of Ofcom's questions invite views on mobile's role in the future of universal service provision, and related issues of digital inclusion. Vodafone understands that universal service will be subject to further more specific review in due course. Vodafone's comments below are not intended to be a comprehensive or definitive analysis of universal service, but simply some initial reflections on the subject in the context of the MSA as a whole.

It is worth briefly pausing to consider the origins of the concept of universal service and universal service obligations in telecoms and more widely. Universal service obligations were originally an informal *quid pro quo* for monopoly, which became progressively more formal as previously state-owned industries transferred into the private sector. The public policy concern was essentially that without the levers of state control, profit maximising private companies might cut back on services and facilities they considered marginal, uneconomic and not commercially sustainable without subsidy.

The principal concerns historically were over *access* to available networks and services, with a focus on pricing (poverty related exclusion) and infrastructure (location related exclusion), based on the assumption that lack of access to voice communications and then narrowband data communications contributes to exclusion from social and economic activities. Universal service obligations were to provide a safety net, and the funding would be internalised within industry. In the UK, obligations and funding have been largely internalised within BT, as the former monopoly fixed line incumbent.

As is often the case, the original concept has morphed and developed over time and come to mean different things to different people. Some of the questions about its future point, potentially, in different directions. On one hand, one might ask to what extent universal service has served its original purpose and can be scaled back. On the other, there are questions over whether the concept should be extended to encompass a broader range of services and entitlements than were ever envisaged at its birth.

In the present context, one issue for consideration is how far mobile can and does already contribute to meeting the original aims of universal service as regards widespread affordable access to the ability to make and receive calls. Prepay mobile, for example, has clearly played a major role in the growth of mobile penetration, using a business model that sidesteps some of the concerns about disconnection policy and budgetary control that applied to fixed line phones. As Ofcom notes, the number of 'unphoned' households is decreasing, while the number of mobile only households is increasing<sup>1</sup> – an increase that is more pronounced among particular household types and social groups<sup>2</sup>. In practice, therefore, the explosion of mobile has contained the overall levels of intervention by addressing narrowband access challenges to a large extent.

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<sup>1</sup> See 3.7 and footnote, reporting from Ofcom's Communications Market Report 2008 that 11 per cent of all UK households are mobile only, while less than one per cent of households report being without any telecoms service.

<sup>2</sup> See Communications Market Report 2008, p333.

Against this background, one might legitimately ask whether the growth of mobile, which has been fuelled by competition rather than regulation, means some of the present formal universal service obligations on fixed operators can safely be eased. For example, to what extent does the increasing availability and affordability of mobile phones reduce the need for public call boxes in areas with good mobile coverage, potentially lessening associated funding requirements?

On the other hand, Ofcom is also asking in the MSA about mobile coverage and so-called ‘not spots’, and whether there is a role for regulation in extending availability and uptake of mobile broadband, for example. Whether the issue is about extending general availability of ‘basic’ voice services, promoting widespread uptake of innovative new services or supporting and extending services targeted at particular groups – the young, the old, those with poor hearing or poor sight, and so on – there is a question of how far telecoms regulation can, and should, attempt to mandate particular products and services that the competitive market would or might not otherwise support of its own accord. Among the more obvious questions are: who decides, where would the burden of meeting any such obligations fall, and how will the costs be met?

For the past 30 years or so, the debate around universal service has been largely internalised within the telecommunications sector. While some formal regulation currently remains, universal voice and narrowband data access has in practice been delivered via market mechanisms. There is no reason to suppose that this will not continue to be the case, and thus no strong case for introducing obligations in relation to mobile or to suppose that direct public intervention will be required to extend mobile voice availability in future<sup>3</sup>.

The one possible exception to this is additional accessibility for certain disabled customers who are unable to use mainstream products and services<sup>4</sup>. Vodafone’s preference is to ensure that the variety and range of mainstream products takes such requirements into account, enabling economies of scale to be realised and allowing easy interoperability between all customers rather than building niche ‘regulatory’ products that do not always meet the needs and expectations of those groups they were intended for. The very limited take up of ‘textphone’ services relative to the widespread use of SMS text among deaf and hard of hearing customers, for example, shows the contrast between regulator-led and customer-led approaches, although Vodafone accepts that it cannot necessarily be assumed that mainstream products will prove suitable for all customers in all cases.

The general point, however, is that there is no case for regulatory intervention to deliver what the market can and will deliver of its own accord. To the extent regulation imposes obligations above and beyond what can be justified on a purely commercial basis, it imposes a cost which must be set against the presumed benefit in order to assess proportionality.

There is also the question of how such costs are borne. The traditional model has been to internalise such costs within the telecoms industry either, as in the UK, by expecting those subject to obligations to bear their own costs or through ‘top slicing’ arrangements contributing to an industry fund.

Such arrangements have the effect of hiding the costs of regulatory obligations, but they do not remove them. It is a mistake to assume that adding to the shopping list of regulatory obligations results in consumer benefits at industry’s expense, since in a competitive market obligations funded through hidden cross-subsidy are ultimately borne by consumers as a whole. While this may be sustainable on a small scale, the bigger the gap between what the market can deliver on a commercial basis and additional impositions stemming from regulation, the stronger the case for an alternative public funding model

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<sup>3</sup> Which is not to say there are not regulatory actions that should not be taken to make the market mechanism work better – spectrum reform to allow lower cost network deployment and MTR regulation, which will impact outbound pricing and penetration levels – see below

<sup>4</sup> This is rightly a focus of the current EU Telecoms Review - although there are few specific proposals at this stage. It may again be better to incorporate this within much broader governmental action addressing exclusion of these groups generally.

given that the public policy aims are about broad social policy and social choice affecting society as a whole.

One thing is certain, the extent of provision and investment required beyond that which can be supported commercially cannot sensibly be considered in isolation from the question of funding. Put simply, there is no free lunch. In general, Vodafone believes it is far better for such issues to be addressed transparently rather than assume that consumers will happily bear any additional costs as long as they are sufficiently disguised. The bigger the ambition and scale of intervention above and beyond what the market will deliver spontaneously, the more acute and pressing this issue is likely to become.

This is not to say that sectoral regulators have no role at all to play in shaping and determining such choices – far from it. As noted, spectrum reform and MTR regulation are two key areas that bear critically on the baseline level of market-led provision. Ofcom can also help influence other policy makers who can help or hinder availability, accessibility and affordability goals, for example through the planning process, policies on infrastructure sharing etc. But, as Ofcom notes, some of the issues and public policy choices involved extend beyond its statutory remit and need therefore to be debated on a wider basis.

This is not the place to anticipate the outcome of such future debates. However, what is clear and highly relevant to the agenda mapped out for the MSA to consider, is that the current level of market provision which has helped meet voice and narrowband access challenges to date has grown up in an environment where the prevailing business model is one of calling party pays (CPP) and regulated mobile termination rates (MTR) which allow efficient cost recovery on inbound calls. It cannot be assumed that the same level and pattern of provision can be sustained in the event of a radical change to this business model. Indeed, all the available evidence strongly suggests the reverse is true as we shall see in the next section below.

The implication for universal service and digital inclusion more generally is clear. Ofcom cannot sensibly consider such issues in a vacuum. The debate about extending regulation needs to include an honest and transparent debate about future funding. And the funding debate needs to take account of the likely baseline level of market provision, which is critically influenced by the regulatory framework for MTR regulation. Even without factoring in the impact of possible substantial *extension* of current universal service or digital inclusion objectives, therefore, Ofcom needs to consider the role played by current MTR regulation in meeting such objectives and how these would potentially be put at risk by a radical change in the business model that underpins them.

#### Future of mobile termination rate (MTR) regulation

The future regime for MTR regulation is clearly one of the key issues contemplated as part of the MSA. The European Commission has also been considering these issues recently<sup>5</sup>. The current MTR charge control regime is due to run until 2011, but preparation for the period beyond the present charge control will need to begin soon in any event. As with universal service and digital inclusion discussed above, it is useful to consider established approaches to regulation and the assumptions that underpin them from time to time to assess whether and to what extent they remain valid, or alternatively whether conditions have changed so fundamentally as to necessitate a complete re-think. So it is timely that Ofcom should include consideration of future MTR regulation within the ambit of the MSA.

As Ofcom makes clear, radical change is not something for the present charge control period (this would undermine legal certainty and the incentive properties of multi-year RPI-X price control). Nevertheless, Vodafone understands why Ofcom wishes to canvass views on whether old solutions and assumptions continue to hold or whether new approaches might be worth considering.

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<sup>5</sup> See Vodafone's response to the recent draft Commission recommendation for a fuller commentary

The current approach to MTR regulation is based on a number of core propositions. These include the analysis of call termination as a 'bottleneck' due to calling party pays (CPP) convention, and the conclusion that without regulation, MT rates would be set 'too high' resulting in price signals that skew consumption decisions away from a pattern that would maximise economic efficiency. In principle, therefore, economic welfare can be improved by regulation which caps charges at the economically efficient level. This has been approximated by setting caps based on long run incremental cost (LRIC) plus an allowance for recovery of common costs.

It should be noted that the precise level of the caps is not static, but rather set on a downward trajectory. This stems from the assumptions built into the cost modelling that underpins the present charge controls. As noted by Ofcom and Analysys Mason, one of the key parameters in the current cost model is data uptake. The pace with which mobile broadband and the incipient 'dongle explosion' fuel growth in data, therefore, stands to affect the proportion of common costs recovered from inbound voice calls. Everything else being equal, higher expected rates of data usage will tend to yield lower voice MTRs. But while the detail of future MTR charge controls would be a matter for the next charge control review, within the current charge control period, rates are set to decline. And if broadly the same approach were rolled forwards beyond 2011, the expectation is that rates would continue to decline. It is the exact pace and pattern of decline, rather than the direction of future prices, which is still to be determined.

Another aspect of MTR charge control regulation to date has been a certain asymmetry in rates between MNOs, though this is due to decrease substantially over the current charge control period and Ofcom has signalled that it expects to move towards complete symmetry over time – as has the European Commission. Vodafone has long supported greater symmetry. 'Entry assistance' arguments for asymmetry should be approached with particular caution if they are not to lead to incentives to inefficient entry and investment, especially where the market in question is already effectively competitive. Quite apart from the difficulties of incentivising inefficient entry, they are also apt to generate incentives for abuse of the 07 number range which have proved problematic on 070 personal numbers.

To prevent such problems, Ofcom needs to address the issue on two related fronts. Firstly, Ofcom should signal that it expects to set symmetrical MTRs based on the costs of an average efficient operator, to avoid incentives to inefficient entry while preserving the incentive properties of established multi-year RPI-X style price cap regulation. Secondly, we suggest Ofcom should review its mobile number allocation policy to ensure that the definition of what constitutes a mobile service is in step with current customer expectations of the functionality – coverage, mobility management etc. – a mobile voice service should support. This is needed in order to ensure that essentially fixed services without the functionality – and associated cost base – typical of mobile voice services do not masquerade behind mobile numbers simply to exploit a regulatory loophole, without actually providing a genuinely mobile service that callers to 07 numbers would expect. Ofcom made clear in its strategic review of numbering the importance it attached to broad call price transparency by number range. Symmetrical MTRs will greatly assist uniform pricing to all 07 mobile destinations, while confining use of 07 numbers to genuinely mobile services will minimise the risk of customer detriment through abuse.

If the current regime as described above represents one model of MTR regulation, what are the alternatives, how do they compare with the current model, and what principles should Ofcom apply in choosing between them?

There are many different flavours of possible alternative proposition on offer. For simplicity, Vodafone will focus primarily on the proposed system known as 'bill and keep' (B&K), which is effectively the same as saying that MTR is zero because the originating operator retains 100 per cent of their retail call revenue without making any outpayment to the mobile terminating operator. While by no means the only alternative model, many of the core features of B&K are shared by other variant systems too. In particular, a core feature of B&K is that it means an effective MTR that not only a) allows no recovery of common costs on inbound calls but also b) is below incremental cost.

Proponents of B&K sometimes seek to portray it as ‘deregulatory’ in that it absolves the regulator of the need to determine the correct level of MTRs. In reality, however, B&K is not deregulatory at all. As we have seen, in an environment characterised by CPP pricing principle, in the absence of regulation competition in the outbound market will drive all MNOs to set MTRs above the level considered economically efficient – that is the conventional rationale for MTR regulation today. In principle, regulators can improve efficiency by setting MTRs at the right level. But, crucially, picking the right level – the efficient level – means finding the level which is *neither too high nor too low*. Any departure from the efficient level, in either direction, will result in a reduction in economic welfare, so can hardly be recommended on economic efficiency grounds.

In virtually all regulated industries regulators use efficiently incurred costs as the starting benchmark for regulating prices at efficient levels. In some cases, such as telecommunications networks, there are arguments for adjusting regulated termination prices either up or down to capture so-called externality effects. The argument for B&K must depend on there being a sufficiently large so-called “call externality”, whereby subscribers gain a sufficiently large benefit from receiving calls that they are prepared to contribute towards the cost of the calls made by others, through either a charge to receive calls or higher charges for an outgoing call service, thereby increasing the overall volume of calls made. In reality, of course, the call externality effect will usually be “internalised” since most calls are made between subscribers who frequently exchange calls between each other, making the subsidy from called to calling party unnecessary.

In any event, there is absolutely no robust evidence that the call externality is material, let alone sufficiently large to exactly off-set the cost to the terminating network of delivering the call – a requirement of B&K.

What would such an alternative model mean in practice? Proponents tend to argue that by bringing down the costs of mobile call termination, B&K will engender a virtuous circle, enabling calls to mobiles (fixed and mobile originated) to come down in price – a win-win scenario, self-evidently good for consumers. The reality, of course, is rather different. At the same time as reducing the cost base for calls to mobile, B&K clearly also reduces (to zero) the stream of termination revenue presently associated with inbound calls. This means there is no contribution towards common costs, and the incremental costs associated with call termination are also not covered. It follows that both sets of costs must somehow be reduced and/or covered from other revenue streams. Everything else being equal this will tend to increase, rather than decrease, charges for outbound calls and access.

Thus there are two effects pulling in opposite directions, and the question is which effect is stronger. Will the net effect be a reduction in mobile prices, taken in the round, or an increase? And even if some mobile customers benefit as a result, can it really be the case that there are only winners and no losers? Surely, this is too good to be true?

Vodafone has examined this issue in some detail in its response to the European Commission, and has also sponsored an independent evaluation by Frontier Economics, looking among other things at the experience of the United States which, unlike most of Europe, operates a partial receiving-party pays (RPP) model. While the European Commission proposals are not strictly B&K, they share many of its essential features in that they propose a sharp cut of around 85% in MTRs, bringing them down to a level which not only makes no allowance for common cost recovery but also fails to cover incremental costs. A much fuller discussion is provided in Vodafone’s response to the Commission, but the essential conclusion is that while such a change may indeed benefit some high-spending customers who make a lot of outbound calls to other mobiles, it is unequivocally bad for lower spending (mainly pre-pay) customers who will either find themselves paying more than they do today or having to cut back substantially on their use of mobile to stay within their budgets.

In the extreme, marginal customers – who are overwhelmingly concentrated among disadvantaged social groups - may be forced to abandon mobile altogether on grounds of affordability. Such an outcome clearly runs directly counter to the objectives of universal service and digital inclusion discussed above. For this reason, it is vitally important that any consideration of alternatives to current MTR regulation



take full account of these likely effects so that regulators do not sleepwalk into a customer revolt against the consequences of their intervention.

Vodafone fully understands why Ofcom should want to consider alternatives to the current MTR regime, but it is important that it does so carefully. We understand that retreating from cost-modelling, escaping judicial scrutiny on appeal and generating win-win results for customers could be a beguiling prospect for a regulator. Unfortunately, however, any such prospect is entirely illusory. A radical move away from current forms of MTR regulation would not be de-regulatory, but would merely substitute one form of regulation for another. Consequently, it would not immunise Ofcom from the need to work within the statutory framework established by Parliament, and to consider the interests of all citizens and consumers in the round.

In summary, therefore, Vodafone believes that while there is a strong case for greater symmetry in MTRs, the case for reducing MTRs below cost is weak. A radical move away from the current model would tend to be bad for pre-pay, bad for 'not spots' and digital inclusion generally, so should be approached with great caution. A wider debate is needed about the future of universal service and associated funding, but in the meantime the right approach to coverage issues is to ease planning constraints, allow infrastructure sharing in appropriate circumstances and seek market-based solutions wherever possible.

## **2. Balancing consumer protection and competition**

Ofcom's statutory duties require it to promote the interests of citizens and consumers, where appropriate by promoting competition. To a large extent, Vodafone shares Ofcom's original philosophy that, in the main, competition itself is the principal route to promoting consumer interests, though we also recognise that there may be occasions where there is more of a tension and trade off. The knack, of course, is to know how to strike the appropriate balance. Ofcom has previously chosen to encapsulate this in its principle that it operates with a bias against intervention but with a determination to intervene swiftly, firmly and effectively where necessary.

Vodafone largely agrees that this 'bias against intervention' formula may be a better guide than the alternative 'light touch regulation'<sup>6</sup> – though of course the proof of the pudding is in the eating. Vodafone would underline two aspects. On the one hand, it ought to be tautologous that intervention only occurs 'where necessary' – but this begs the question of how to interpret and apply such a threshold test in practice. This is where the bias against intervention comes in. There will always be a temptation for regulators to respond to calls for something to be done by a display of regulatory activism. But there is a real risk that regulation applied in haste without proper evidential support will result in overkill, or alternatively ineffective intervention which hits the wrong target and/or has unintended adverse consequences.

This is not to say that regulation should only ever move at a snail's pace, or that doing so guarantees better regulation. The point is rather that there is a need for clarity on the nature of the problem – and the existence of a *genuine* problem – in order to design a solution that is both proportionate and fit for purpose.

So how should Ofcom approach its role in relation to consumer protection? Ofcom is required under the Communications Act to have regard to such principles of regulatory best practice as it considers appropriate<sup>7</sup>. On the face of it, this would seem to allow Ofcom considerable latitude in how to interpret and apply such a duty. But it is worth reflecting, nevertheless, on some aspects of 'best practice' of general applicability that might usefully be had regard to when considering intervention in pursuit of consumer protection. A non-exhaustive list might include many of the following elements:

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<sup>6</sup> See Lord Currie's recent comments to this effect in his Ofcom Annual Lecture 2008

<sup>7</sup> Communications Act 2003, Section 3(3)(b)

- Be clear about what problem is being addressed by regulatory intervention – what is the consumer harm that Ofcom is trying to address?
- Be clear about objectives – try and forge as much stakeholder consensus as possible through consultation on objectives so that attention can then be focused on a common perception of the problem to be tackled.
- Diagnose market failure – if there is no market failure, then the case for regulatory intervention is bound to be weak. If the market is delivering, or can be expected to do so in a way that means a perceived problem is likely to be transitory and self-correcting, premature intervention may do more harm than good. But of course if a problem is serious and there is little prospect of a market based solution, well targeted intervention may be the appropriate course.
- Gather the right evidence – the only reliable way to decide between competing claims and theories is by reference to the available evidence. Unless there is real evidence of a problem it is difficult to justify investing time to try and ‘solve’ it. And evidence is also needed for solutions too.
- Evaluate it properly – Ofcom prides itself on being an evidence-based regulator but care is always needed to gather the right evidence, pertinent to the issue being addressed, and to evaluate it objectively so that the policy conclusions are suitably informed.
- Consider options – including self-regulation – there is almost always more than one way of addressing an issue so it is always worth considering more than one option or approach. In relation to consumer issues particularly, self-regulation is often the Cinderella option. It won’t always be the right choice, but it should be explored and, where selected, given time to work before recourse to other measures. Otherwise, incentives to pursue self-regulation and make it work are undermined.
- Assess costs/benefits – regulation almost always has costs associated with it, even if they are to some extent hidden and not explicitly quantified. For regulation to be worthwhile, and proportionate, there need to be some tangible benefits sufficient to justify the costs. So identifying costs and benefits and, where possible, quantifying them is highly recommended.
- Prefer the least onerous option consistent with the objective – having identified options, how do you choose between them? Obviously, you look at how well they meet the identified objective, but if several might achieve this equally well, the least onerous and intrusive option will generally be the best bet.
- Weigh risks of regulatory failure – regulation is not an exact science and in the same way that markets can sometimes fail, so can regulatory intervention. This may be because the regulator doesn’t have enough information to make a good decision, or relies on the wrong information, or because the solution proposed hasn’t been sufficiently thought through and/or has unintended and unforeseen consequences. Consultation should be used to iron out such difficulties and weigh up the risks before irrevocable policy decisions are taken.
- Determine success criteria – if the objectives of regulatory intervention are clear then it should be possible to devise some suitable criteria by which the success or otherwise of an initiative can be judged. Good regulation will do the job it was intended to do. Regulation that doesn’t work is not good regulation, but how will we know whether it is working or not?
- Evaluate effectiveness, including unintended consequences, after the event – the point of determining success criteria in advance is so that there is a clear yardstick by which actual performance can be measured, success or failure identified and calibrated, so that adjustments can be made as appropriate and any wider lessons can be learned.

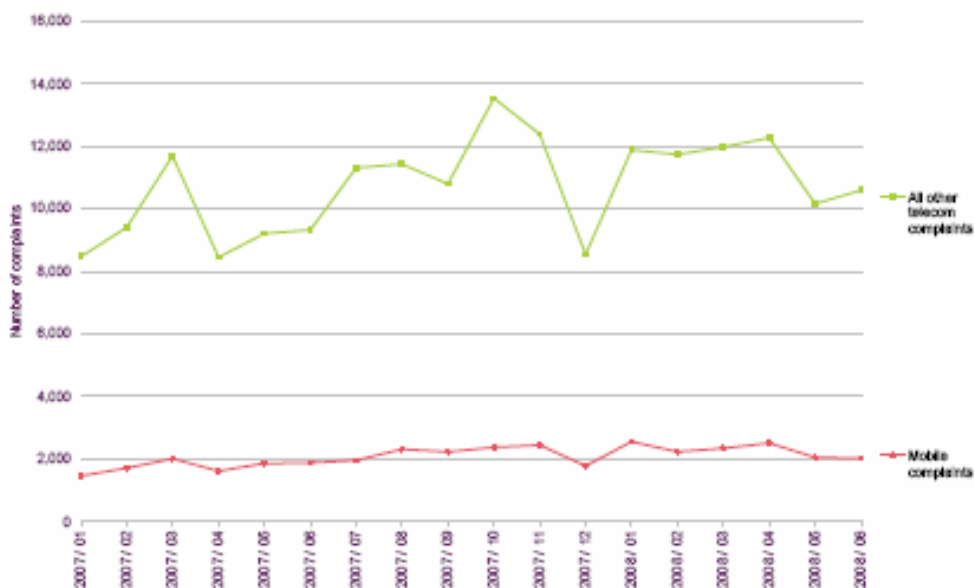
Ofcom would surely recognise most if not all of these principles, many of which feature in a variety of forms in various Ofcom publications setting out how it intends to go about its job<sup>8</sup>. This is welcome, although it is rare, in Vodafone’s experience, to see success criteria specified explicitly at the time regulation is introduced, and even rarer to see a systematic review of intervention after the event. It may be that Ofcom does in fact conduct such reviews, but does so in private. It would perhaps instil greater confidence among stakeholders, however, if they could see and contribute to such activity so that there is a genuine and transparent feedback loop.

In many ways, what matters more than whether intervention is well intentioned is its practical effect. This really needs to be considered not just case by case *but also cumulatively* as new regulation is overlaid on top of existing regulation. It is noteworthy, for example, that the General Conditions have expanded from 47 pages on since their introduction in 2003 to 76 pages in August 2007, with further additions and proposed additions since, due in large part to the proliferation of statutory codes of conduct introduced under General Condition 14.

So, the tide of regulation to which mobile is subject is rising in any event. What then are the pressures for more regulation specifically directed at the mobile sector? Ofcom seems to suggest that it faces a rising tide of complaints, but how far is this borne out by the evidence presented in the MSA?

Ofcom presents a limited picture of complaints received by its advisory team (OAT) between January 2007 and June 2008 – Annex 6, fig A1.

**Figure A1: Total mobile complaints reported to Ofcom’s Advisory Team (OAT) and all other telecoms complaints (fixed line and broadband) between January 2007 and June 2008**



Source: Ofcom OAT complaints data

This is a relatively short period over which to examine trends and a longer time series might be helpful. However, at first blush A1 shows very slight rise in the absolute number of mobile complaints between these dates. Does this represent a ‘rising tide’? If so, the tide does not appear to be rising very far or very fast. Indeed, ‘roughly flat’ might be a fairer description. It is also worth noting that this chart appears to track the absolute number of complaints received, while the sector

<sup>8</sup> See, for instance, Better Policy Making, Ofcom’s approach to impact assessment, July 2005

has continued to grow. It is not immediately clear, therefore, whether the slight increase observed also represents a proportionate rise relative to subscriber, traffic or revenue growth over same period.

Either way, it is clear that the absolute level of complaint about anything mobile is still far below all other telecom complaints, despite mobile now having overtaken other sectors in terms of customer numbers and revenue<sup>9</sup>. The term ‘complaint’ should also be interpreted with caution, since Ofcom does not apparently investigate whether such complaints are in fact well founded – though this is presumably true of all categories, not just mobile.

Ofcom also appeals to the pattern of complaints made to other agencies to suggest that complaints are on the increase generally. We have reviewed the data presented at Annex 6, and acknowledge that some of the reported increases do, at first sight, appear more pronounced. Nevertheless, care should be taken in interpreting the results.

As with Ofcom’s own data, without a longer continuous time series it is difficult to get a feel for how far year on year variability in a recent period indicates a sustained long-term trend. We note, however, that the headline 32 percent increase in complaints to Consumer Direct appears rather less stark when expressed on a proportionate basis. As Ofcom notes at A6.14 *“The total number of mobile related complaints received by Consumer Direct grew 32% between 2006 and 2007. As a proportion of total subscriber base that total grew marginally from 0.06% of the base in 2006 to 0.07% of the base in 2007.”*

We note also that Ofcom estimates that over half (roughly six in ten) of the increase in complaints relating to mobile service agreements may be attributable to mis-selling and cashback. Yet there are now some encouraging signs that this particular issue may be on the wane. Lord Currie recently described bogus mobile cashback offers as an issue that was *“cracked in weeks not months”*<sup>10</sup> Other recent reports have suggested that mobile mis-selling complaints have more than halved over the course of a year, down from 900 in September 2007 to 400 in July 2008<sup>11</sup>.

As regards complaints to Citizens Advice Bureaux, we note the reported rise in reported mobile problems from 8,500 in 2006/07 to over 12,500 in 2007/08, though some of this may be explained by discontinuity in coding/tracking. Little detail is provided, but from the broad description provided it may well be that part of this increase is also cashback or mis-selling related.

Vodafone itself does not offer cashback deals, frowns upon mis-selling of any kind and therefore fully supports effective action aimed at protecting consumers from mis-selling and from the damaging aspects of cashback deals. We recognised that there were problems with a small number of dealers with regards to cashback offers. Some of these were about the extent to which restrictive terms were sufficiently explained up front, while others were due to the fact that the dealers concerned had over-extended themselves financially. We reacted sympathetically to those customers who came to us with problems on a case-by-case basis, while also seeking to tackle the issue on a broader front through a self-regulatory code for all mobile operators. While it is encouraging to note that Ofcom apparently believes the problem has been cracked, this cannot be attributed to formal regulation which, we understand, Ofcom is still considering.

PhonpayPlus reports the most dramatic 108 per cent increase in ‘mobile related’ complaints, though it is not immediately clear how this corresponds to the picture presented in Figure A2, mapping complaints from October 2007 to June 2008. We note that PhonpayPlus appears to have changed its system for recording and tracking complaints in February 2008. However, the most significant point to bear in mind from Vodafone’s perspective is that any growth in ‘mobile related’ complaints

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<sup>9</sup> See 3.46. Ofcom reports: *“Mobile communications’ share of total retail telecoms revenue became larger than fixed in 2004 . . . . By 2007, total retail revenue from mobile telecommunications was greater than the combined revenues of the fixed telecommunication (residential and corporate) and broadband sectors, and more than half total retail telecoms revenue.”*

<sup>10</sup> David Currie, Chairman, Ofcom – The Ofcom Annual Lecture 2008, 15 October 2008

<sup>11</sup> “Mis-selling complaints drop by over half within a year”, Mobile Today, 28 October 2008

reflects the increasing popularity of mobile as an access mechanism. The complaints themselves are essentially about the premium rate services (PRS) themselves.

The big PRS issue over the period in question was around participation TV, which will almost certainly have driven a large number of complaints. We note that PhonepayPlus reports an increase in the number of individual complaints about the same service, up from an average of 5 to 10 in April 2007 to as many as 270 in mid July 2008. It might be interesting to understand in more detail how far this was driven by particular high profile incidents concerning participation TV. This is not to belittle the significant consumer protection and trust issues at stake as a result of serious compliance failures by broadcasters, merely to qualify their characterisation as ‘mobile related’.

Unlike Ofcom, Vodafone deals directly with customers about complaints. Over the last two years we have seen a 20% year on year reduction in complaints against a background of continued customer growth. Of course, there may be many reasons for such difference. Ofcom, after all, is measuring the mobile sector as a whole and not just one company. Nevertheless, it is interesting that Vodafone’s own data does not seem to reflect the rising tide Ofcom attributes to the sector generally. It is interesting, also, to note that at the same time Ofcom thinks it detects rising concern, the measures it presents elsewhere<sup>12</sup> reveal that overall customer satisfaction is high and rising. It is curious, therefore, that Ofcom chooses to emphasise the minority result<sup>13</sup>.

Viewed in the round, therefore, the data presented seem to show a more complex picture than that suggested by Ofcom’s overall assertion of rising concern. Even if the rising tide were more pronounced, however, care should be taken not simply to appeal to a generalised perception of concern to justify intervention on a broad front. Rather, it is important to understand more specifically what is driving such concerns, what is being complained about, and whether it is long lived and systemic or transitory and self-righting.

While the empirical basis for asserting a rising tide of concern is in some respects questionable, however, the rising tide of intervention affecting mobile is much less so. We are concerned not just with mobile-specific regulation, but everything that affects mobile, whatever its origins. This leads naturally to the third and final heading – deregulation and convergence.

### **3. Deregulation and convergence**

Convergence is a term that means different things to different people, and its use can also vary according to context. Sometimes it is also value-laden – convergence is “a good thing”. So it may be, but why, and to whom?

Ofcom has recognised these different senses of term in its report to the convergence think tank<sup>14</sup>. Vodafone agrees that convergence can be a good thing, for example where it delivers cost savings or enables new functionality that customers want and value. In general, however, we believe Ofcom should refrain from eulogising about convergence in abstract and allow consumers and the market decide what forms and degree of convergence they want and value.

Of course, if there are artificial regulatory barriers that hamper particular aspects of convergence for no good reason, they should be reviewed and removed as appropriate. For example, having decided there was no reason in principle why mobile services should not be allowed to operate behind geographic

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<sup>12</sup> See Figure 51, page 53

<sup>13</sup> Ofcom notes at 4.11 that of the six per cent who did not form part of the 94 per cent of satisfied users, three percent of those surveyed in 2008 reported being dissatisfied (or very dissatisfied) with their mobile service (with the remaining two per cent reporting indifference).

<sup>14</sup> What is Convergence? A submission to the Convergence Think Tank by Ofcom (undated)

numbers so long as they conformed to the designations in the numbering plan, there was no logic to maintaining a different policy in respect of portability rights and obligations. This is why Vodafone both urged and subsequently welcomed Ofcom's reforms relating to number portability and technology neutrality<sup>15</sup>.

The aspect of convergence that seems to be uppermost in Ofcom's mind for the MSA is fixed-mobile convergence. Here, the doctrine of technological neutrality is sometimes misconstrued to suggest it implies or requires a simple read across from fixed to mobile. In fact, the concept is rather more subtle. The basic idea of technological neutrality is to avoid generating or maintaining regulation in ways that are highly technology specific, that risk creating or perpetuating arbitrary distinctions and perverse incentives<sup>16</sup>. This does not, of course, imply or require *identical* treatment of 'fixed' and 'mobile' where there are clear and relevant differences. Technological neutrality is just like the concept of non-discrimination in that sense. Discrimination can apply equally to similar treatment in dissimilar circumstances as to dissimilar treatment in similar ones.

In spite of this, however, rules devised for a fixed environment are sometimes transferred rather naively to mobile, whether or not objective differences justify the same approach. For all the aspects of convergence that can be pointed to at the margin, the mobile market remains significantly different from fixed telecoms markets in key respects. For example:

- Network competition extending to access networks has been a defining feature of the mobile market from day one – there is, and never has been, a legacy of monopoly to overcome.
- Mobile purchase decisions differ from fixed purchase decisions in important respects. Mobile is often personal where fixed is often communal. Handsets are a major factor in network and service provider selection decisions, to an extent not true of the fixed world.
- Network competition exists at wholesale as well as retail level without regulatory underpinning – as evidenced by commercial MVNO and national roaming agreements.
- By comparison with fixed telecommunications and broadband, switching mobile providers is very straightforward. Customers can and do switch, with or without also porting their numbers<sup>17</sup>. Switching rates for mobile are higher than for fixed lines<sup>18</sup> and the UK mobile market is widely regarded as among the most competitive in the world<sup>19</sup>.
- Mobile cost structures are clearly different from fixed cost-structures in important respects, by virtue of different technology that supports materially different functionality – including mobility management. This has a key bearing on the appropriate MTR regime for mobile, discussed above, and is a key reason why tying MTR to fixed termination rates would be economically inefficient and therefore inappropriate.

The first wave of regulation transferring from fixed to mobile centred on 'competition' interventions of one kind or another, devised for a world dominated by a fixed monopoly incumbent. Perhaps the most obvious example is the mandated service provider regime that applied to Vodafone and Cellnet

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<sup>15</sup> See Number Portability and Technology Neutrality, Ofcom, November 2005 and subsequent statement of March 2006

<sup>16</sup> As in the case of number portability, noted above, where it was clearly perverse to allow new geographic numbers to be used for innovative converged services while outlawing the use of ported geographic numbers for exactly the same services.

<sup>17</sup> Ofcom reports at 4.20 that over 40 per cent of UK consumers have switched supplier at some point. Among those who have not switched, the predominant reason given is that customers are happy with their current supplier (70 per cent) followed by those who consider their current supplier is still the best deal (14 per cent) – see Fig. 58

<sup>18</sup> See The UK Communications Market 2008, page 343. Results for Q1 2008 show the proportion of customers who have ever switched provider to be 41 per cent for mobile, 37 per cent fixed and 27 per cent internet/broadband.

<sup>19</sup> See 3.69 and accompanying footnote, recording that many commentators regard the UK market as among the most competitive in the world.

from their inception until April 2002<sup>20</sup>. Initially, the regime was even stricter than that applying to BT in that it effectively required structural separation between network and service provider businesses, although this was subsequently modified and relaxed. But the basic concept of arms' length operation and strict non-discrimination between affiliated and independent service providers was predicated on the same basic assumption; namely that competition between a multiplicity of service providers at retail level would be beneficial and needed regulatory underpinning in a world of only two network operators, just as it did in a fixed market dominated by a former incumbent monopolist. There followed a period of asymmetric regulation with different regimes applying to first movers and new entrants, notionally on grounds of market power, before the apparatus of the mandated service provider regime was eventually relaxed following a recognition that self-sustaining network competition had become established and the market was effectively competitive.

Other interventions like mobile number portability, originally introduced on competition grounds, have stuck and become an established feature of the mobile regulatory landscape. Over time, the original competition rationale for intervention has receded somewhat as the concept of number portability as a consumer right has taken hold. Vodafone sees mobile number portability as a modest but worthwhile intervention, easing a potential barrier to switching for those customers who particularly value the ability to keep their number. Not all customers do, but those customers who will only switch if they can keep their number are, in Vodafone's view, well served by the current system<sup>21</sup>. Further changes to the current porting process are likely to be competitively neutral, given that portability is a two-way street for communications providers – the ability to attract customers with ported numbers and the obligation to let customers take their numbers with them when they leave going hand in hand. This being so, the case for change must rest on the customer experience and whether genuine improvements can be brought about at proportionate cost without sacrificing the vital consumer protections built in to the current process.

The second wave of regulation that is now in the process of transferring itself from fixed to mobile is more focussed on consumer protection. Often, however, the issues checklist starts with knowledge of a problem or perceived problem encountered in fixed markets, and a regulatory approach developed in/for them, followed by an assumption that similar problems must exist in mobile markets and demand the same solution. Price and quality of service comparisons arguably fall into this category. Some of the same questions are likely to be relevant in mobile as in fixed – what is the problem, what sort of indicators would be most relevant, would they actually be used by consumers, is there a danger that the chosen measures skew performance towards what is measured rather than what actually matters? But there are also important differences between fixed and mobile to take into account.

As regards pricing, the role of handsets in consumer purchase decisions substantially qualifies 'best buy' price comparisons that abstract from this. More generally, the differentiated and multi-service nature of mobile product offerings – voice, text, internet etc – is what drives pricing innovation, providing customers with a choice of different packages tailored to address varying priorities and usage patterns. So meaningful comparison is always going to be more complex than with a simple commodity like gas or electricity where it is relatively trivial to compare cost per unit between rival suppliers. There is thus a trade off between range and choice on one hand and ease of comparison on the other, and it is by no means clear that customers are best served by limiting choice.

Similarly, as regards non-price comparisons, it is important to ensure that any chosen metrics are ones that mean something to customers and will actually be used, otherwise there is little point to the

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<sup>20</sup> See OfTel legacy archive, Determinations to remove the determinations that Vodafone and BT Cellnet have Market Influence at <http://www.ofcom.org.uk/static/archive/oftel/publications/mobile/2002/mide0402.htm>

<sup>21</sup> It is interesting to note that perceived 'hassle' of any kind rates far below 'happy with current supplier' and 'current provider still best deal' as a reason for not switching supplier according to the detailed results presented in Figure 58 – see also footnote 17 above – while porting arrangements receive no specific mention at all. In fact, there is no compelling evidence that consumers are significantly deterred from porting, let alone switching, by current porting arrangements.

exercise. Ofcom must always consider to what extent well intentioned regulatory initiatives proposed in the name of helping consumers are actually used and valued by them in practice, otherwise it risks diverting time and energy away from the things that really matter.

The other trend that Vodafone detects in the area of consumer regulation is simply one of proliferation, hitting fixed and mobile alike. As noted previously, since their introduction in 2003, the General Conditions of Entitlement have swelled from a modest 47 pages to a rather bulkier 76 in August 2007, with further increase in prospect. Too often, such initiatives are proposed without any serious impact analysis in terms of likely compliance costs, effectiveness and assessment of proportionality. Criteria for success are often poorly defined, and seldom actually measured in retrospect.

This is not to say that all resulting regulation is necessarily bad regulation, just that it is very difficult to tell. Moreover, while it may be possible to make a plausible case for any individual initiative, the cumulative effect of ever increasing regulation is rarely considered systematically. Ofcom Annual Plans regularly promise reviews and rationalisations of general conditions, but no such review has actually been forthcoming to date. In practice, what happens instead is that new issues – real or perceived – provoke new ‘initiatives’. But once such initiatives have been formalised, it takes a brave regulator to ask whether they are actually achieving anything useful or whether they might be doing more harm than good. It is usually far safer to leave well alone and move on to the next initiative.

Most of the recent increase in consumer-facing regulation has either originated in the fixed world or applied to fixed and mobile alike. But Ofcom may now be about to herald a third wave of intervention specifically directed at mobile, on the basis that mobile is now big enough to attract attention in its own right, and the purportedly ‘rising tide’ of concern discussed above. It must be open to question whether this is appropriate when in fact the mobile market is far more competitive and less beset with deep-seated consumer protection concerns than fixed and broadband markets. It is unclear why, for example, has Ofcom fixated on alleged deficiencies of the same mobile number portability process it used to commend for its high degree of consumer protection<sup>22</sup>, while promised initiatives to review and streamline broadband migrations – an area shown to be more troublesome for consumers according to Ofcom’s own data<sup>23</sup> – seems to have stalled<sup>24</sup>?

The combined effect of these successive waves of intervention is that the mobile market is subject to a rising tide of regulation with its origins in the fixed world. Yet the only deregulatory agenda discernible in the MSA consultation document is a suggestion that to the extent a ‘converged’ mobile competes increasingly with fixed, maybe certain aspects of fixed market regulation can be relaxed.

This question, however, is not capable of being answered by the MSA itself. The question of how the fixed narrowband market should be regulated has to take place within the structured (and statutory) EC framework of market reviews, market definition, analysis of competitive constraints etc. It is a big step from observing some element of convergence or overlap at the margin to concluding that a single competitive constraint applies such as to completely re-draw previous market boundaries. Ofcom cannot abrogate its statutory duties to do this analysis properly. Concluding that there is a single ‘converged’ market would represent a potentially massive change, generating significant regulatory uncertainty. The analysis of retail markets also has substantial implications for corresponding analysis of wholesale markets, all of which would need to be similarly reviewed. Ofcom cannot and should not seek to dismantle the well established process of market review casually or on a selective basis.

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<sup>22</sup> See, for example, Ofcom’s consultation Protecting customers from mis-selling of communications services, February 2007

<sup>23</sup> See discussion in The UK Communications Market Report 2008 at the foot of page 343

<sup>24</sup> In March 2007, Ofcom commissioned a study by consultants Deloitte exploring options, subsequently published in January 2008, which Vodafone understood was due to be followed by an Ofcom consultation.



In summary, therefore, Vodafone invites Ofcom to consider how its bias against intervention sits with the cumulative increase in regulation over which it has presided, to check any reflex to overlay additional regulation on top of what already exists, to progressively review and prune back intervention that is time expired, has served its purpose or risks doing more harm than good. Ofcom should keep in mind the ways in which fixed and mobile still differ and tailor regulation accordingly, not simply assume that solutions developed in one context are needed, or will work, in another. And Ofcom should take care not to let the MSA become a substitute for rigorous market review and competition analysis, which are clearly necessary before concluding that fixed and mobile have ceased to be separate markets.

**Vodafone Limited**

**November 2008**

# Consultation questions

## A4.1 Section 1 - Executive summary

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

As markets change, it can be useful to take stock from time to time, review developments to date and possible future trends in order to assess to what extent the current approach to regulation remains appropriate or alternatively may need to adapt.

Future gazing is always fraught with uncertainty, and the past is not necessarily an accurate guide. However, when trying to detect broad trends and understand market dynamics, it is important to look back over a reasonably long period to help distinguish between long term trends and shorter term movements that may signal the beginning of new trends or may, on the other hand, simply be 'noise'.

Looking back over the past 25 years or so, mobile must be regarded as a remarkable success story. Mobile telephony has evolved from a niche, premium service with patchy coverage and handsets the size of house bricks to a mass market proposition available to all. Handsets come in many shapes and sizes, some with high resolution cameras, colour displays, touch screen navigation and hi-fi audio capability. Voice calls have been joined by the phenomenal popularity of texting, not to mention music downloads, video, and the mobile internet.

What are the factors that have contributed to this success? One key factor is that the mobile market has been driven by competition from the very outset. Unlike fixed telephony with its origins in the nationalised industry days of the Post Office, mobile has been built from scratch, driven by technical innovation, entrepreneurial skill and consumer demand. The success story is overwhelmingly one built on competition and the commercial discipline of the marketplace. In contrast to fixed line telephony and subsequent development of fixed broadband, regulation has played a limited role.

Competition has flourished in spite of rather than because of regulation. Progressively, regulatory barriers to entry have been rolled back with the licensing of new network operators. The former regulatory mandatory service provider regime that characterised the market's early days has been found to have outlived its usefulness and been overtaken by the growth of commercial MVNOs, including household names with strong brands.

Future success, of course, cannot be taken for granted. The early phase of rapid growth through customer acquisition has made way for growth in usage made possible by scale economies and continued downward pressure on prices, coupled with product and service innovation. Voice remains important, but future growth opportunities may lie elsewhere. Indeed, they may increasingly lie in markets outside of the UK as investors look to maximise return on investment and see fewer growth opportunities in developed markets.

The regulatory environment is clearly part of the competitive landscape, and can either help or hinder in terms of future growth, consumer benefit and contribution to the wider economy. Regulation clearly influences market outcomes at the margin, but it is mistaken to think that desirable policy outcomes can simply be regulated into existence. To a large

extent, effective competition should make the regulator's job an easy one. Regulatory attention should focus on a few specific areas where there is a genuine market failure that regulatory intervention can correct, and deregulate and liberalise in areas such as spectrum policy.

Tempting though it may be for a sectoral regulator with extensive powers to attempt to second-guess and fine tune market outcomes, there are inherent dangers in excessive regulatory activism and a 'regulator knows best' approach to market management. This is not, of course, to deny a role for regulation in areas of genuine market failure which cannot be resolved without recourse to formal intervention. But such interventions should always be well focussed, evidence-based and proportionate to the specific problems they are intended to address. Any other approach is not in the long-run interests of citizens or consumers.

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

As noted above, citizens and consumers have benefited enormously from the development of the mobile sector to date. Mobile telephony is a part of every day life and while the precise pattern of future developments can not be predicted with certainty there is every reason to think citizens and consumers will continue to benefit from future competition, technological and commercial innovation. The big proviso, of course, is that the regulatory framework does not unduly frustrate necessary market freedom to experiment and innovate, succeed or fail, and learn from experience either way.

Regulators can also assist by providing reasonable predictability and certainty, consulting widely and in good time before implementing radical changes in policy which would fundamentally alter current business models. Handbrake turns in areas such as MTR regulation risk having far reaching adverse consequences citizens and consumers, so Ofcom should proceed with caution and ensure that its approach to economic regulation and digital inclusion is consistent and sustainable.

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

The principles of good regulation in mobile are not that different from those that apply to any regulation, even if the detailed application of regulation may differ between fixed and mobile. Regulation should always be for a purpose, and never for its own sake. The main purpose of regulation ought to be to correct clear market failure, while also weighing the risk of regulatory failure.

Generally speaking, the purpose of regulation is not and should not be to attempt to second guess and 'improve upon' market outcomes where these are the result of effective competition. There is a substantial risk of adverse unintended consequences, however well meaning interventions may be. So exceptions to this general rule, of which there may be some, need to be approached with caution. Objectives need to be very clear, problems need to be analysed based on evidence, options considered, tested and costed before final decisions are taken, to ensure that interventions are well conceived and directed at the right targets.

In practice, we suggest these principles point to a continued focus on MTR regulation that allows efficient cost-recovery, and on spectrum reform. Consumer protection interventions that apply to the mobile sector need to be approached with the specific circumstances of

the mobile market in mind. Approaches developed in fixed line markets will not always be appropriate. The problems they were intended to address may simply not be present in mobile, or manifest themselves differently requiring a different approach. Mobile specific interventions also need to be limited and targeted only at genuine, serious and non-transitory problem areas that market forces or self-regulation cannot or will not remedy.

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

There is plainly plenty of competition and innovation now and plenty of scope for more to come. Unlike fixed telephony with its legacy of monopoly which continues to cast a long shadow, mobile has always been characterised by multiple access networks. Vodafone has long supported spectrum reform, which holds the prospect of further competition and innovation. The retail sector is also very dynamic, with a variety of commercial MVNOs, and diverse distribution channels including on-line. Competition can be expected to drive further innovation on all fronts – technical, commercial, pricing, product, back-office, cost reduction and so on.

We see plenty of scope for deregulation, though the pace of spectrum reform has, in some respects, been disappointing and the recent trend in consumer-facing regulation particularly has been largely in the opposite direction. A useful first step, therefore, would be to stem the increasing tendency to see intervention as a first recourse – whether or not it is really warranted, and the chosen intervention well calculated to address the underlying source of any perceived problem.

Mobile is affected by a wide variety of such interventions, few of which are specifically aimed at or geared for the mobile market. No real world market is ever perfect, and from time to time, mobile-specific problems can and do arise and may demand action of one kind or another. It is important, however, to distinguish between problems that are serious and deep seated and those that may not, in fact, be so serious in their impact or extent, or may simply be transient, and to approach all such issues as they arise with objectivity, perspective and a sense of proportion.

**A4.2 Section 2 – Why is Ofcom undertaking this Assessment?**

We have not included any questions for this section.

**A4.3 Section 3 – Today's UK mobile markets**

***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?***

The essential features of a well-functioning mobile market are easy enough to describe and clearly present in the mobile market in the UK. There is strong network and service competition, driven by increasingly savvy and demanding customers as evidenced by high levels of customer switching and bargaining with current suppliers to secure the best deal. The result is continued downward pressure on prices, continuing innovation on many fronts, and high and rising levels of customer satisfaction. There is plenty of positive evidence on all counts in the consultation document itself without the need to adduce additional confidential data.

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

We respectfully suggest that the key measure for this purpose is the existence of an effectively competitive and dynamic market, as evidenced by the key indicators outlined in response to question 3.1 above.

***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?***

This is a rather open-ended question and consequently difficult to answer comprehensively or with a high degree of certainty. For the same reason that Ofcom stresses that the Analysys Mason scenarios it presents are in no sense predictions it should also be wary of resting too much on specific prediction from any quarter.

At a very broad brush level, we would expect all such developments to be positive from the perspective of competition, innovation and customer choice. In terms of what this means for regulation, we suggest that removing artificial regulatory barriers through spectrum reform should be a priority. It should also go without saying that Ofcom should take care to avoid starving mobile of spectrum by succumbing to special pleading from other spectrum users. The whole point of a market-based approach to spectrum is to enable the market to solve the resource allocation problem by responding dynamically so that scarce spectrum is used efficiently and where it is most highly valued, so maximising the benefit to society as a whole.

#### **A4.4 Section 4 – Consumers**

***Question 4.1: What is your experience, as an individual consumer or an organisation that uses mobile services?***

While we are an organisation that uses mobile services, our perspective is predominantly that of a provider of such services. At a very general level, Vodafone's experience is that consumer and business customers are increasingly savvy, sophisticated and demanding in their needs and expectations. We see this as a natural product of competition, continuing technological development and innovation coupled with growing media literacy across society as a whole, and among younger customers in particular.

Within this general picture, however, it should be recognised that there is wide variety of consumer wants, needs and priorities. We therefore need to continue to recognise and respond to this diversity and provide choice through designing different solutions for different customers and groups of customers, not assuming that one size fits all.

This is reflected at a high level in the way we organise ourselves, with separate business units to address the different needs of business, consumer and wholesale customers. It is also reflected in our consumer propositions, for example through pay-monthly contract and prepay tariff options, and a wide range of handsets, PDAs and mobile broadband data cards and dongles to work with laptops to cater for our customers various needs, tastes, priorities and budgets.

While we aim to provide choice, we also need to ensure that such choice and variety does not result in propositions that are overly complex or difficult to understand, operate and support. Our business strategy is based around the proposition that we need to provide a

great customer experience, and that to help us do that we need to 'keep it simple, and make it work'.

We put enormous effort into thinking about the customer experience, which is about a great deal more than simply how we run our distribution channels, shops and contact centres, important as they are. We try to design products and propositions that think about the customer experience from end to end. We don't always get it exactly right first time, but we soon discover if we've got it wrong and move rapidly to fix problems we become aware of, for example through our 'voice of the customer' programme. We are not perfect, and we are always looking to do better not just because we care about our customers but because commercial pressures drive us to perform and punish us when we don't.

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

The short answer to this question might be: 'attentively, but objectively and with a sense of perspective'.

As a general proposition, Ofcom should clearly test the evidence and ensure that it understands the problem it is trying to tackle before jumping to conclusions. This is good practice in relation to individual issues, but might also usefully be applied to the apparent premise of the question i.e. that there are 'signs of rising consumer concern'.

Having examined the evidence Ofcom itself puts forward on mobile complaints in the consultation document and compared it both with our own experience, and the comparative data provided for fixed and broadband, a number of points emerge which qualify and call into question the general inference of 'rising concern':

- Ofcom's complaint data is for a relatively short and recent period, so longer term movements are not directly ascertainable
- Over the period under review, there is a very slight rise in the absolute number of recorded complaints, though the pattern might equally be described as 'roughly flat'
- This slight rise/roughly flat picture in absolute numbers of complaints takes place against a background of continued revenue and customer growth
- It is not clear, therefore, whether even on the 'slight rise' characterisation, this is also true on a proportionate basis
- Everything else being equal, one might expect some rise in absolute complaint volumes as the market grows. 'Roughly flat' complaint volumes against a background of growth, therefore, should not in itself be a particular cause for alarm.
- It is striking that throughout the period the absolute level of complaints about mobile remains far below those for fixed and broadband, despite mobile having reportedly overtaken these other sectors in terms of revenue and customer numbers
- Ofcom's interpretation of the data as indicating 'rising concern' appears at odds with the measures of high and rising satisfaction it reports elsewhere, and Vodafone's own experience of 20% year on year fall in complaints (although we realise that Vodafone's own experience may not necessarily be typical of the industry as a whole)

Other data sources referred to reflect subsets of the overall picture. We note that on the face of it some of these subsets seem to exhibit a more dramatic rise in percentage terms. But care still needs to be exercised in interpreting such results. The commentary suggests that some of the apparent increase may be accounted for by changes in classification so there is no consistent time series. Some of the more dramatic increases are for particular categories of complaint. But subsets of data are bound to give a different picture from that

seen at aggregate level. Especially where the absolute number of complaints in a particular category is small, there is a risk of mistaking apparently dramatic increases for natural variability (an absolute increase of 1 could represent very different *proportionate* increases depending on the base to which it is compared – an increase of 1 from 1 to 2 is 100%, from 2 to 3 50%, but from 20 to 21, 5% and from 1000 to 1001, 0.1% etc.)

This is not to say that Ofcom should ignore such data, but it is important to examine them carefully and critically to ensure that inferences drawn do not stray beyond what the data themselves will sustain.

In any event, we query how useful it is to think in terms of *general concern* rather than *specific concerns* since it is surely the latter that are a better guide if the aim is to pinpoint areas for particular policy attention. It is not helpful, in Vodafone's view, to use generalised concern to justify very particular measures if there is no more specific evidence that sheds more direct light on the nature and extent of the particular problem in question.

Homing in on specific areas, cashback has clearly driven complaint numbers under the mis-selling heading. But this has been addressed, with Vodafone's full support, through a self-regulatory code of practice. Lord Currie has proclaimed that the issue was cracked in weeks not months, and the latest data shows that cashback complaints have now halved. This tends to point to the success of the action that has been taken to date by industry rather than an urgent need for statutory intervention.

The other area where dramatic increase is reported relates to complaints to PhonepayPlus. In addition to the general points made about natural variability, subsets, small numbers and discontinuous time series, it is also important in this case to query what a 'mobile related' complaint is actually about. Phone Pay Plus regulates the service providers marketing the premium rate services. Its complaints have clearly been swollen by recent scandals over interactive voting in association with radio and TV broadcast output, where text is one of the access mechanisms. But the complaints generated are essentially about the fairness and propriety of the competitions and voting. The 'mobile' access mechanism is largely incidental. This is not to diminish the existence of a genuine consumer protection issue that demanded action, but does highlight the need to understand what complaints are actually about before drawing general policy conclusions about levels of 'mobile' concern.

***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?***

This topic is discussed in more detail, together with the previous topic, in the body of the response.

In summary:

- It is clearly important to seek appropriate evidence and evaluate it critically before acting, always remembering the 'bias against intervention'
- Ofcom should apply the same standards of objectivity and professional scepticism to lobbying and special pleading from whatever quarter
- Ofcom should consider case by case whether a perceived problem is serious and deep seated or minor and transitory
- Ofcom should also consider alternative approaches with an open mind before announcing initiatives, and engage with industry to ensure it understands the true nature of the issue in question



- Ofcom should acknowledge trade-offs, be explicit about how success will be measured, and then review outcomes afterwards
- Ofcom has not, in Vodafone's view, got the balance quite right today but following the approach we recommend would, we believe, help restore the right balance.

#### **A4.5 Section 5 – Citizens**

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

We agree that mobile phones already bring many positive benefits for citizens, and that the use and application of mobile services, particularly within the public sector, is likely to continue to benefit citizens in the future, in terms of speed of accessibility to information. We would question however whether mobile services should be considered a precondition of effective citizen engagement as it is likely that a suite of communication tools including face to face and electronic will need to exist to account for differing citizen needs.

Not all citizens will want or are able to use mobile devices (particularly the old and infirm that are often the most in need of public services), so it is our view that mobile communication should support, rather than seek to replace existing, well established citizen engagement channels. At Vodafone we have working examples of how mobile devices can support citizen engagement especially in our public sector accounts and we are excited about the possibility of improving this especially in the areas of education, location based services and health.

As for democratic opportunities, we recognise that opportunities may exist but note also the risk of disenfranchising non-mobile citizens.

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

At Vodafone we recognise the role our products and services have to play in giving access to all and in social inclusion. This is why we believe it is important to retain pay as you talk options within our pricing plans because some customers either can't afford or aren't able to register for a contract based account. One could argue therefore that pay as you talk options help reduce rather than expand the so called digital divide.

Personal choice and freedom of choice are therefore important in a market economy and we would therefore caution against interventions that might undermine affordability for the most vulnerable groups.

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

One of the factors that should be taken into account is the wider legal framework of existing laws, and not just sector specific legislation. Ofcom itself is not the competent authority in many cases, so it needs to understand the public policy concerns that other regulators have been set up to deal with.

As in other areas of policy, it is also important to recognise the need to balance potentially conflicting objectives, and ensure decisions are 'joined up' across regulators and



government departments. This not only reduces workload for all concerned, but also provides more consistent messaging for those most in need of support – the consumers.

It is worth considering the role and responsibility of the individual in using new services and that regulation is unlikely to be able to deal with every user's IT wants and needs. Education, information provision and training are therefore as important to this debate and market players may be better placed to assist with that.

Similarly, Ofcom should avoid any presumption that new intervention is needed as market players may well be ahead of the game having considered the above issues. It is in the interests of companies to demonstrate a responsible approach to issues that are of concern to their customers in order to gain customer confidence when launching new products and services.

Finally it is important not to undermine incentives to self-regulate. While it may sometimes be the case that a prospect of formal regulation can act as a spur to self-regulation, a general expectation that formal intervention is the preferred course can have exactly the opposite effect, blighting any self-regulatory initiatives that might otherwise have been pursued – whether or not formal intervention actually materialises. Ofcom should take great care therefore, to give self-regulation long enough to prove its worth where it has been pursued, not to denigrate it prematurely.

Examples of self-regulatory work and work done voluntarily on an education basis include;

- Risk to society: Vodafone recently won an award for a cyberbullying communication campaign in partnership with Beatbullying and DCSF; has developed child protection initiatives including the self regulatory Content Code and partnerships with parenting and teaching organisations; has actively participated in the Byron Review and has gained a place on the UK Council for Child Internet Safety.
- Risk to health: Vodafone was instrumental in developing the 10 Commitments to best siting practice and the subsequent Code of Best Practice on Mobile Phone Network Development; Vodafone voluntarily supports the international research projects on mobile technology and health via the Mobile Telecoms and Health Research Council (MTHR) and World Health Organisation EMF programme. Vodafone financially supports and helps develop content for the Mobile Operators Association website to ensure consumers have a practical and useful resource for information on mobile technology and health.

***Question 5.4: Have you been affected by issues about coverage or 'not spots'? How has it affected you?***

While this particular question appears to be aimed at end-users more than mobile providers, it may nevertheless be helpful to offer some general thoughts from a network operator perspective.

We believe there is a need to deconstruct the various meanings and understandings that may be subsumed under the heading 'not spots'. The term almost certainly means different things to different people, and also varies according to context.

At one level, an area with no coverage at all – 2G or 3G – might be considered a 'not spot'. Then again, if the issue is in-building coverage, 'not spots' might also be identified in isolated pockets within areas where there is already general coverage. There may be good coverage for voice, but no 3G coverage. Or there may be 3G coverage, but user experience

of mobile broadband performance is variable, perhaps due to contention from other users or 'cell breathing'.

The point of illustrating these different scenarios is simply to underline that there is more than one type of 'not spot', and that different approaches may be needed according to the nature of the perceived problem in any particular case.

Femtocells certainly have potential to address 3G performance issues in areas where 3G coverage is not sufficient for particular users, or simply lacking. But it will not necessarily be a universal solution, since it relies on the existence of fixed broadband infrastructure. Femtocells may also provide a partial answer to problems with voice coverage in localised coverage holes. On the other hand, lack of mobile (and quite possibly fixed) coverage in remoter and sparsely populated areas of the country are often due to a combination of economic and environmental reasons.

If the problem is essentially economic, then a variety of approaches might be considered depending on the local situation. It might be possible, for example, for local agencies to help identify the potential extent of unmet demand in order to help assess economic viability. If such demand proves insufficient to sustain investment based on standard criteria, then there may be potential to explore commercial arrangements whereby local communities contract with network operators to support certain agreed service levels.

Of course, this depends on funding and the extent of local support for such initiatives. Often local opinion is split – some people concerned about isolation and wanting all the 'connectedness' of urban living in the country, others choosing rural life to get away from the ubiquity and immediateness of modern communications technology. Additionally, even among those who want to see more or better coverage, it is not always the case that these priorities will win out over planning controls and local opposition to mast siting. To some extent, these are trade offs that local communities will have to discuss and juggle for themselves. Network operators do have expertise they can bring to bear on some of these issues, and work with local and regional planning authorities, but they cannot usurp the functions of local democracy.

#### **A4.6 Section 6 - Regulation**

We have not included any questions for this section.

#### **A4.7 Section 7 - Scenarios**

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

As noted previously, care is needed when approaching future gazing exercises of this kind. It is easy to fall into simple extrapolation of currently observed trends, or pure speculation. Nevertheless, at a very general level we would expect to see continuing competition, innovation, and tension between complexity and the need to simplify customer propositions. On current trends, regulation itself may play an increasing role than it has done in market development hitherto. Clearly, this particular trend is one that is, to a large extent, within the control of policy makers in a way others are not.

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

We have reviewed the scenarios discussed by Analysys Mason. However, while we acknowledge that scenario planning can sometimes be a useful way of structuring thought and developing strategy, we see a slight disjuncture between discussion of possible futures and the speculation about possible implications for regulation.

It is not altogether clear where the particular scenarios chosen for exposition have come from, whether the particular combinations of features and issues chosen have any robust analytical or empirical basis, whether and to what extent they reflect positive views on likelihood or normative views on desirability – and, if so, whose views. We would be particularly concerned at the idea that the scenarios presented represent a ‘menu’ of possible outcomes, which Ofcom can choose between by judicious selection and application of particular regulatory tools.

We find some of the assumptions apparently embedded within the various scenarios questionable. For example, Analysys Mason appears to see a strong one-for-one relationship between deployment of femtocells and home zone pricing. This is possible, but by no means assured. Similarly, the suggestion that spectrum constraints could stifle market entry and innovation is asserted without being sufficiently explained. These and other reservations cause us to question the basis for the particular scenarios presented, and consequently their value as a starting point for discussion of policy options.

One of the ways in which scenario planning is often employed is to try and identify dominant strategies, that is to say ones that yield a superior outcome compared to alternative courses of action in a variety of different circumstances, or even in all circumstances. However, in addition to our reservations about the provenance of the particular scenarios selected, there does not appear to be any attempt to use the scenarios to inform the main body of the consultation in any systematic way, perhaps because they are not very tractable as they stand.

It may be that this scenario approach could be revisited at a later stage once the number of core issues for consideration has been narrowed down somewhat. At this stage, however, we are rather sceptical about how far the descriptive account of possible futures assists the policy analysis. For this reason, we think a general health warning is needed about the danger of looking at too many issues too far ahead, based on wholly speculative assumptions, and above all thinking that it is possible to dine *a la carte* from an outcomes menu simply by pulling the right policy levers.

#### **A4.8 Section 8 – Implications**

Promoting competition

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

Vodafone firmly believes that competition has been, and should continue to be, the key driver of innovation and economic benefit to consumers and society as a whole. Ofcom has a statutory duty to promote the interests of citizens and consumers, ‘where appropriate’ by promoting competition. So we understand why Ofcom might ask itself whether it should ‘do more’. If competition is a good thing, surely more competition is even better? Isn’t it always going to be appropriate to ‘do more’ to promote competition?

If the answer to the last question were an unequivocal ‘yes’ then there might be little more to be said, except perhaps to ask the further question ‘what exactly should Ofcom do’?

However, there is a good reason why Ofcom's duty is expressed as a duty to promote competition 'where appropriate'. It implies, not unreasonably, that the active 'promotion' of competition may be more appropriate in some circumstances than others. In particular, it points to the need to focus specific intervention to promote competition *where it is not already effective*. Seen in this light, the mobile market is not obviously a prime candidate for special remedial attention. Other sectors, where competition is not already effective, are more likely to benefit from active intervention.

In any sector, it is vitally important to distinguish between the *competitive process itself* and the *number of and/or interests of particular competitors*. The two are not identical and indeed beyond a certain point may actually be contradictory. It will often be appropriate to remove artificial regulatory barriers to entry. But effective competition depends on the possibility of market entry and exit. Competition needs to be sustainable, and there are dangers going down the entry assistance route in a market that is already competitive.

One danger is that of introducing competitive distortions, encouraging *inefficient* investment that reduces economic welfare. Another is that of institutionalising permanent regulatory dependency as struggling entrants, initially encouraged by the regulator, look to the regulator for continuing assistance to keep afloat amid tough competitive conditions. Asymmetric regulation may sometimes be necessary and appropriate in markets characterised by dominance and lack of effective competition, but it is not generally appropriate in markets that are effectively competitive.

Ofcom therefore needs to tread with care before intervening. When it comes to promoting competition, it is important to diagnose the supposed problem before proposing a solution. Absent clear evidence of market failure, the case for actively promoting competition in effectively competitive markets is weak and not necessarily in the long term consumer interest.

***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?***

What Ofcom describes here as 'Ofcom's strategy' would actually seem to be its fixed line strategy, devised to address the problem of enduring monopoly in the fixed access network and confirmed during the course its earlier Telecoms review. The mobile market is very different – it has never been a monopoly and there are no signs that it is likely ever to become one. As noted, the case for intervening in competitive markets to somehow 'further improve' competition is weak and not necessarily in the consumer interest.

***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?***

Competition can play a big role, providing it is allowed to. There are clearly a number of facets to development of mobile internet services. Broadband access is fairly fundamental, and driven by network competition. But mobilising the internet is about more than raw access. It is about providing a customer experience that works on the move, on a variety of devices.

While the combination of laptop computer plus mobile broadband access may enable an experience rivalling that of fixed internet access but with the added flexibility of wireless access and wide area coverage, customers also want to be able to access particular applications and content on smaller handsets and smartphones. This poses technical and commercial challenges that go beyond simply providing mobile access to the internet.

Some of these are to do with optimisation and rendering content in a way that suits devices with smaller screens and less processing power than a fixed PC, while maintaining fast download and intuitive navigation. Others relate to the ability to access the same applications via a variety of access methods without losing the benefits of synchronisation and personalisation. The success of the Blackberry in mobilising e-mail applications, for example, is in large part due to specialisation and focus. Competition and customer demand, not regulation, provide the spur for such developments.

As Ofcom notes, the value chain is increasingly complex. Mobile network operators do have a substantial role, but are by no means the only influential players. Mobilising the internet requires cooperation between different actors across the value chain. But cooperation co-exists with competition, which operates not just between direct competitors but between those operating at different levels of the value chain – device manufacturers, operating system and applications developers, content providers, and so on. It is this competitive dynamic that drives innovation.

Ofcom asks whether it should explore open access requirements to ensure opportunities for innovation. It should be clear that there is no shortage of opportunities for innovation, so no need to intervene from that perspective. But there is also a further point; namely that intervention could be positively harmful if it distorts market outcomes (as regulating MNOs while leaving all other market actors free to operate commercially would be likely to do).

It is not simply that regulating one part of the value chain will tend to tilt the balance of advantage and commercial bargaining position of the parties. Requiring MNOs to offer particular forms of regulated access could hamper and dampen competitive dynamics in other ways. Regulated forms of access might be inflexible relative to those negotiated commercially, while a one-size-fits-all approach also threatens to undermine the dynamic benefits from the process of experimentation and discovery as all economic actors vie for temporary competitive advantage through constant struggle to develop superior solutions.

‘Net neutrality’ is a term that means different things to different people. In its purest form it implies no packet prioritisation of any kind. This is unlikely to be economically efficient or in the consumer interest as it would, for example, rule out the ability to prioritise real time applications such as voice and video over less time sensitive applications like certain types of messaging and e-mail. As noted above, mobilising the internet requires the ability to optimise performance within the limitations imposed by bandwidth and the capabilities of terminal equipment. A requirement to treat all packets alike would run counter to this approach, which requires the ability to differentiate.

It is also important to ensure that price signals are allowed to work to help discover what customers really value, so that networks are used efficiently and the correct investment signals provided. Without the ability to use price signals to differentiate, there is a danger that capacity investment lurches from feast to famine. The so-called dot.com bubble was the result of speculative investment in capacity, resulting in a glut at a time when demand conditions were weak. Since then, new capacity-hungry applications have grown up in an environment where capacity is relatively cheaper and the marginal costs of capacity utilisation are not accurately reflected in the price signals to end-users (as the debate over the role of BBC’s i-player and the role it has had on other users’ experience of broadband speeds and contention amply demonstrates).

Setting clear rules for consumer protection

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

Competition can and does play a big role in providing clarity to customers about those aspects of pricing that matter most to them. There is, and probably always will be, a school of thought that believes choice and variety is very confusing and to be regarded with suspicion. Surely, tariff innovation is simply an attempt to bamboozle through ‘confusion marketing’? Wouldn’t it be so much easier to compare competing offers if they were all structured the same?

We understand that some customers may yearn for simpler days when there was less choice and fewer decisions to make. But it is important to understand that pricing innovation is a response to market pressures to deliver value to customers, and the ability to structure pricing propositions and promotions flexibly, to meet and respond to competitor offers, is one of the main vehicles through which price competition and value for money is realised. Figure 60 shows how the real cost of a basket of mobile services has fallen year on year, almost halving between 2002 and 2007. So concerns about pricing transparency need to be set in the context of a vibrant competitive market where on the whole customers are getting a good deal.

It is important also not to overstate tariff complexity or problems of comparability. Prices and tariffs are not static, but evolve and respond to changing customer needs and expectations. And where those demands are for greater simplicity, the market tends to respond.

Mobile pioneered the concept of inclusive call bundles on contract tariffs, while customer growth has been fuelled by the simplicity and budgetary control provided by pre-pay options. But bundles have changed over time – where once it was the norm for on-net and off-net mobile calls to be treated differently, it is now common for off-net mobile calls to be included within bundles. Text and data bundles are also now common. Similarly, while some original pre-pay tariffs had time based expiry limits operating alongside call charges, competitors saw an opportunity to gain marketing advantage by introducing a ‘no periodic charge’ proposition (Orange’s “no ouch in our voucher”) which proved to be very attractive and which stimulated others to follow suit. The range of different tariff propositions on offer enables customers to identify for themselves the type of deal best suited to their particular preferences. In many cases, customers have the ability to mix and match e.g. by adding higher data usage to a basic bundle, or to secure a better value monthly charge or pay less for a high-end handset in return for a longer minimum term.

To some extent, there is a trade-off between simplicity and demands for very granular transparency at the level of individual call types in mass market advertising and promotional material. Transparency is not the same as clarity. It is possible to be *transparent* by presenting a mass of detail, but this may be very difficult to grasp or interpret when presented *en masse* (as opposed to being available for reference). It is not just a question of how marketers prefer to package and present messages but of what is actually useful and valuable to customers. We note Ofcom’s comments at 4.20: “Confidence and awareness of consumers is reflected in actual behaviour with over 40 per cent of UK consumers having switched supplier at some point . . . . *When deciding which*



*operator to sign up with, consumers use a number of information sources, most commonly trusted personal sources, followed by websites and supplier sources.” (emphasis added).*

As Ofcom further notes at 4.25 “Choices about aspects of service, including price, are, of course, a healthy sign of a well functioning market. Nor are varied (or even complex) prices necessarily a sign of a problem – for example, there are important efficiencies that can be lost if providers are not able to take opportunities to offer prices that vary between different groups of customers with different requirements or willingness to pay for particular features. The critical question is whether there is anything about the balance between simplicity and complexity that suggests the market is not functioning properly in offering those choices.”

Marketing propositions tend to focus on those aspects of value that matter most to customers when making purchase decisions, in which handsets clearly play a substantial part. As noted, bundles provide a convenient way of communicating value and budgetary control in a way not possible by presenting a vast array of pence per minute charges by time of day for every conceivable call type. This responds to the concerns of most customers to know how much the type of calls they make most of are likely to cost them. Regulatory demands for minority call types to have equal prominence with majority ones tend to be unwieldy, and attach disproportionate weight to the price of calls made infrequently. They may also have the unintended consequence of skewing marketing effort away from price towards more intangible brand projection which is not subject to the same level of prescription and constraint, which is counter-productive to their stated aim.

***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?***

The Mobile Operators Content Code<sup>25</sup> is a prime example of where self-regulation can be highly effective in an area where Ofcom does not have direct regulatory remit.

The background to the Code, introduced in 2004, was that mobile devices were increasingly available with enhanced features; including colour screens, picture messaging, video cameras and Internet browsers allowing consumers to access a wide variety of content.

In anticipation of these products being widely adopted by consumers, including consumers under the age of 18, the mobile operators put in place a code setting out how they would protect their consumers – especially children – in a targeted and proportionate manner. The intention was – and still is – that parents and carers should have access to the information with which they can show their children how to use new mobile devices responsibly and the power to influence the type of content they can access.

The main features of the code include:

- Mobile operators to appoint an independent classification body to provide a framework for classifying commercial content that is unsuitable for customers under the age of 18.
- Commercial content providers required to self-classify as 18 all content unsuitable for customers under the age of 18

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<sup>25</sup> [http://www.mobilebroadbandgroup.com/documents/CC\\_CoP\\_newcontent\\_release190104.pdf](http://www.mobilebroadbandgroup.com/documents/CC_CoP_newcontent_release190104.pdf)

- Each mobile operator to place commercial content classified as 18 behind access controls and only make it available to those customers that it has satisfied itself, through a process of age verification, are 18 or over.
- Each mobile operator to place behind access controls on all commercial content chat rooms, unless they are moderated chat rooms.

The success of the UK's approach is perhaps well-evidenced by the European Commission's support for the GSMA's 2008 'European Framework for Safer Mobile Use by Younger Teenagers and Children', covering all 27 Member States of the Union, and which uses the UK's code as its basis.

The self-regulatory location-based services code<sup>26</sup> is an example of where self-regulation can be onerous and certainly not a 'light touch' alternative to formal regulation. It could be argued that the child and general consumer protection requirements put in place by the mobile networks have held back development of mass-market LBS in the UK as the controls mandated represent a significant regulatory burden. But mobile operators have deliberately opted for a cautious approach because it is the right thing to do, given the potential repercussions of an incautious approach which could prove far more stifling of consumer acceptance in the long term.

As regards privacy, this is a substantial subject in its own right that we cannot do full justice to in the present response. However, we believe that self-regulation and media literacy both have a big role to play.

Increasing mobile media literacy, among adults as much as among children, is essential to ensuring that users stay safe and understand how their privacy may be impacted by the services they use.

Those with the greatest investment in the mobile user have the greatest incentive to ensure the mobile environment is protected from abuse and misuse, and that user privacy remains safeguarded. Self-regulation encourages best practice, rather than penalising worst practice, so tends to be 'aspirational' in its effect.

There should be increased focus on 'Privacy by Design' (as encouraged by the UK's ICO), i.e. designing in the tools that minimise the potential for privacy to be compromised in an open 2.0 world, and that enable users to better protect themselves. This should fall as much on the device manufacturers, platform operators, software vendors and application service providers as on the mobile operators.

It is important to recognise that we can no longer assume we can always know exactly who we are dealing with, e.g. children or young users. Therefore we need to create a set of rules that both allow and respect the right of children and young people to engage in the mobile information society and exercise autonomy over their personal information, but take account of the special circumstances of children and young people in protecting their privacy.

Adapting regulation to converging markets

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

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<sup>26</sup> [http://www.mobilebroadbandgroup.com/documents/UK\\_CoP\\_LocationServs\\_release\\_240904.pdf](http://www.mobilebroadbandgroup.com/documents/UK_CoP_LocationServs_release_240904.pdf)



For reasons discussed more fully in the body of this response, we think evolution may be more appropriate than fundamental change. We support the move towards symmetry, but would underline also the need to allow efficient cost recovery. Termination rates are already set to decline over time, but forcing them below cost could jeopardise social inclusion and affordability objectives and should therefore be approached with caution.

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

This might be regarded as something of a loaded question insofar as it seems to presuppose that competition will not reduce such charges sufficiently, which immediately begs the question as to what ‘sufficiently’ means, and to whom.

Vodafone’s preference is to let the market work, and we would highlight the actions Vodafone itself has taken to simplify and deliver greater value to customers through Vodafone Passport. In many cases, Passport offers better value to customers than alternative regulated tariff options.

We recognise that intervening directly to bring down retail prices may have certain attractions to European institutions keen to court popular favour. As with termination rates, however there are hidden dangers in setting prices arbitrarily without regard to underlying costs or demand conditions. Ofcom has rightly preferred to focus intervention at a wholesale level wherever possible, and should continue to urge that a similar approach is applied at European level.

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

Mobile’s role in universal service and digital inclusion is discussed more fully in the body of this response. In general, we think the growth of mobile has done a great deal to further universal service policy goals to date, while keeping the cost of universal voice provision down. We recognise that new service capabilities, while delivering great benefits, may also fuel concerns about the possibility of a digital divide. However, the debate is complex, spanning issues of coverage, handset capability, affordability and media literacy. We think such issues may well merit wider debate, recognising that they extend to areas of broad social policy that are to some extent beyond Ofcom’s own direct remit. We would urge, however, that any calls for significant extension of the current concept of universal service address issues of funding. Otherwise, there is a danger that, as with healthcare, technological advance creates an insatiable appetite for more and better which, if it cannot be met on a commercial basis, still needs to be paid for somehow.

***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 question of ‘not spots’ is discussed in answer to Question 5.4 above. In brief, we think the problem of not spots manifests itself differently in different places, raising different issues for which a variety of responses may be appropriate.

As regards emergency access specifically, there is already a requirement to support emergency access with provision of location information where technically feasible, which

we support. We understand that consideration is given from time to time to the possibility of national roaming for 999/112 calls. We are not averse to this in principle. However, we understand that it was originally in response to a growing number of hoax calls that the Association of Chief Police Officers (ACPO) asked for the capability to be turned off, so it would be important to review to what extent such concerns still apply today.

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

These are very big questions and we can only scratch the surface in the present response.

One important point, from Vodafone's perspective, is the need to recognise that not only do different groups of people have different needs, but that *individuals* also have different needs. It can, therefore, be dangerous to generalise too much, and there is a risk too of making assumptions about individuals and groups that may not always be well founded. At a very broad brush level, however, affordability is likely to be an issue for some, so it is important that regulation should not inadvertently undermine the commercial model that enables low spending customers to be supported. For others, functionality may be the key issue – whether to do with the handset, service or support.

Competition does have a role to play, not least as mainstream functionality is increasingly capable of meeting particular needs – we note, for example, the popularity of mainstream text in comparison to specialised 'textphone' services. Such 'mainstreaming' has a number of potential advantages, side-stepping issues of inter-operability with mainstream services, enabling particular groups to communicate with everyone – not just other members of a finite group. It also potentially assists affordability through realisation of scale economies.

Equally, we recognise that such an approach may not provide the answer in all circumstances. However, we would recommend a certain degree of caution before formally mandating particular 'regulatory' products or services without first exploring other options. While there might be some cases where this is justified, there is also a risk that mandated products don't actually address real needs, and become an expensive diversion from potentially more productive approaches to meeting special needs.

Our proposed way forward

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

This first round has covered a very broad canvass, asking a great many open-ended questions of a great number of people. We hope this will assist Ofcom in gathering and distilling from a wide range of views some slightly more focussed themes for more in-depth evaluation. There is a slight risk that the MSA will become all things to all people, raising expectations that it might not be possible or practicable to meet.

It might be helpful, therefore, to seek to narrow rather than broaden the range of issues considered in the next stage, enabling a sharper focus. We look forward to better understanding the outlook and priorities of other stakeholders, and would not want to be too prescriptive at this stage about how the next phase of the assessment should be conducted. However, we would encourage Ofcom to be guided by the principles of better regulation, and to pursue the search for 'less but better' regulation rather than a general expansion of mobile regulation.

**We understand and fully accept that we operate in a regulated environment, and that Ofcom's primary duty is to pursue the interests of citizens and consumers. The question is how that duty is best discharged, and while formal regulation may sometimes be the answer, there is also a need to be open about the limits of regulation and risk of regulatory failure. Sometimes, this will mean that citizen and consumer interests are best served when regulators have the courage and wisdom to forbear.**