NON-CONFIDENTIAL VERSION

CALL FOR INPUTS: SHARED WORKS, SHARED FACILITIES AND REVENUE SHARING

RESPONSE OF VODAFONE LIMITED

1. Introduction and summary

1.1 Vodafone Limited ("Vodafone") welcomes the opportunity to respond the call inputs issued by the Joint Regulators' Group (the "JRG") regarding the existing regulatory framework governing sharing of and access to infrastructure that enables the operation and expansion of communications services. It is of vital importance for ongoing investment and innovation on the part of mobile communications providers that this regulatory framework is targeted more proportionately, effectively and in a more technologically neutral way than has been the case to date. Such an outcome will provide both the legal and commercial certainty upon which communications providers depend to make the significant investment decisions that will deliver the technological enhancement and innovation demanded by consumers. We elaborate on this core theme in greater detail below; the issues and examples that we highlight below are of course specific to the mobile communications sector, but they are highly germane to the way in which that sector develops in future and may have wider application in other network industries being considered by the JRG.

1.2 In our response below, we distinguish between infrastructure sharing between market actors operating at the same and different levels of the value chain. We draw this distinction because it should inform how regulatory intervention should be structured and more effectively targeted in future.

1.3 Regulatory frameworks have historically placed great emphasis on a model or theory of infrastructure competition between competing network operators. However, it has become increasingly evident that this regulatory model is unlikely to create the commercial environment that will enable long-term sustained investment necessary to deliver truly national networks with consistently high levels of network coverage irrespective of region or locality. The need for such networks is particularly compelling as network connectivity (and the quality of that connectivity) plays a central role in the life of UK citizens and is, as has been recognised by successive governments, a key driver of economic growth and productivity. Accordingly, <u>where there are opportunities for these communications providers to collaborate to reduce the cost of deploying and operating networks, it is important that the regulatory framework should not operate to inhibit or delay such collaborations, provided that there are clear benefits for end users flowing from these collaborations</u>.

1.4 <u>By contrast, much greater attention should be devoted in future to the scope for mandated access to strategic infrastructure for mobile operators where control over these critical assets is exercised by an incumbent that may have little incentive to negotiate or conclude commercial arrangements on economically sustainable terms</u>. We provide below some obvious examples of where such regulatory intervention might be appropriate and how this type of intervention will assist in the proliferation of enhanced mobile communications services to UK consumers in the future.

2. Collaboration between existing infrastructure operators

2.1 In its *tour d'horizon* of the mobile sector in 2008-2009, Ofcom examined the potential for network sharing between competing mobile infrastructure providers and expressed the view that:

"by reducing the extent of competition between the sharing networks, the overall intensity of competition in the market is reduced."[1]

2.2 This prevailing theory of infrastructure competition appears to be predicated on the assumption that the preservation of independence of infrastructures is central to the intensity of competition in downstream wholesale and retail markets. Whilst, this theory appears superficially attractive in pure competition terms, its practical application has not created an environment for sustainable investment in national network expansion that has been the desired policy outcome for successive governments.[2] This network investment is critical if mobile communications providers are to satisfy the evident increase in consumer demand for the next generation of very high speed data services via mobile infrastructures.

2.3 Yet Ofcom's review of the deployment of networks in 2008-2009 conceded that the existence of a number of independent infrastructures, each with different strengths and weaknesses (reflecting the 'stop-go' cycle of network investment) had failed to deliver the best outcome for consumers:

"*In our Mostly Mobile consultation published July 2009 we pointed out that, while mobile network availability is generally good, coverage issues persist. There is still a noticeable difference between 3G coverage in rural and urban areas, and also between different parts of the UK. 2G coverage is unlikely to be extended further on commercial grounds."*[3]

And, a little over two years later, in its first review of the nation's communications infrastructure, Ofcom that infrastructure differentiation in practice was unlikely to be of value to consumers:

"Consumers are generally only concerned about the coverage of their chosen network operator, and gain little comfort from knowing that a signal from another operator is available when they find themselves in a 'local' mobile not-spot (unless there is an arrangement between network operators to allow network roaming, such as the roaming agreement currently being rolled out by Orange and T-Mobile as a result of the Everything Everywhere merger)."[4]

2.4 Instead, it is increasingly in the realm of services where competition will be fought by both existing infrastructure operators and new (increasingly 'over-the-top') entrants in the next decade and beyond. Recent technological innovation means that infrastructure sharing collaborations can be implemented in a way that has no effect on the ability of any party to differentiate in the service layer. **[Confidential]**

2.5 Collaborations, such as the one entered into recently by Vodafone and Telefonica, plainly deliver the most efficient outcome for consumers, particularly when viewed from the perspective of increased and speedier network coverage. It is, of course,

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[1] Ofcom, *Mobile Evolution. Ofcom's mobile sector assessment*, 17 December 2009, paragraph 3.15

[2] See for instance, *Digital Britain*, June 2009; speech by Ed Vaizey, *Enabling Mobile Broadband,* , 15 November 2011

[3] Ofcom, *Mobile Evolution. Ofcom's mobile sector assessment*, 17 December 2009, paragraph 1.9

[4] Ofcom, *Infrastructure Report*, 1 November 2011, paragraph 4.14

important that collaborations between previously independent infrastructure providers: (i) do not diminish the incentives of the parties to such collaborations to continue to compete vigorously in downstream wholesale and retail access markets; and (ii) generate clear consumer benefits. Where these incentives remain unaffected and clear consumer benefits can be established, the case for protracted regulatory scrutiny and any intervention is simply no longer justifiable. Ofcom itself appears to have taken steps on this journey to a new regulatory paradigm in the context of its spectrum auction consultation in January 2011:

"*We consider that if there were future network sharing agreements, it would still be possible for them to be structured such that the sharers have an incentive and ability to continue to compete as independent national wholesalers. It may be easier with LTE technology for national wholesalers sharing a network to maintain control over more dimensions of quality compared to 2G and 3G technology. It may also be possible for there to be spectrum sharing without compromising the independence of national wholesalers.*"[5]

2.6 We would therefore urge the JRG, and Ofcom in particular, to recognise that a change to the regulatory model of infrastructure-based competition is both a timely and necessary adjustment to reflect the change in where and how competition will take place in the years ahead.

3. The importance of mandated access to strategic infrastructure

3.1 It is, thus, no longer appropriate for regulatory frameworks to preserve a historic model of infrastructure competition at the 'horizontal' level. However, the case for increased regulatory focus and intervention where infrastructure remains in the hands of one operator and is a critical 'vertical' input to the provision of downstream communications services, has, if anything, become more compelling. Communications providers operating at the same level of the supply and distribution chain are likely to have strong incentives to conclude infrastructure sharing arrangements; in these cases, a light touch approach must be the leitmotif of a prudent regulator.

3.2 By contrast, where infrastructure remains within the control of a de facto monopolist, such incentives to conclude access arrangements on commercial terms plainly do not exist. Indeed, if that monopolist is vertically integrated and is itself present on downstream communications services markets, the converse incentives exist either to refuse to provide access to such infrastructures or to offer terms (i.e. monopoly pricing) that in effect constitute a constructive refusal to supply access to infrastructure. The case for regulatory intervention in such a case is particularly compelling since a regulator will seek to determine the terms of wholesale access to infrastructure taking into account a wide range of statutory objectives, including the interests of consumers; in contrast, a private market actor, and in particular a market actor that is a monopolist, will by its very nature, have an entirely different set of objectives (that will not take into account consumer welfare) when offering access to third parties.

3.3 The significance of wholesale access to infrastructure to the way in which competition takes place on downstream markets (and corresponding benefits to consumers) was explicitly recognised by the European Commissioner for Information, Media and Society earlier this year when discussing the introduction of a new suite of

[5] Ofcom, *Consultation on assessment of future mobile competition and proposals for the award of 800MHz and 2.6GHz spectrum and related issues* 22 March 2011, Annex 6, Paragraph 5.39

harmonised principles governing wholesale access to infrastructure across the European Union:

"securing truly equivalent access by ***alternative operators*** [emphasis added] *to incumbent networks is probably the most important guarantee of sustainable competition, on existing and new networks."*[6]

3.4 Vodafone would endorse that sentiment. It must, however, become a working reality, applied by national regulators across the European Union to ensure that a wide range of *alternative operators* (including mobile operators) are able to secure the benefit of this proposed approach. The current regulatory framework governing access to such infrastructure controlled by incumbent monopolists fails to provide the legal and commercial certainty for wholesale access seekers such as mobile operators and thus reinforces incentives on the part of infrastructure owners to refuse to deal with these access seekers. Currently, in the absence of a formal finding of market power and the corresponding imposition of *ex ante* regulatory obligations, access seekers in the mobile communications sector are forced to consider referring disputes to Ofcom after the failure of protracted negotiations (where the analytical framework to be adopted by the regulator in a dispute would be far from certain) or to refer complaints under competition law where the process may be ill-defined and lengthy, with no prospect of speedy resolution to the harm being suffered.

3.5 We therefore would urge Ofcom and other regulators in the JRG to consider firstly the extent to which strategic assets held by *de facto* monopolists in their sectors may form an important input to the provision of a wide range of communications services (including mobile). This means that regulation must be applied in future on a truly technologically neutral basis. Whilst technological neutrality is at the heart of the harmonised pan-European Common Regulatory Framework governing the way in which national regulators should frame regulatory intervention[7], as we illustrate below, it is far from clear that this principle is being effectively applied.

3.6 Consequently, we would invite the JRG to consider secondly the extent to which there is scope for a clarified, coherent and strengthened regulatory framework that creates the incentives for access to be secured by mobile operators to critical infrastructure without delay and on economically viable and, if necessary, cost-oriented terms. For instance, there is no reason why the proposed approach to wholesale access and equivalence of inputs outlined by the European Commissioner for Information, Media and Society earlier this year should not be extended to encompass mobile communications providers seeking wholesale access to infrastructure.[8] In this context, we would highlight the range of simple low-impact regulatory measures relating to access to passive infrastructure that were proposed by Analysys Mason in its report for the European Commission earlier this year[9];

[6] Neelie Kroes, 'Enhancing the Broadband investment environment – policy by Vice President Kroes', 12 July 2012

[7] Directive 2002/21/EC on a common regulatory framework for electronic communications networks and services (as amended), Recital 18

[8] Indeed, this principles was recognised by the Commissioner herself. See Neelie Kroes, 'Enhancing the Broadband investment environment – policy by Vice President Kroes', 12 July 2012 *"**Technology neutrality"** is just another way of saying that we cannot predict with any certainty what the best technological solutions will be, nor how they will compete and interact. Incremental solutions may help to address weak demand in the short term – for example, new technology combining fibre and copper, or upgrading TV cable, can be very cost-effective in delivering higher download capacity."*

[9] Analysys Mason, *Support for the preparation of an impact assessment to accompany an EU initiative on reducing the costs of high-speed broadband infrastructure deployment,* 2012

technological neutrality means that the benefit of such regulatory intervention should also be made available to mobile operators.

3.7 We consider below the issues of mobile backhaul and site access as obvious illustrations of how regulators could consider: (i) more broadly how infrastructure could be used widely as key inputs in the mobile communications sector; and (ii) the ways in which existing regulatory frameworks could be simplified and strengthened to secure access to such infrastructure and thus enable the proliferation of enhanced mobile communications services.

3.8 The topics of growing mobile data use, the penetration of smartphones, current and future new mobile spectrum, and the introduction of 4G mobile services are all well-aired matters. There is, as Ofcom's recent Communications Reports have demonstrated, clear demand on the part of UK consumers for faster mobile data services being provided by mobile operators in the near future. What appears not to be recognised from a regulatory perspective, however, is that there is a significant risk that all the steps being taken to provide high speed mobile data will be undermined by the present inability of mobile operators to pass the resulting very rapidly growing mobile traffic from their cell sites back into their core networks at an appropriate level of cost.

3.9 The most important and obvious solution to this challenge, mandated access to BT's ducts, in order to install high capacity fibre links that can join cell sites with the core network, is currently not extended to mobile operators seeking access – the only circumstances where duct access is currently allowed is to assist fixed operators in deploying NGA for fibre-based fixed broadband (commonly dubbed "superfast broadband").[10] The absence of an equivalent regulatory right for mobile operators constitutes not only an unjustified and inconsistent regulatory approach between fixed and mobile broadband, but also acts a deterrent to mobile data growth. We would therefore urge that fresh consideration be given to how BT's existing infrastructure may serve as inputs to a wider range of downstream markets and the remedies that should be imposed as a priority to enable access to these assets to be more widely available than at the present time.

3.10 Mandated infrastructure sharing may also be necessary where environmental reasons deny duplication of facilities. For example, in the provision of mobile coverage, operators are, pursuant to planning rules, frequently unable to secure planning permission to establish a new cell site and mast close to the location of a television mast controlled by an entity such as Arqiva or other similar strategic structure (such as a water tower or land owned by Network Rail). However, where there are no replicable sites, as is typically the case in rural areas, this framework often places the site owner in a position of market power at a local level and enables the charging of monopoly rents for site access.

3.11 Whilst television and radio broadcasters are able to secure access to these same sites on regulated terms, no such regulatory protection exists for mobile operators; these operators are forced to deal with unavoidable trading partners whose terms of dealing indicate that they are constrained neither by competition nor customers. This outcome is of particular concern in less densely populated (typically rural) areas where the economics of network deployment are already poor. The regulatory framework thus clearly facilitates exploitative pricing that ultimately acts as a clear disincentive to increased network deployment on the part of mobile communications providers and represents an obvious disbenefit to consumers. What is now

[10] Ofcom. *Review of the wholesale local access market*, 7 October 2010, paragraphs 7.61-7.63

increasingly critical to enable the deployment of high speed data services on a national basis is immediate regulatory intervention to require such facility sharing, but on viable cost-oriented terms.

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