

Consultation response

Emma Taylor
Floor 4 (Competition Group)
Ofcom
By E-Mail

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TO: Emma Taylor

RESPONSE BY: John D Holmes
020 7770 7645
john.holmes@which.co.uk

MOSTLY MOBILE - OFCOM'S MOBILE SECTOR ASSESSMENT

Introduction

- 1 Which? is an independent, not-for-profit consumer organisation with over 700,000 members and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, online services and books. Which? works to make consumers as powerful as the organisations they deal with every day.
- 2 Which? welcomes the opportunity to respond to Ofcom's consultation. If you have any questions about our response please contact John Holmes or Richard Hyde (Richard.hyde@which.co.uk). Which? has an ongoing interest in telecom issues, most notably through the reviews of products, services and companies in Which? magazine that captures the experience of many UK consumers. This is supported by an annual satisfaction survey of mobile phone customers. Which? has also responded to some regulatory developments, mainly focussed on mergers and recent European proposals for next generation access regulation.
- 3 This response is organised as follows. First, we summarise our key messages and recommendations. Second, we outline the key data sources and issues raised by consumers in the course of Which?'s work. Third, we have



responded to those questions most relevant to Which?. We draw on the information gathered by Which? in forming our response. We have also considered the lessons from other regulated markets, where Which? has considerable experience in commenting and influencing the development and effectiveness of regulation.

Summary

- 4 Our key messages in this response are:
 - a) Based on our research, Which? considers many of our Members seek out the best value deals with the most cost effective tariffs and wide coverage. These engaged mobile users consider carefully which providers to use and have high expectations for customer service. However, it is disappointing that no mobile provider qualifies as a Which? Best Buy, and overall satisfaction with mobile providers is fairly low compared to other telecoms markets (such as broadband).
 - b) There are important regulatory challenges that arise from the convergence of mobile and fixed services. Consumer protection is vital as the number of third party content providers grows.
 - c) Which? agrees that the current market structure has served consumers relatively well. We are very concerned that any further concentration amongst network operators could substantially lessen competition, especially in light of reports of a joint venture between T-Mobile and Orange.
 - d) Mobile virtual network operators (MVNO)s appear to play a key role in stimulating retail competition. However, for this to be effective MVNOs must be able to operate independently of and in rivalry with their host networks.
 - e) Which? does not consider it relevant to talk of a trade-off between competition and regulation. Instead, competitive well-functioning markets must work within an institutional framework that includes consumer protection and competition law alongside other pre-requisites



(e.g. contract law). Clarity about the framework and decisive enforcement gives consumers and fair-dealing business confidence in the market process.

- f) Which? questions the extent to which complexity in the mobile phone market is intrinsic or designed. Which? does not agree with Ofcom's view that where the market has been found to be competitive it necessarily follows that regulatory intervention on the structure of tariffs is inappropriate.
- g) Ofcom should be cautious and pragmatic about the burden on consumers to achieve a good deal (or at the very least avoid the worst deal). Searching markets and selecting from the tens of thousands of tariffs available is costly. Price offers to consumers should always be clear and not mis-leading, where they are not prompt regulatory action should follow.
- h) Which? is cautious about the effectiveness of principles-based regulation. To date, there is limited experience of applying principles regimes, with enforcement in practice likely difficult. Principles may create uncertainty, for firms and consumers, as to when complaints or redress are appropriate.
- i) Consumer redress is an essential component of well-functioning markets. Any process for redress should be widely known and understood by consumers. It should resolve complaints quickly and impartially. The process should be transparent. Ideally, a single dispute mechanism should apply to any specific industry.

5 Our main recommendations are:

Market structure and competition

- a) Should a significant change to market structure occur, Ofcom should consider mandating that network operators offer non-discriminatory and fair access terms to any potential MVNO.



- b) Recent reports of a joint venture between T-Mobile and Orange make a detailed market assessment a necessity should the merger proceed, irrespective of any proposed merger remedies. Such a merger would threaten to significantly damage the prospects for effective competition to the detriment of consumers.
- c) There are some risks with relying on ex-post competition law in fast moving markets, Ofcom should therefore consider what information it needs to be prepared to promptly follow up a complaint or to launch an own-initiative investigation.
- d) Which? does not consider that financial penalties have proven a significant deterrent to prevent anti-competitive conduct. Ofcom should consider the use of director disqualification orders and naming and shaming. The most effective form of deterrence may well be full and prompt redress for final consumers

Mobile Internet

- e) A key regulatory challenge arises from mobile Internet, Ofcom should ensure early policy development on issues including: privacy and consumer data management; rights management; online security; new routes to market; and speeds and usage limits.
- f) Network providers - as the 'gatekeepers' to the Internet - will be in a position to have considerable influence over what consumers can access. Careful scrutiny needs to be made of the developments in this area in order to ensure companies cannot restrict competition and access to rival content and services.

Price structure and contract clarity

- g) Which? considers that Ofcom should keep price structures under review, and determine whether such structures harm or help consumers or the competitive process.
- h) The quality of the switching experience is as important as the number or simplicity of switching - i.e. whether consumers' achieve their intended



objectives for switching and can assess this outcome. Ofcom should consider the success of switching decisions within its assessment criteria.

- i) Ofcom should ensure that price comparison sites have access to the full range of tariffs and mobile phone firms do not structure-tariffs to 'game' rankings on such sites.
- j) It is a considerable burden to consumers, and competitors, to change phone number. Ofcom should give consideration as to whether number portability is a pre-requisite to maintaining effective competition.
- k) Ofcom should review the circumstances in which consumers' should be able to cancel fixed-term contracts. This review should include at least two issues: the circumstances where a dispute has arisen that cannot be settled in a reasonable time; and where coverage of mobile services is inadequate, falling below the level expected by the consumer.

Arrangements for redress

- l) At present, Ombudsman services for mobile services are covered by CISAS and OTELO. This arrangement can confuse consumers. Ofcom should consider the merits of establishing a 'one-stop shop' to direct consumers to the right dispute resolution body. This could be co-ordinated with Consumer Direct.
- m) Given the dis-aggregated nature of the regulatory framework it might be worth considering a comprehensive review - to examine the case for consolidation of the various statutes and agencies where practicable. This may be particularly pertinent in light of the *Telecoms Package* currently going through the EU.

Key data and consumer issues

- 6 Which? has collected a range of consumer views on aspects of mobile services. This includes a mobile phone satisfaction survey, conducted regularly over the last four years. We have also featured specific advice, issues or problems experienced by consumers in our magazine. This information is summarised below.



- 7 Which? has conducted mobile phone satisfaction surveys each year since 2006. The survey asks Which? online panel members a series of questions, covering contract and pay-as-you-go (PAYG) mobile services, relating to cost of use (domestic and abroad), coverage, handset, billing and customer services enquires, switching and number portability. The survey response rates exceed 50 per cent, with the fewest number of respondents numbering 4631 members (in 2008). The results of the survey are used to produce customer satisfaction scores for mobile phone providers. The results are reported in Which? magazine and on www.which.co.uk.¹ The key observations include:
- > Virtual network operators Tesco (for PAYG) and Virgin (for pay monthly) have consistently ranked highest for overall customer satisfaction over the four surveys, with each achieving a customer score of 69 per cent in our 2009 survey;
 - > However, even the highest scoring mobile providers do not attain the level required to become a Which? Best Buy, and most networks score around the 50 per cent mark. In comparison, our four current Which? broadband Best Buys all achieve a customer score of 80 per cent or more.
 - > Satisfaction with customer service levels in particular is low - in our 2009 survey, the overall percentage of survey respondents who were very satisfied with their mobile provider's customer service was 30 per cent for pay-monthly customers and 27 per cent for PAYG customers.
 - > The main reasons for choosing a mobile provider, or switching to another provider, are getting the best value tariff and signal coverage (2009 survey);
 - > In our 2008 survey, around 75 per cent of respondents were confident they understood what their mobile deal included and that they had the right deal to suit their needs, this confidence was lower for PAYG; however this leaves a significant minority (in excess of 20 per cent) who were neither aware nor confident.
 - > According to our 2009 survey the most common contract period is 18 months (reported by 60 per cent of respondents);

¹ The most recent article published in Which?, May 2009 - survey conducted in January/February 2009.



- > According to our 2009 survey around 10 per cent of respondents had switched in the last year, with nearly 80 per cent finding the process easy;
 - > According to our 2009 survey, around two-thirds of respondents who had switched took their phone number with them, with around 80 per cent happy with the process
- 8 From these surveys Which? considers that many Which? Members with mobile phones are engaged, seeking out the best value deals with a high preference for better tariffs and coverage. These engaged mobile users consider carefully which providers to use and have high expectations for customer service. However, it is disappointing that no mobile provider qualifies as a Which? Best Buy, and overall satisfaction with mobile providers is fairly low compared to other telecoms markets (such as broadband). Switching remains fairly low which suggests mobile phone users may not be shopping around as much as might be hoped. In addition it is worrying that more than 20 per cent of people who were asked were unaware of what options their mobile deal included and were not sure they were on the right tariff. It is also worth noting that the survey was done among Which? members, so not necessarily representative of the general population.

Questions

The changing market environment

Q3.1: Are there additional sector trends that we should consider in our analysis?

- 9 There seems to be an increasing trend towards ever longer contracts; whereas a few years ago 12 months was the norm, now 18 months is far more typical and 24 months is becoming more common. While we do not necessarily see a problem with offering better deals in exchange for longer tie ins, we believe there should remain a good choice of contract lengths so that long tie-ins do not become a bar to switching.

This is particularly a concern given that mobile contract customers are often charged the full amount for the remainder of their contract if they wish to



break their contract early, even if the reason for breaking the contract may be out of the customer's direct control (for example, if a customer moves house and finds they can no longer get a mobile signal at their new address, rendering their mobile service useless).

Q3.2: Have we identified the right regulatory challenges?

- 10 We agree with Ofcom's outline of the key regulatory challenges it faces. There are important regulatory challenges that arise from the convergence of mobile and fixed services. Consumer protection is vital as the number of third party content providers grows. We emphasise the following issues.
- 11 With rapidly evolving services and an increasing number of third parties offering mobile content it may be difficult for consumers' to determine how they can take action if they have a complaint or suffer harm. We agree that Ofcom will need to be vigilant in order to ensure consumer protection measures e.g. distance selling regulations are enforced and consumers can obtain redress promptly.
- 12 As mobile technology increasingly enables access to the Internet the types of issues that currently affect the fixed online world will become equally relevant. These include:
 - a Privacy and consumer data management
 - b Rights management
 - c Online security
 - d New routes to market
 - e Speeds and usage limits
- 13 These issues are closely interlinked. They are the subject of extensive debate in the fixed online world. Widening this debate to include mobile services - sooner rather than later - may help lessen some problems before they have a chance to develop.
- 14 *Online privacy and data management:* This is a crucial issue that should be high on the policy agenda. Protecting the privacy of the mobile Internet user



is equally relevant and as important as protecting the privacy of the fixed Internet user. Salient issues will include the storage and use of data by network and content providers. Ascertaining whether current laws governing these areas are fit for purpose in the mobile Internet age will be an important measure. Doing this as soon as practicable would be sensible. This could help prevent any problems developing into major issues.

- 15 *Rights management*: This refers to how intellectual property is to be protected in an online mobile world. With the current consultation on illegal file sharing being conducted by BIS it would be prudent - at the very least - to begin thinking about how these problems would be approached when the Internet goes mobile. The issue at the core of the BIS consultation is how to balance the consumer's freedom to access the Internet and the protections of due process with the practicalities of finding and prosecuting illegal file sharers. We would support a sensible process that looked to get to grip with these issues.
- 16 *Online security*: The current security model in operation in the fixed online arena is one of 'end user responsibility'. However, this approach has come under significant criticism from several quarters, including the House of Lord's Science and Technology Committee.² They have issued two reports describing the inadequacies of this approach. Certainly the record of this approach is not beyond criticism. Therefore, we would support a review of the 'end user responsibility' model to online security in the mobile Internet age.
- 17 *New routes to market*: Accessing the Internet through mobile devices also raises issues about how firms will develop their routes to market and what impact this will have on consumers. The evolution of a range of new - Internet enabled - (behavioural) marketing techniques in recent years allows firms to market their offerings in a highly sophisticated manner. These are already controversial in the fixed online arena. Their impact on mobile online

² House of Lords Science and Technology Committee (2007). 'Personal Internet Security: Report No 5', pub: SO, London. House of Lords Science and Technology Committee (2008). 'Personal Internet Security: Follow-up', pub: SO: London.



activity is in its infancy. There is no reason to believe that they will not continue to be used and evolve further. In light of this a framework to ensure fairness, transparency, choice and value for money for consumers is required. This would equally be the case for fixed online access. Work on evaluating the robustness of the current framework and to identify any gaps that may need filling needs to begin.

- 18** *Speed and usage limits:* Even more so than with fixed line broadband, the speeds achievable over a mobile broadband service (whether on your mobile handset or via a dongle) can vary dramatically from advertised maximum speeds. Ofcom must consider whether the same protection that is in place for fixed line broadband is appropriate for mobile broadband. In addition, usage limits are often fairly low for mobile broadband services and the costs of exceeding these limits can be prohibitive (and not necessarily transparent). Consumer protection measures should be put in place to avoid issues of bill shock - for example by issuing mobile users with alerts when their mobile bill reaches a certain level, or allowing them to put their own limits on the amount they are able to spend each month.
- 19** Mobile products can be complex. This includes complex tariffs, that bundle charges for different services together in a variety of ways, and the ‘small print’ of contract terms (including additional charges such as contract cancellation fees, or the cost of using non-inclusive minutes, or the trend towards locking PAYG handsets to a single provider). We question the extent to which the complexity of mobile phone services is intrinsic or designed and recommend Ofcom keep tariff structures under review (see paragraphs 45 - 48 below).
- 20** As Ofcom notes, there are a number of ways that firms could co-operate as mobile phone services develop. We are cautious of the extent that joint ventures or other co-operative arrangements, such as network sharing, are necessary or consistent with a competitive market.³ Where such arrangements go ahead, it is important to ensure that regulatory scrutiny is applied to ensure the process of competition is not undermined and

³ See paragraphs 3.74 - 3.89 of Mostly Mobile.



consumers receive a fair share of any efficiency gains. Our views on this are further outlined below (see paragraph 22 to 24).

Competition and new entry

Q4.1: 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?

Q4.2: Do you see any risks to competition that we have not highlighted?

- 21 Which? supports Ofcom's focus on maintaining robust competition for mobile services. We have considered the experience of consumers, as reported to Which?, and the lessons we can learn from other key services, notably domestic energy supply. The specific actions possible for Ofcom are outlined more fully in our response to question 6.3 below.

Market structure and new entry

- 22 Which? agrees that the current market structure has served consumers relatively well. We are very concerned that any further concentration amongst network operators could substantially lessen competition, especially in light of reports of a joint venture between T-Mobile and Orange. The risks of further concentration may include:
- > Weaker rivalry between dominant incumbents;
 - > Less incentive to innovate or greater incentive to block or prevent innovations (especially where network intelligence becomes less important), such as those related to mobile Internet content; and
 - > Foreclosure of retail services, in particular through a weakening of the bargaining power of mobile virtual networks operators (MVNOs), margin squeeze or similar behaviour and raising customer acquisition costs (via price obfuscation or complex contract terms).



- 23** Our concerns with changing market structure also apply to horizontal co-operation agreements between competitors. Where the merger regime applies (for example joint ventures), Ofcom should consider whether the nature of telecom services require a particular or special range of remedies or analysis. If such arrangements fall below the threshold for merger analysis, Ofcom should ensure that co-operation will not weaken the incentives to compete. Further, co-operation between network operators or other mobile service firms should ensure a fair share of benefits are accrued by consumers.
- 24** It seems likely that MVNOs may play a key role in stimulating retail competition. However, for this to be effective MVNOs must be able to operate independently of and in rivalry with their host networks. Some incentives may already exist that weaken the incentive of MVNOs to act independently.⁴ Although, as Ofcom notes, the wholesale market is at present unregulated (and ideally will remain so), this is an area that should be kept under review. Should a significant change to market structure occur, Ofcom should consider mandating that network operators offer non-discriminatory and fair access terms to any potential MVNO.
- 25** The costs of acquiring customers can be a significant impediment to competition for both network operators and MVNOs. Although mobile services have a number of dimensions (different qualities of handset, different types of service), and with data may become more differentiated, deliberate strategies to make price comparisons difficult or to tie consumers into contracts harms rivals and consumers (see paragraph 47). Price discrimination strategies may also be a problem where they target foot-loose or marginal consumers.
- 26** The specific case of telephone number portability may present a significant barrier to entry. For the energy industry customer reference numbers already exist. For personal bank accounts there is discussion about whether account number portability should be introduced. It appears that, once a

⁴ Tesco appear to have taken a position similar to their host network in respect of the mobile termination rate debate, 'Mobile phone fee chat sparks unlikely calls', 19 August 2009, The Times.



number has been assigned to the customer, it becomes a key part of the customer's personal information. It is a considerable burden to consumers, and competitors, to change phone number. Ofcom should give consideration as to whether number portability is a pre-requisite to maintaining effective competition.

- 27 Finally, one potential influence on future market structure - deriving from the development of mobile Internet - is the opportunity for network providers to become involved in content provision. This may be driven by a decline in the volume of revenue to be earned through network provision in the future. Network providers - as the 'gatekeepers' to the Internet - will be in a position to have considerable influence over what consumers can access. There are potential competition and access issues that arise when network providers also operate and own contents provision. There are already examples of what can happen in the fixed online world⁵. Careful scrutiny needs to be made of the developments in this area in order to ensure companies cannot restrict competition and access to rival content and services.

Consumer experience and market complexity

- 28 Which?'s consumer surveys suggest that many of its members are engaged with mobile phone services and have a clear idea of what types of deal or service standards they want. This is very positive. However, switching is fairly low and a significant number of respondents to Which? surveys are unaware of the details of their tariffs. In addition, as Ofcom set out, pricing complexity is a problem that, without vigilance, may escalate into serious consumer detriment and atrophy of competition. In particular, at a certain point differentiation (complexity) as a competitive tool begins to display diminishing returns for consumers; where it comes at the expense of meeting

⁵ American telecommunications company, *Madison River Communications*, blocked its customers from using VoIP⁵ services, which would have competed with its telephony provision.

Another example from the US is *Comcast*, a major ISP, who in addition provide a cable TV service. They sent false data down its cable network to prevent customers from accessing a range of applications. Source: TACD (2008). 'Resolution on Net Neutrality', pub: Transatlantic Consumer Dialogue: London.



actual demand with consumers making ‘forced-errors’ resulting in entirely inappropriate choices.

- 29** Competition alone may not ensure that prices are clear and transparent with competition focused on the merits of firms’ product offerings. Where a price or other product characteristic is effectively invisible to consumers, it is unlikely to form a relevant dimension of competition.
- 30** As Ofcom notes, certain elements of the tariff are less visible.⁶ There is a risk that mobile phone providers exploit the lower visibility of certain elements of a tariff bundle, as recognised in the work on additional charges. Further, the ability of consumers to make fair comparisons can also suffer, especially where new deals are introduced frequently or discounts are only available for limited periods (so called ‘bait’ pricing). These problems may be exacerbated where contracts are typically 18 months duration, resulting in loyalty ‘penalties’. Our response to question 6.3 below outlines further concerns with complexity of tariff structures. Price comparison websites offer consumers some tools to tackle this complexity, however as noted in paragraph 48 below, there is a risk that tariffs are designed to ‘game’ such sites.
- 31** The potential for these poor outcomes means that the quality of switching decisions is very important, rather than just the frequency or volume of switching alone. The quality of switching decisions will determine whether consumers are able to achieve their intended outcomes and ensure that providers continue to face pressure to offer value-added products. The switching experience should enable consumers to make a post-switch comparison, comparing and contrasting their outcomes before and after switching, thereby learning from the experience. This may require additional information to be easily available on consumers’ consumption or usage patterns.
- 32** Finally, Ofcom should be cautious and pragmatic about the burden on consumers to achieve a good deal (or at the very least avoid the worst deal).

⁶ See paragraph 4.45 of Mostly Mobile.



Searching markets and selecting from the tens of thousands of tariffs available is costly. Market complexity raises search and switching costs, which can harm the process of competition, and may not be easily avoided even if some consumers' needs are relatively simple. Regulation, consumer and competition law establish the institutional framework for the process of competition to work effectively, rivalry between firms alone cannot do this (see paragraph 37).

Q4.3: Do you agree that a market review in the mobile sector (other than in the call termination market) is not currently required?

- 33** Without any significant changes to market structure, Which? considers that no specific review is required. However, recent reports of a joint venture between T-Mobile and Orange make a detailed market assessment a necessity should the merger proceed, irrespective of any proposed merger remedies. Such a merger would threaten to significantly damage the prospects for effective competition to the detriment of consumers.
- 34** More generally, an ex-post enforcement regime must be effective at protecting the process of competition. This requires enforcement that is prompt, targeted and acts as an effective deterrent. There are some risks with relying on competition law in fast moving markets:
- > There is often a considerable period between initiating an investigation and its ultimate conclusion
 - > In some cases, harm to competition and specific firms may have already occurred or be occurring throughout the investigation
 - > Competitors, as the principle source of complaints, may 'game' the system by making poorly founded complaints
- 35** Ofcom should therefore consider what information it needs to be prepared to promptly follow up a complaint or to launch an own-initiative investigation. It should also consider the use of interim measures if necessary to prevent harm while an investigation is ongoing. This may be especially relevant in cases of margin squeeze or refusal to supply network services. Which? does not consider that financial penalties have proven a significant deterrent to



prevent anti-competitive conduct. Ofcom should consider the use of director disqualification orders and naming and shaming. The most effective form of deterrence may well be full and prompt redress for final consumers, with specific attention to addressing financial loss as a result of anti-competitive conduct (see paragraph 49 to 51).

Consumer protection and empowerment

Q6.1: 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?

- 36 Which? agrees that competition, although the principal driver of good value, is not sufficient alone to protect consumers' interests. As set out above, consumers' of mobile phone services are engaged with the market and reasonably confident that they achieve good value deals (see paragraphs 7 to 8). However, the need for steps such as Ofcom's work on additional charges, mis-selling and review of complaint handling emphasises the need for continued regulatory oversight.⁷ Price offers to consumers should always be clear and not mis-leading; where they are not prompt regulatory action should follow.
- 37 More generally, Which? does not consider that there is a trade-off between competition and regulation. Instead, competitive well-functioning markets must work within an institutional framework that includes consumer protection and competition law alongside other pre-requisites (e.g. contract law). Clarity about the framework and decisive enforcement gives consumers and fair-dealing business confidence in the market process.

Q6.2: 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?

⁷ See paragraph 6.45 of Mostly Mobile.



- 38 Which? agrees with Ofcom's overall objective for consumer policy and the criteria used to assess these.⁸ We have some additional comments as follows.
- 39 First, as noted in paragraph 31 the quality of the switching experience is as important as the number or simplicity of switching - i.e. whether consumers' achieve their intended objectives for switching and can assess this outcome. Ofcom should consider the success of switching decisions within its assessment criteria.
- 40 Second, as Ofcom note, mobile services are rapidly evolving. The use of general consumer protection law, covering fair trading and contract terms is therefore an important tool.⁹ Consumers and firms should have certainty over when these powers may apply and how they are enforced.
- 41 However, Which? is cautious about the effectiveness of principles-based regulation. To date, there is limited experience of applying principles regimes. Principles may create uncertainty, for firms and consumers, as to when complaints or redress are appropriate. Effective enforcement is therefore necessary to imbed principles in the business plans of firms and establish clarity (through case-law). The problems of principles based regulation are not unique to mobile phones or Ofcom. Ofcom has, through its review of additional charges, taken steps to offer clarity and certainty in some area, which is very welcome. We hope to see further clarity in the future, perhaps alongside joined-up work with other regulators.
- 42 Third, in certain circumstances Which? considers that self- and co-regulation can be effective, especially where technology or market conditions change rapidly. This judgement should be made on a case by case basis. Any form of industry-led consultation should be inclusive and transparent. Consumers, as the key stakeholder, should be consulted when establishing standards or guidance, which should include a clear consumer protection objective. The

⁸ See paragraph 6.40 of Mostly Mobile.

⁹ This includes the Unfair Terms of Consumer Contracts Regulations, the Consumer Protection (Distance Selling) Regulations and Consumer Protection from Unfair Trading Regulations (paragraph 6.53 of Mostly Mobile).



presence of self- or co-regulation should be well known and widely accessible to consumers.

- 43 Self-regulation is more appropriate where absolute levels of individual consumer detriment are likely to be relatively low. The factors supporting self-regulation include:
- > Individual firm's interests are aligned with the desired regulatory outcomes
 - > A substantial proportion, if not all, of the industry must participate
 - > A single self-regulatory body enforces binding standards across all members
 - > Transparent monitoring and reporting of compliance to standards, alongside robust sanctions for firms that breach self-regulatory standards
 - > Rules or practices established should be proportionate, and not support or create entry barriers or otherwise harm rivalry between firms
- 44 Co-regulation may be appropriate where the conditions of self-regulation are not present. Co-regulation can include statutorily or publicly sanctioned standards schemes (for example, the OFT's consumer codes approval scheme) or statutory ombudsmen schemes that facilitate consumer redress. Many of the same factors essential for self-regulation apply to co-regulation, in particular a single body representing the industry that consumers' can easily identify. We have set out views on redress arrangements below (see paragraphs 49 to **Error! Reference source not found.**).

Q6.3: 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?

- 45 Ofcom outline a number of factors that suggest the mobile phone market is complex. These include challenges for consumers such as estimating likely future phone use, comparing bundled products, determining the extent that headline prices differ with conditional or hidden charges.¹⁰ Ofcom also note the behavioural limitations facing consumers when presented with complex

¹⁰ See paragraph 6.24 of Mostly Mobile.



products or overwhelmed with choice.¹¹ Which? welcomes Ofcom's attention to these areas.

- 46 However, Which? questions the extent to which complexity in the mobile phone market is intrinsic or designed. Which? does not agree with Ofcom's view that where the market has been found to be competitive it necessarily follows that regulatory intervention on the structure of tariffs is inappropriate.¹²
- 47 Mobile phone service providers choose how to structure their prices, what information to present (and how) in advertising material, what conditions or additional charges to impose and in what circumstances. The structure of prices may play an important part in softening or intensifying competition. The structure of charges, or frequent variation or amendments to structure, is a direct contributor to complexity. Firms may attempt to high-light rivals' additional charges or may acquiesce to a common practice of hidden charges in an industry.¹³ Price-discrimination strategies are implemented through alteration to pricing structures. Price-discrimination may enable engaged consumers to achieve good deals but can also be used to weaken overall competitive pressure or punish those consumers less able to respond to rapid market developments (see paragraphs 28 to 30).¹⁴
- 48 Which? considers that Ofcom should keep price structures under review, and determine whether such structures harm or help consumers or the competitive process. Developing a more detailed understanding of the outcomes of consumer switching decisions would support this assessment (see

¹¹ See paragraph 6.25 of Mostly Mobile.

¹² See paragraph 6.46 of Mostly Mobile.

¹³ For example, Nationwide Building Society ran a widespread advertising campaign pointing out the surcharges on foreign currency transactions operated by other credit card issuers (See Nationwide press release of 17 March 2008 http://www.nationwide.co.uk/mediacentre/PressRelease_last.asp?ID=1174). Which? Holiday reported in July on the common practice of 'no-frills' airlines to levy substantial surcharges on credit card payments that are not usually advertised in the headline price but are practicably unavoidable.

¹⁴ Ofgem's 'Energy supply probe - initial findings report', 6 October 2008, found persistent price differences charged by former regional monopolists on their 'in-area' customers that 'out-of-area'. Ofgem considered this price discrimination to act against the interests of consumers.



paragraph 31). Price comparison sites, such as Billmonitor, are an essential tool for consumers to manage the complexity of the mobile phone market. However, the widespread use of such sites may have perverse incentives on firms to create further tariff variations to ‘game’ the ranking on comparison sites.¹⁵ A recent Consumer Focus report, using data from BillMonitor, found over 110,000 tariff combinations.¹⁶ As Ofcom acknowledge, behavioural limitations may mean that more information, or comparison services, are ineffective to ensure consumers achieve their preferred outcome, especially when faced with a bewildering array of choices. Ofcom should ensure that price comparison sites have access to the full range of tariffs and mobile phone firms do not structure-tariffs to ‘game’ rankings on such sites.

- 49** Consumer redress is an essential component of well-functioning markets. Redress involves handling complaints quickly and impartially. It must also ensure that consumers are fully compensated where mis-lead or service fails to meet the promised standards. A process to ensure effective redress, which is widely understood by consumers, can ensure consumer confidence and reward fair dealing firms. It should be transparent to consumers when redress has been necessary and the circumstances. Any system of self- or co-regulation should have clear and enforced standards for redress. A successful redress scheme may, over-time, allow statutory regulation to be rolled-back.
- 50** A key part of the apparatus for redress is an independent Ombudsman, well known to consumers that address complaints impartially within clearly defined timescales. At present, Ombudsman services for mobile services are covered by CISAS and OTELO. The arrangement of two ombudsman covering telecoms is not satisfactory. This situation can confuse consumers, with each ombudsman covering only a proportion of the firms in the sector. It may also distort incentives of firms, to join those schemes seen as more sympathetic to industry rather than consumer.

¹⁵ See paragraphs 26 - 31 of Which?’s response to Ofgem’s energy probe initial findings report, (<http://www.ofgem.gov.uk/Markets/RetMkts/ensupro/Documents1/Which.pdf>).

¹⁶ Page 24 of ‘Mobile: What’s the problem?’, DATE, Consumer Focus.



- 51 A superior system would be a unified ombudsman service with comprehensive coverage. We would like to see any ombudsman operating to the very best practice.¹⁷ This would mean any scheme would have to have the widest accessibility possible, be independent, operating fairly, transparently, effectively and efficiently and maintaining the confidentiality of complainants and third parties in particular.¹⁸
- 52 Which? has noted that the duration of mobile phone contracts has lengthened significantly, with 18 or even 24 months often typical. The duration of contracts in itself is unlikely to be an issue, where consumers value the services offered, agree to the conditions and are not subject to unfair terms or conditions. However, where disputes arise, especially serious issues of mis-selling, the consumer should be able to cancel the contract and switch to an alternative mobile provider.
- 53 Ofcom should review the circumstances in which consumers' should be able to cancel fixed-term contracts. This review should include at least two issues: the circumstances where a dispute has arisen that cannot be settled in a reasonable time; and where coverage of mobile services is inadequate, falling below the level expected by the consumer. Consumers may not be aware of limitations to coverage until after a period of use. Additionally, where consumers' circumstances change significantly in a way that affects coverage, notably moving house, it is not appropriate to charge consumers penalties for ending a contract.

Q8.1: Do you agree that our proposed facilitation role around mobile not-spot issues is a realistic and sensible thing to do?

Q8.2: Do you agree with our general approach set out in the table above? Are there any other action we should take and why?

¹⁷ We consider the Financial Ombudsman Service (FOS) to be an example of an ombudsman - while not perfect - leading the way in best practice.

¹⁸ Which? (2006). 'The Right to Redress: A Model Ombudsman System', pub: Consumers' Association: London.



- 54 As noted above, coverage is a key concern to consumers and second only to value for money tariffs. As Ofcom notes, the experience of poor-coverage may be very localised or intermittent. We support Ofcom facilitating improvements in coverage. The absence of a 'business case' for coverage in some areas does not undermine greater coverage as a policy goal. There are wider social efficiencies to be gained from greater mobile coverage. It will mean reduced levels of exclusion from the benefits of mobile, for example as online mobile takes off more consumers will be able to enjoy the convenience of accessing content online from almost anywhere.

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

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

- 55 We have set out our views on the consumer protection issues of third party content above (see paragraphs 10 to 18). With ever greater content available to consumers we agree with a priority of protecting consumers from scams, allowing consumers to block inappropriate content.
- 56 In particular, greater protection will require effective enforcement. All the prohibitions in the world are no good if they are not effectively enforced. In addition to enforcement there has to be the capability - somewhere in the system - to block access to content and protect the privacy of the user. As described earlier, questions have been raised about the effectiveness of relying on an 'end-user' approach to these issues. In relation to vulnerable groups - such as minors - where the 'end-user' approach may be considered a risky approach to take. Clearly there is content on the Internet that children have to be protected against. On a home PC it is easier to guard against such content.
- 57 One option may be requiring protections to be built into the hardware/ operating systems of mobile devices that enable Internet access. There would no doubt be many issues to work out in detail before a way forward



could be agreed. For this reason it would be prudent to think about this issue as soon as possible.

- 58** Ofcom's paper makes clear that regulation is spread across a number of different agencies (statutory and non-statutory) and the regulatory framework is spread across different pieces of legislation.¹⁹ This is likely to be confusing to consumers seeking advice or redress, for example it may not be clear which agency is responsible for specific types of problem. Ofcom should consider the merits of establishing a 'one-stop shop' to direct consumers to the right dispute resolution body. This could be co-ordinated with Consumer Direct. Further agreement between regulatory agencies on the process for dealing with complaints, that uses the same forms or information to save replication by the consumer, may also ease consumers' experience.
- 59** Given the dis-aggregated nature of the regulatory framework it might be worth considering a comprehensive review - to examine the case for consolidation of the various statutes and agencies where practicable. This may be particularly pertinent in light of the *Telecoms Package* currently going through the EU. The *Telecoms Package* will mean changes to domestic legislation and may provide an opportunity for a comprehensive review of the regulatory framework. Thought should be given to how such a review may be established and taken forward.

¹⁹ See paragraph 9.14 of *Mostly Mobile*.