

MOSTLY MOBILE – OFCOM'S MOBILE SECTOR ASSESSMENT SECOND CONSULTATION

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Cable&Wireless

INTRODUCTION

Cable&Wireless is one of the world's leading international communications companies. It operates through two standalone business units – Worldwide and CWI.

The Worldwide business unit provides enterprise and carrier solutions to the largest users of telecom services across the UK and the globe. In October 2008 Cable&Wireless strengthened its position when it acquired UK business communication provider THUS. With experience of delivering connectivity to 153 countries – and an intention to be the first customer-defined communications service business – the focus is on delivering customers a service experience that is second to none. More information on Cable&Wireless can be found at: <http://www.cw.com/>

Today Cable&Wireless has the necessary scale to meet the needs of UK enterprise customers and we are a strategic provider of voice services to both the UK public and private sectors, offering a range of innovative and market leading voice products. Our customers include most of the UK's top companies and public sector organisations, each of whom has placed its trust in Cable&Wireless to deliver an array of business critical services.

In September 2008 C&W added to its portfolio of voice services by the launch of its new and innovative FMC service. This a telephony service that combines the benefits of fixed and mobile telephony. The customer can use a single mobile handset that will operate over the fixed network whilst in their office location, but then seamlessly switches to a mobile network when the customer is away from their office location. In the office the service works using pico cells, operating over C&W's GSM Guardband spectrum, and connected back into the customers' fixed line network. Away from the office the connectivity is provided over one of the existing mobile networks under a roaming agreement established between C&W and its partner operator.

In addition to being a new entrant to the mobile market, C&W has direct interconnect agreements with each of the 5 MNOs, we provide retail fixed line voice services to the business market and a range of wholesale voice services including end to end fixed line voice to resellers operating in the residential and small business markets. We supply voice transit to fixed and mobile destinations, international incoming and outgoing voice services of which a large proportion of incoming international voice terminates on mobile. We also sell various services, both voice and data to the mobile network operators (MNOs) directly. Due to the wide variety of services which C&W supplies we are well placed to provide comments on Ofcom's second consultation on the mobile sector assessment.

GENERAL COMMENTS

The success of mobile telephony is undeniable and is clearly borne out by the statistics set out by Ofcom in the consultation paper to illustrate the relative increase in both penetration and usage compared to declines in numbers for fixed services. However, despite the increased importance of mobile services to both the economy and the consumer it is essential that Ofcom continues to ensure the availability of a wide variety of communications technologies on the market. Accordingly Ofcom must ensure that as the mobile industry develops that it does not do so to the detriment of specific groups of users or the wider communications market. Any regulatory measures that Ofcom put in place must therefore be assessed to ensure that competition between different network operators is not distorted and that new entrants to the mobile market are able to operate on a level playing field with the 5MNOs.

In particular it is important that the current difficult financial climate does not result in short term views of both market trends and investment decisions and that a focus is maintained on the medium to longer term market developments. To this extent Ofcom should be consistent in the application of competition law principles to market consolidation and network sharing agreements and should not be tempted to apply a more lenient approach in order to encourage investment now, as in the longer term the outcome of any such decisions could have a seriously damaging impact on both consumers and the market more broadly.

Ofcom's consultation paper covers a wide range of issues. We do not propose to answer all the questions raised by Ofcom rather we set out below a number of general comments and observations with a focus on those issues which are of most relevance to us.

OFCOM'S APPROACH TO REGULATION

C&W generally supports Ofcom's principles for mobile regulation. We agree that wherever possible competition is best delivered by the use of market forces and that regulation should be reserved for where there are clear signs of market failure. However in taking this approach, Ofcom needs to keep alert of market changes to ensure that it is able to react quickly when signs of market failure or consumer harm are evident.

We agree that a full market review is not necessary at this time and welcome Ofcom's current focus on reviewing the future regulatory regime for mobile termination rates. We refer Ofcom to the comments made by C&W in response to that review. However, as the market develops further and more new entrants enter the mobile market Ofcom may need to keep the SMS market under review to ensure that wholesale charges for SMS services are set on a fair and reasonable basis and do not discriminate against new market entrants.

We believe that Ofcom is correct to broaden its regulatory focus at this time to include consumer issues but should also remain alert to any issues which arise up-stream particularly as more spectrum is made available and more new entrants emerge in the market. New issues may arise which cannot be adequately addressed by competition law and may therefore necessitate Ofcom taking action. For example, an increase in network share agreements and market consolidation could have a negative impact on access issues in addition to other tactics deployed to by some MNOs to make market entry difficult.

Ofcom state that it is considering whether measures may need to be put in place to ensure that new entrants to the mobile market have access to interconnect and number portability. C&W is aware that there can be difficulties in reaching agreement with MNOs and that a variety of means can be used to delay the reaching of agreement thereby delaying the launch of services by the new market entrant. For example in negotiations with one MNO, the fact that our FMC service did not offer the same technical functionality as the service operated by the MNO was used as a reason not to agree the number portability agreement. Although the agreement was eventually signed these tactics can delay launch of service especially as the high penetration levels in the mobile market mean that any new market entrant will be reliant on the ability to port numbers onto its network in order to offer services to customers who currently receive service from one of the MNOs.

To this extent C&W welcomes proposals to ensure that new market entrants have access to interconnect and number portability although it is unclear how Ofcom intend to achieve this. For example it is unclear whether Ofcom is considering any amendments to the General Conditions of Authorisation. Currently CPs are under an obligation to negotiate interconnect and any amendment to this obligation would need to be based on clear signs of a wider problem within the

communications market. Clearly Ofcom will need to consult on this issue separately should it intend to take any such measures.

Ofcom should also be aware of and be prepared to take action regarding other tactics deployed by the MNOs which can be used to make it difficult for a new market entrant to compete on a level playing field. For example, following a dispute with one of the MNOs C&W has recently been subject to a Determination by Ofcom to set our termination rates for the FMC service at the same level as the regulated rates of both Vodafone and O2. However we are aware that some MNOs have excluded calls to our FMC service from their inclusive minutes packages and have set the retail charges for calling customers of our FMC service at a significantly higher rate than calls to other mobile networks. We are aware that similar action has been directed at other new entrants to the mobile market.

This action has a negative impact on both consumers and new market entrants. The consumer will not necessarily know which network it is calling when it dials a mobile number and will only realise that it has been charged for the call at a higher rate when it receives the bill. In turn this can impact take up of the service if there is the perception by consumers that the cost of the new entrants service is high. Such a negative perception can be particularly damaging during the early stages of market launch and could in turn impact the long term business case for the service. Moreover this approach to pricing allows the MNO to make an abnormal profit on calls to new services- such as the FMC service- because the termination rate is the same as the regulated rates of the MNOs which are included in the inclusive packages or charged at a lower rate. In the long run these tactics will have a damaging impact on competition and are inconsistent with Ofcom's proposals for promoting competition in the mobile market by encouraging investment and new market entry through the sale of spectrum licenses. It is suggested this conduct needs to be addressed promptly by Ofcom possibly via an own initiative investigation into the consumer impact of such tactics or by taking enforcement action under new General Condition 23.

However, GC23 would only place an MNO under an obligation to inform the consumer of the charges it would not of itself prevent the MNO from charging different tariffs for calls to services offered by new market entrants and further measures may be required to address the MNOs' ability to price discriminate in this way.

DEVELOPMENTS IN COMPETITION

We recognise that market consolidation within the mobile industry is likely, however it is unclear how Ofcom will view this or what action it is likely to take to ensure competition in the market is not distorted. Market consolidation will inevitably create fewer and larger players in the market and conditions will need to be carefully monitored to ensure that both consumers and smaller competitors are not disadvantaged by the presence of a large dominant operator. It is essential that Ofcom applies a consistent approach to competition law issues and does not take an overly lenient approach to market consolidation due to the current economic climate and the desire to encourage investment in order to meet a broader communications strategy as set out in Digital Britain. In particular Ofcom needs to ensure that market conditions are consistent with encouraging investment by a number of players in order to encourage diversity of services and price competition going forward. Ofcom will need to ensure that due to concentrations in ownership of infrastructure and network sharing arrangements that access to networks will still be available to new market entrants and that the terms of such access are fair and reasonable.

The current economic climate will inevitably have an impact on investment decisions however it is essential that Ofcom should not take a short term view of market developments but rather should assess their impact from the perspective of the longer term implications on competition. Accordingly any evaluation of the appropriateness or not of infrastructure sharing arrangements should be looked at for the longer term efficiency and competition benefits rather than ensuring that

investment is maintained in the short term. Failure to take this approach will lead to market failure and consumer harm in the long run.

In order to encourage investment Ofcom needs to provide clear regulatory signals to the communications market as a whole. In particular Ofcom needs to ensure that it takes a balanced approach to encouraging investment to ensure that it does not promote one technology to the detriment of others.

C&W agree that competition appears to be addressing access issues and providing that this remains the case we see no requirement for regulatory intervention in this area. However, this situation will need to be kept under review as more spectrum is made available and the number of new market entrants increases. In particular it is likely that there will be increased reliance on national roaming agreements to provide services due to the high investment required to build a network. The ability of new market entrants to reach such agreements will be key and Ofcom will need to be prepared to act if there are signs that the market is not delivering or that tactics are being deployed to delay market entry.

CONCLUSION

In conclusion we are generally supportive of the approach that Ofcom is proposing to regulation of the mobile market. We have a number of concerns regarding tactics used by MNOs to delay or make market entry difficult and we believe that Ofcom should be prepared to act where necessary to ensure that a level playing field is in place for new market entrants. Where appropriate this may necessitate consideration and use of informal measures given the time delays associated with taking more formal measures such as dispute resolution or enforcement action under General Conditions.

We believe that in carrying out any assessment of market conditions that Ofcom should remain focused on the longer term and should not be swayed by the current economic climate into taking a more lenient approach in order to encourage investment in mobile services.