

## Vodafone's response to "Mostly Mobile" – Ofcom's mobile sector assessment second consultation<sup>1</sup>

### Summary and conclusions

Vodafone welcomes the opportunity to respond to Ofcom's second consultation. This response focuses specifically on Ofcom's current consultation questions. Vodafone does not comment extensively on Ofcom's more general discussion, as this largely covers ground Vodafone has commented on previously in response to Ofcom's first consultation. For a fuller view of Vodafone's outlook, the present response should be read in conjunction with Vodafone's previous response<sup>2</sup>.

The most important finding reported in Mostly Mobile is what Ofcom describes in Section 4<sup>3</sup> as its core finding, namely:

*"Our core finding is that competition within the mobile sector is generally working well: we see shifts in retail and wholesale market shares between existing players; switching levels are robust; new suppliers (such as MVNOs) are able to enter the market and providers are innovating with new product and price options."*

In the light of this core finding, which is both unsurprising and critically important, we broadly agree with Ofcom's proposed response, in particular, its key conclusions<sup>4</sup>:

- that Ofcom should not regulate third party access;
- that there is no need for a formal market review or investigation;
- that competition principles should be used to assess future change, and;
- that spectrum reform should continue.

While we welcome and endorse this finding and conclusions, we do have serious reservations about the analysis presented elsewhere in the consultation. In particular, we do not believe Ofcom's proposed "strategic principles" for regulating the mobile sector actually provide any useful guide – either for Ofcom or for other stakeholders. At best, the principles are ambiguous and unclear. At worst, they constitute an all purpose licence to meddle and tinker in a highly competitive sector that, according to Ofcom's own analysis, is generally working well for customers. This cannot be an appropriate focus for Ofcom, given the lack of effective competition and far clearer cases of market failure leading to consumer detriment in other less competitive sectors.

For Ofcom's regulatory principles to mean anything, it must apply them consistently across all regulated sectors – not invent new and different principles in an attempt to justify an approach to mobile regulation that would fail to meet existing regulatory principles. Consistent application of constant principles would lead Ofcom to regulate less intensively in competitive sectors such as the mobile sector, and to concentrate its attentions on problems of genuine market failure which are more widespread, and more damaging in their impact on consumers, in markets that are *not* effectively competitive. Any other approach turns on its head Ofcom's declared belief that:

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<sup>1</sup> <http://www.ofcom.org.uk/consult/condocs/msa/msa.pdf>

<sup>2</sup> <http://www.ofcom.org.uk/consult/condocs/msa08/responses/vodafone.pdf>

<sup>3</sup> See 4.5

<sup>4</sup> See 4.9

*"competition is the most important stimulus for ensuring that consumers benefit from advances. . . . . through service and technology innovation, fair prices and investment."*<sup>5</sup>

We therefore invite Ofcom to reconsider its proposed mobile-specific principles, with a view to abandoning them in favour of its existing, general regulatory principles. In any event, Ofcom must apply rigorous standards to any proposed intervention. The fact that the mobile sector is dynamic and interesting is not a reason to regulate it, though there is a clear danger that a heavily regulated mobile sector will cease to be dynamic and interesting. Ofcom will do more good for consumers by attending to enduring problems of market failure outside the mobile sector than attempting to second guess and fine tune a competitive mobile market that is already working well.

**Vodafone Limited**  
**September 2009**

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<sup>5</sup> See 4.2. Ofcom makes this statement specific to the mobile sector. However, Vodafone submits that this is a statement of principle of general application. It also accords with Ofcom's primary duty to further the interests of consumers in relevant markets, where appropriate by promoting competition.

## Consultation questions

Section 1 - Executive summary

Section 2 – Introduction

### **2.1 Do you agree with our principles for mobile regulation?**

Ofcom sets out three proposed strategic principles to inform its future approach to the mobile sector<sup>6</sup>. These are:

- ***“Using markets where we can.*** *We will rely on market forces to deliver our vision for the mobile sector wherever possible.*
- ***“Recognising the limits of markets.*** *We will respond to market failure and consumer protection needs with focused intervention.*
- ***“Widening the focus of regulation to reflect a changing mobile sector.*** *We will act with a view of the bigger picture, keeping regulation relevant by ensuring that it evolves to reflect the growing importance and complexity of mobile services.”*

The first two of these are two sides of the same coin. We endorse the view that Ofcom should use markets where it can, and confine intervention to cases of genuine market failure. However, the key test will be how these principles are applied in practice. In principle, we see no reason why Ofcom’s “strategic principles” for mobile should be any different from its general guiding principles, which already include a commitment to operate *“with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required.”*

As for the third suggested principle, it is difficult to discern what Ofcom intends. If this means no more than that Ofcom will keep matters under review in the light of changing circumstances, it is unremarkable and superfluous<sup>7</sup>. If, on the other hand, this is code for an open-ended mandate to examine all manner of possible or potential issues, real or imagined, on a speculative basis with a view to ‘solving’ them by regulatory intervention, then we would seriously question the appropriateness of such an approach. We are far from persuaded that a so-called strategic principle that is apparently “catch-all” in nature provides any useful guide to Ofcom or stakeholders, and consider this likely to undermine rather than enhance regulatory certainty, to the ultimate detriment of consumers.

Section 3 – The changing market environment

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

We continue to caution against placing firm bets now as to how the sector will evolve in future, for all the reasons rehearsed in our response to the first round of consultation, and apparently widely echoed by other respondents.

We therefore welcome Ofcom’s acknowledgement that a high degree of uncertainty attaches to its future predictions<sup>8</sup> and have no objection to the idea that Ofcom should keep itself abreast of significant developments<sup>9</sup>. Our concern arises where the caveats and uncertainties get lost and Ofcom attempts to divine clear trends as though these provided a secure and stable framework for future policy making.

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<sup>6</sup> See 2.23

<sup>7</sup> Ofcom’s regulatory principles already include a commitment to *“... research markets constantly and ... aim to remain at the forefront of technological understanding”*. See <http://www.ofcom.org.uk/about/sdrp/>

<sup>8</sup> See 3.12

<sup>9</sup> As noted, this falls squarely within the ambit of Ofcom’s existing regulatory principles

Despite the preponderance of 'may' and 'might's in the text, Ofcom is still tempted into prophesying how the various, sometimes conflicting and contradictory trends it observes will play out. Yet a great deal of Ofcom's speculation lacks compelling analytical or evidential support.

For example, the 'virtuous circle' Ofcom describes in relation to a mutual reinforcement of demand lead and supply push for mobile data may be one possible outcome but is by no means inevitable or assured. The recent history of mobile data has indeed seen substantial volume growth coupled with very modest revenue growth<sup>10</sup>. However, the proportionate increase in data's share of total revenue<sup>11</sup> is also due, in part, to the levelling off of voice revenue seen over the same period<sup>12</sup>. Keener and more certain data pricing at retail level can be seen as a rational profit maximising response by operators in circumstances where they have network capacity available to accommodate increased demand (or the ability to add incremental capacity at relatively low cost). But it is by no means clear that a sharply falling unit price for data can be relied on to fuel exponential capacity growth to meet ever increasing demand indefinitely as Ofcom seems to suggest. All such cycles tend to reach a limit eventually.

None of this is to suggest we will not see further growth in mobile data and faster data rates in the near term<sup>13</sup>. It is merely Ofcom's apparent confidence that the dynamics behind this are immutable, and can be divorced from the underlying need for a commercial return on risky investment that we question.

### ***Q 3.2: Have we identified the right regulatory challenges?***

Not necessarily, no. For the reasons outlined above and in our previous response, we think predictions about future trends need to be taken with a large pinch of salt. It follows that any analysis of 'regulatory challenges' based on a particular view of sector trends also needs to be treated with circumspection.

Our concern is not solely confined to the pitfalls inherent in attempting to identify reliable trends. Even if Ofcom's identification of trends were impeccable, there are serious questions about how Ofcom has made the leap from 'trend' to 'regulatory challenge'.

For instance, the discussion of Ofcom's 'convergence' trend is based almost entirely on the observation that both fixed and mobile networks are gravitating from voice-centric circuit switched technology towards increasing use of IP. This in itself is relatively uncontroversial. What is far from uncontroversial, however, is the apparent suggestion<sup>14</sup> that 'convergence' in the limited sense above *"also raises the question of future mobile call termination rates, in a world where the delivery paths of fixed and mobile services may easily cross over."* This simply does not follow.

Convergence in certain aspects of core network architecture has little if any direct bearing on the competition analysis underpinning market definition and the assessment of market power on which all existing regulation of termination rates, fixed and mobile, is predicated. No case has been made that a fixed retail market still characterised by dominance has converged with the competitive mobile market so as to completely redraw previous market boundaries. In any event, as Ofcom itself notes<sup>15</sup> there remains a *fundamental* difference between fixed and mobile networks at the access level. This has a clear bearing on any assessment of efficiently incurred costs, which Ofcom cannot responsibly disregard when determining the appropriate regulation of voice call termination.

Mobile termination rate regulation is already under review and this is not the place to rehearse all the arguments being debated elsewhere. The point here is simply to note the slippery nature of the concept of 'convergence', and the consequent need to be very clear what is intended when using the term in any particular context. There is a real

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<sup>10</sup> Fig 6

<sup>11</sup> Fig 5

<sup>12</sup> Fig 3

<sup>13</sup> Vodafone recently announced a significant network upgrade to support data rates of up to 14.4Mbps – see [http://www.vodafone.com/start/media\\_relations/news/local\\_press\\_releases/uk\\_press\\_releases/2007/vodafone\\_uk\\_deliver\\_s.html](http://www.vodafone.com/start/media_relations/news/local_press_releases/uk_press_releases/2007/vodafone_uk_deliver_s.html)

<sup>14</sup> See 3.91

<sup>15</sup> See 3.53

risk that casual, rhetorical use of the term convergence obscures what sort of convergence is being considered and what relevance, if any, it has to the policy issue at hand. Vodafone recalls that “convergence” was invoked to justify a new mandatory “converged” technical solution for routing calls to ported numbers until this decision was quashed on appeal<sup>16</sup>. Ofcom’s more recent analysis, however, confirms Vodafone’s abiding concern that a converged solution is not, in fact, economically justified at present and would impose substantial net costs on industry and consumers<sup>17</sup>.

Finally, it is striking that although many if not most of the trends Ofcom claims to observe are apparently benign (or indeed ‘virtuous’ in one case) the challenges Ofcom sets for itself are heavily skewed towards possible future dangers and threats, thus apparently requiring redoubled vigilance on the part of the regulator. Nowhere in its discussion of regulatory challenges does Ofcom acknowledge a danger that excessive or premature regulatory activism may do more harm than good, diverting time and resources away from more immediate and practical problems of market failure in other less competitive sectors, while doing nothing to create a more certain investment climate for mobile<sup>18</sup>. This is a serious oversight, and reflects a lack of balance in Ofcom’s approach.

#### Section 4 – Competition and new entry

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

We agree that:

*“competition is the most important stimulus for ensuring that consumers benefit from advances in the mobile sector through service and technology innovation, fair prices and investment.” (4.2)*

We therefore welcome and endorse Ofcom’s core finding:

*“Our core finding is that competition within the mobile sector is generally working well: we see shifts in retail and wholesale market shares between existing players; switching levels are robust; new suppliers (such as MVNOs) are able to enter the market and providers are innovating with new product and price options.” (4.5)*

And we broadly agree with Ofcom’s proposed response (4.9), in particular, the key conclusions:

- that Ofcom should not regulate third party access
- that there is no need for a formal market review or investigation
- that competition principles should be used to assess future change, and;
- that spectrum reform should continue.

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

No.

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

Yes.

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<sup>16</sup> [http://www.catribunal.org.uk/files/Judgment\\_1094\\_180908.pdf](http://www.catribunal.org.uk/files/Judgment_1094_180908.pdf)

<sup>17</sup> [http://www.ofcom.org.uk/consult/condocs/gc18\\_routing/routing.pdf](http://www.ofcom.org.uk/consult/condocs/gc18_routing/routing.pdf)

<sup>18</sup> Though, to its credit, Ofcom *does* acknowledge this risk explicitly elsewhere – notably in its discussion of investment in Section 5. See further below.

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

Yes.

Section 5 – Investment

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

We agree with Ofcom's key conclusion at 5.7:

*"We believe that the best contribution we can make to timely and efficient investment in the mobile market continues to be to promote competition and ensure that any regulation we impose does not hinder or delay investment. We also recognise the important role regulatory certainty has for investment decisions in a sector with long investment horizons."*

Section 6 – Consumer protection and empowerment

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

Not entirely.

We recognise that there may be some specific issues where there is a genuine market failure that may warrant regulatory intervention. However, we would certainly not agree with any general presumption that market outcomes in the mobile sector do not serve the consumer interest, or that regulatory intervention necessarily guarantees better outcomes for consumers.

We welcome Ofcom's recognition that vigorous competition has delivered high levels of consumer satisfaction and that on the whole consumers get a good deal. We agree with this conclusion.

Ofcom then, however, goes on to justify intervention on the grounds that occasional problems for a small minority of customers can still be very serious for the individuals concerned, and can also affect a large absolute number of people even if the number of people affected in this way is small as a proportion of the total. Again, we agree – but only up to a point.

It must be recognised that no real world market is ever perfect, and justifying intervention through failure to achieve perfection sets an unrealistically and inappropriately high benchmark against which to judge the proportionality and appropriateness of intervention. Moreover, although commercial pressures force operators to try to understand what customers want and deliver it to them, it is also evident that different customers want different things and – as the cliché has it - you can't please all the people all the time.

In many cases, the 'problems' that Ofcom identifies as affecting some customers are actually the flip side of the solution to other customers' concerns. Of course, one way to meet the variety of different customer wants and needs is through choice, which the competitive mobile market delivers. But for the small group of customers that finds choice bewildering, choice itself is a bad thing.

Ofcom attempts to square the circle by suggesting that the problem with choice is complexity, and that the answer to complexity is easier comparability. This deft footwork does not entirely succeed, however. There remains a fundamental tension between real choice and regimented comparability that cannot easily be overcome, and moreover there is scant evidence that the latter approach actually works in practice. The majority of customers who are happy with the present level of choice are already well served, while the minority who find choice confusing are unlikely to use or benefit from interventions designed to produce yet more comparative information.

Ofcom also ignores the likely effect of enforced comparability in limiting choice, as competition is skewed towards performance against mandatory comparative metrics where the results may well end up virtually indistinguishable. Comparative performance indicators may have some role to play in some circumstances but are not the panacea sometimes suggested<sup>19</sup>.

We think Ofcom's regulatory principles, and the interests of consumers as a whole, are best served by a two stage test before recourse to intervention. Firstly, the 'problem' in question must be one of genuine market failure in the economic sense of frustrating the realisation of the best outcome for society as a whole (as distinct from mere failure to meet the sectional demands of a vocal self-interested lobby). Secondly, having diagnosed a genuine market failure, the risk of regulatory failure also needs to be assessed to avoid the risk of a well-intentioned intervention having unintended consequences and actually doing more harm than good. Moreover, once a decision to regulate has been made, Ofcom still needs to review whether, in practice, the chosen intervention is actually effective in meeting the underlying objectives and whether it remains appropriate and proportionate as circumstances change<sup>20</sup>.

These are not novel ideas, and should in fact be entirely uncontroversial - although we recognise that applying such an approach in practice requires considerable skill and care. Notwithstanding the difficulties, we urge Ofcom to apply rigorous standards in assessing any calls for intervention and in reviewing the effectiveness of existing interventions.

There may be a temptation by some of Ofcom's readership – perhaps even some within Ofcom itself – to interpret a sweeping statement to the effect that competition alone cannot be relied on to protect consumers as an all purpose excuse and justification for regulatory intervention. We sincerely hope that is not Ofcom's intention. Such an approach is not supported by Ofcom's own evidence base, and would not be in the longer term interest of consumers.

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

Ofcom presents a polarised picture with some stakeholders calling for more intervention, and some for less. It then seeks for itself a happy medium somewhere in between.

We certainly agree that Ofcom should only apply regulation when effective and proportionate. However, we do not entirely share Ofcom's apparent view that it has struck the right balance to date. In any event, we would urge Ofcom to guard against self-congratulation or complacency that it has, in the past, always got the balance right and will necessarily always do so in future. Any new calls for intervention must be considered rigorously, case by case, without any general presumption that intervention in the name of consumer protection or empowerment is always likely to be justified and beneficial.

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

Given Ofcom's core finding that competition is delivering a good deal for consumers with high levels of consumer satisfaction we respectfully suggest that Ofcom should focus its attention on other markets which, unlike mobile, are *not* effectively competitive, rather than casting round for further mobile issues to get its teeth into.

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<sup>19</sup> As Ofcom itself effectively acknowledged in its recent abandonment of the Topcomm scheme - see <http://www.ofcom.org.uk/consult/condocs/topcomm/statement/>

<sup>20</sup> See Vodafone's previous response for a fuller discussion - <http://www.ofcom.org.uk/consult/condocs/msa08/responses/vodafone.pdf>

As noted in our previous response, much of the rising tide of regulation to which mobile is subject is not specific to the mobile sector but applies across the board. Ofcom has long promised a root and branch review of general conditions to prune back regulation that is time expired or not fit for purpose, but no such review has ever materialised. We note, with regret more than surprise, that this exercise now appears to have dropped off Ofcom's 'to-do' list altogether.

#### Section 7 – Access and inclusion for disabled and vulnerable citizens

Ofcom has not included any questions relating to this section as the issues concerned are being addressed elsewhere.

#### Section 8 – Coverage

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

It is not absolutely clear to us at this stage exactly what Ofcom envisages its proposed role might mean in practice.

In principle, we think Ofcom could potentially play a useful role in some ways, for example by using its technical expertise to help interested stakeholders understand both the possibilities and equally the limitations and problems associated with various proposed solutions.

More generally, Ofcom could usefully reinforce the main conclusion from its own analysis – namely that there are many different flavours of so-called 'not spot', and while particular solutions may be available to address particular problems, there is no simple single solution that magically solves all not spot issues at a stroke.

We believe Ofcom is right also to draw attention to the need to weigh up competing and potentially contradictory public policy concerns – including network competition, social inclusion, regional development, environmental impact, and so on.

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

Our answer to the previous question applies equally here.

#### Section 9 – Mobile content

***Q9.1: Are there any additional issues about mobile content and accessing content via mobile that should be considered?***

See question 9.2.

***Q9.2: We have set out some differences between accessing content via the fixed internet and via mobile. Are there any further differences?***

Vodafone notes that the protections developed by mobile operators in the UK are significant and class-leading in the international context. The fixed-line world does not have functional equivalents of the code of practice for the self-regulation of new forms of content on mobiles<sup>21</sup> (the Content Code), the Independent Mobile Classification Body (the

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<sup>21</sup> 'Mostly Mobile' actually refers to: "the Code of Practice... for the sales and marketing of subscriptions to mobile networks" (p.142). As Ofcom is naturally aware, this is a different self-regulatory initiative, which largely came about as a result of concerns over cash-back offers.



IMCB) and the code of practice for passive location services (the Location Code). These initiatives emerged from the Mobile Broadband Group (MBG), which is comprised of the UK businesses of O2, Orange, T-Mobile, H3G, Virgin Mobile and Vodafone.

The Content Code developed by the MBG in the UK was subsequently used as the basis for the EU's framework for the safer use of mobiles by teenagers and young children. The IMCB, meanwhile, in addition to its classification role also acts as a body to which the public can complain if they come across content that they feel is inappropriate for minors to access.

All major mobile operators are member of the Internet Watch Foundation (IWF) and abide by its Code of Practice. In addition, mobile operators have all agreed to use the IWF's database of child sexual abuse images to block customer access to the listed sites.

The MBG joined the Committee for Advertising Practice (CAP) in 2008. Mobile has the potential to become a significant channel for the distribution of advertising in a multitude of new media formats and the mobile operators realise the importance of having this channel properly regulated and support the Advertising Standards Authority in its independent administration of the CAP Code.

Ofcom observes itself that there are: "practical obstacles to imposing regulation on the internet"<sup>22</sup>; this is a sound analysis. Vodafone sees it as important for Ofcom to recognise that effective protections have emerged *in the absence of regulation* and have emerged in mobile; a sector at least historically less intrusively regulated than fixed-line communications. This feature of the mobile world should have bearing on Ofcom's consideration of the necessity of intervention in other areas and on the benefits of self-regulation.

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<sup>22</sup> Op. cit., p.146.