



Ofcom's Mobile Sector Assessment

A response to the consultation

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EUROPEAN POLICY FORUM
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EPF published *Regulating Mobile Phones – A Fresh Look* earlier in 2009. It is available at www.epfltd.org. In this note we respond to some of the themes in Ofcom's consultation on its Mobile Sector Assessment.

In its one page summary Ofcom is right to say that the future will be **mostly mobile** and that competition and innovation are thriving. It should also highlight upfront a point it recognises later, that margins in the sector are low compared with Britain's international competitors. This evidences the consumer benefits of the existing competitive regime.

It is indeed obvious that some consumers benefit more than others from these developments. It is unnecessary to focus heavily on the fact that some people find variety of choice confusing. This is not something Ofcom should worry about.

Ofcom's continued reliance on **competition rules** is welcome. Ofcom's desire to provide certainty by adopting a framework that sets out consumer protection objectives, benchmarks and regulatory response is welcome.

We share the view that continuing to liberate spectrum for mobile telephony is vital, especially given the fact that it is overtaking fixed line provisions.

We strongly support the suggestion that it is appropriate to build on the consumer and economic benefits that have been driven by the mobile sector rather than to adopt a new regulatory approach. But it is not so clear as Ofcom suggests that continuing regulatory activities is required to any significant degree in the three areas it outlines, namely to help promote competition and innovation; to safeguard consumer interests; and to address where possible those areas where the market fails to deliver. Rather Ofcom should prepare a timetable for phased regulatory withdrawal across the sector.

The three strategic principles

Ofcom has asked stakeholders to comment on three strategic principles which 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 failures 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 insuring that it evolves to reflect the growing importance and complexity of mobile services.”

Addressing these three principles in turn, **using markets where we can** clearly makes sense. The story of mobile telephony is one of very rapid growth, very wide customer take-up and very competitive environments in which the prices charged to consumers are constantly being reduced in real terms and the bundles of services available are increased.

Recognising the limits of markets. Of course markets have limits. It is right that Ofcom should respond to market failures and consumer protection needs with focused intervention. This principle would reflect a change from past practice where the use of general conditions and wide-ranging catch-all consumer protections measures has been the opposite of a focused approach. Ofcom has improved its ability to respond quickly to mis-selling or other consumer programmes with effective enforcement, a challenge which faces regulators in all sectors. But the process of strengthening this capability has taken some two years and created voluminous new conditions for operators. Making rules is easier than responding quickly and acting decisively to enforce law or regulation. Ofcom should develop special means of ensuring that a focus on effective enforcement is monitored, measured and maintained. Better regulation requires proportionality. It is far from clear, for example, that advertisement pricing transparency requirements address any real existing customer detriment.

Widening the focus of regulation to reflect a changing mobile sector. It is not clear to us why the focus of regulation needs to be widened. The growing importance and complexity of mobile services, in a competitive market characterised by high levels of consumer satisfaction, does not constitute an argument for sector specific *ex ante* regulation. Current thinking is moving towards a regulatory concentration on **outcomes** with ex-post intervention informed by judgement. This is the approach we would recommend for the next stage of the MSA consultation.

In terms of the changes in the market, Ofcom has set out a number of challenges:

“With the growth of online services in the mobile environment, the role of mobile and delivering services to systems and consumers will grow further, making consumer protection, as well as questions of access and inclusion, and coverage, even more important than they are today;

Mobile services will become more complex for consumers – and while many will benefit, others will find the complexity challenging.

As mobile becomes more like the wider online economy, consumer protection measures may become less effective and the need for generic, tech-aware enforcement of consumer law may grow. Current measures (e.g. protection from the selling and scams, security purchases made using items with a mobile bill or a credit card, control of access to adult content etc) rely on mobile operators at the centre of the value chain and they need to be adapted to the new market context.

New competition challenges may arise, if operators opt for increasing RAN-sharing or if market consolidation occurs.

Fixed-mobile convergence also raises the question of the future of mobile call termination rates, in a world where the delivery paths of fixed and mobile services may easily crossover. “

Dealing with these points in turn:

As mobile overtakes fixed telephony it will be necessary to keep an eye on any significant impacts on consumer protection. But the starting point is that consumer protection for mobile is in the real world **better than for fixed line services**, with more choice of infrastructure and a significantly more contented group of customers.

As we have highlighted before, Ofcom should not worry about the **complexity** of mobile telephony offerings. It is a sign of a highly competitive market with products closely designed to customers' differing, individual needs. The plethora of packages makes it easy for customers to find exactly what they want. A superabundance of choice is a good thing and should not be micro-regulated. General principles of consumer law and general consumer protection rights should be the main form of redress when things go wrong.

Ofcom should align its approach with that of the EU Consumer Rights Directive.

If Ofcom relies on general consumer protection rather than micro-detailed mobile consumer protection approaches it will be better able to cope with a world in which patterns of value-added and consumer payment change. Obviously, the more specific and detailed the regulation the less able it will be to adapt to changing circumstances.

If sharing infrastructure or market consolidation occurs then new competition challenges may arise. Ofcom's concurrent powers with

the competition authorities are designed precisely to address these circumstances and are already in place.

The current market is highly competitive. None of the players have market dominance. There is every incentive for suppliers to compete intensively in terms of tariff packages, quality, after sales service and advertising campaigns to promote product innovation and build brand reputation.

As we noted in our report, academic work by Johan Stennek and Thomas Tangeras suggests that in such a competitive market the need for detailed regulation should wither.

Investment

As we noted in *Mobile Phone Regulation – A Fresh Look*, margins within the UK mobile sector tend to be lower than in comparable markets. As we pointed out, and paragraph 5.15 of the consultation recognises, the UK has the lowest margins of any of the countries considered. These low returns have not held back investment or the rollout of new services. This is a fantastic result for UK consumers and one which should be celebrated.

Ofcom is absolutely right to respond to these facts by making spectrum available in a timely manner and by focusing on providing a regulatory certainty. This latter should not be “where we can” but should be an overarching and priority objective. Investment decisions are significantly affected by the prospect of regulatory change and Ofcom should endeavour to minimise this. It is very appropriate that Ofcom should devote a chapter of the consultation to investment issues. Following Digital Britain it is proposed that Ofcom should have an explicit general duty to encourage investment as a means of furthering the interesting of consumers, alongside its duty to promote competition where appropriate.

The government also proposed to give Ofcom a duty, which is the communications equivalent of the letter from the Governor of the Bank of England, to alert the government to any significant deficiencies in the coverage, capability and resilience of the UK’s communications infrastructure and to report every two years on the state of that infrastructure (Digital Britain, Chapter 1, paragraph 37).

As EPF said in *Regulating Mobile Phones – A Fresh Look* “innovation in the sector is demonstrable. For example, wireless broadband services are becoming increasingly common and technologies such as LTE and WIMAX promise to revolutionise the delivery of a broad range of wireless broadband services. But such innovative initiatives require substantial upfront investment. Detailed regulation deters such capital expenditure because firms are concerned to earn a competitive return on the capital they invest. This is why

it is crucial to avoid unnecessary regulation. Indeed, it is the absence of detailed regulation that has encouraged the fast rollout of mobile broadband and other innovative services, which bring them enormous opportunities for growth, new services for consumers, reduced costs and higher personal business productivity”.

There is a clear connection between the positive approach to investment in communications infrastructure commended by the government in Digital Britain and widely supported across the policy debate, and the design of a regulatory model which by avoiding ex ante regulation leaves the way clear for the fast rollout of innovative, technical solutions to be tested in a highly competitive market place. Ofcom needs to see this position with strategic clarity. The general wish to promote investment can be sabotaged unwittingly by the existence or threat of ex ante regulation. Leaving the way clear for investment does not reduce consumer protection if the competition regime works effectively and policymakers look closely at the most effective means of protection consumer rights. As we have argued throughout, this is best secured by a general approach whereby consumer rights are protected across an open market without sectoral distortions and well-intentioned fine-tuning which often has the effect of adding compliance costs, confusing consumers and, as we have argued, deterring risky investments.

Coverage

Section 8 of the consultation looks at coverage. As the consultation correctly notes, Digital Britain has raised the option of mobile networks having an important role in delivering universal access to broadband in the UK and competition has helped drive investment in networks to reach the majority of the population.

The best approach to a wide coverage of mobile service in the UK is, as has been argued by consultees, to ease planning constraints, allow infrastructure sharing in appropriate circumstances and seek market-based solutions wherever possible.

A new policy focus on infrastructure from government with the establishment of the Infrastructure Planning Commission and the recent report by the Council for Science and Technology mesh with this approach. Network sharing, liberalisation and the release of further spectrum are all important to extending coverage and this should be seen in the context of the potential ability of mobile to assist in delivering a universal broadband service.

We agree that spectrum liberalisation and release will be the most important policy actions to help 3G mobile coverage. As Ofcom notes, it is important that the market remains competitive in this connection.

Consumer protection and empowerment

It is good that Ofcom has a consumer policy framework which applies across all communications markets and that it conducts regular research and publishes the results.

But there is a much bigger picture. General consumer protection laws, the work of ombudsmen services, the role of trading standards departments and new developments in European consumer law are all relevant. Consumer protection in mobile telephony markets should not be seen as a world of its own. It should be recognised that many customers will expect to use their general right first and that **in many cases the general law on supply of goods and services and protection against fraud and deception will be the main means by which consumers are protected.**

As the consultation notes, the figure of 94% satisfaction in the mobile market compares with 87% in the fixed telecoms market and 83% in the broadband market. As we showed in *Mobile phone regulation – a fresh look* it is also significantly ahead of customer experiences in other sectors.

Complaints data is an important measure and it is significant that the total number of complaints to the Ofcom Advisory Team has fallen since 2008.

The discussion of complexity in the mobile market is we believe, a rather fruitless one for reasons advanced earlier and because as the consultation notes in paragraph 6.26 that there are signs that the innovation of the market self-mitigates any perceived excessive complexity. **SIM-only contracts and prepaid services offer customers who might be deterred by equipment prices or the minutiae of contracts an easily available and simple to use alternative which reduces the need for regulatory action.**

Complexity can confuse thinking. In the box on page 89 Ofcom notes that whilst ring tone or other applications normally paid for over the mobile internet are regulated in the same way as any other purchase through general consumer law, but that when delivered by text message is subject to regulation by Ofcom and PhonepayPlus. The box draws the conclusion that “consumers may need to be informed about which type of regulation applies”. A more obvious conclusion is that it would be better for all these services to be regulated by general consumer law. Much of the problems with premium rate calls related from sluggish enforcement and unimaginative action by regulators: it is not clear that there needs to be in the medium and longer term a separate regime policed by Ofcom and PhonepayPlus.

Similarly the particular problem of deceptive selling techniques involving cashbacks required focused attention rather than the promulgation of an elaborate micro-regulatory rule book.

The MSA consultation frequently suggests that the choice is between regulation and relying on “competition alone” see e.g. paragraph 6.63. This is not a correct choice. The more appropriate choice is between micro-regulation in the sector and the application of general consumer law, updated where necessary in the light of experience. The latter is clearly the right approach. In particular as we suggested in our report Ofcom as the sector regulator, can play a role as a facilitator to address specific problems that have arisen in the mobile telephony market and help establish whether co-regulatory initiatives will deal with them in a reasonable time-frame. In this context, it is worth noting a proposal by O2 in response to the consultation on mobile mis-selling. The company suggested that policing the voluntary Code established by the industry in July 2007 could be reinforced through the publication of “complaints statistics in greater detail to highlight those that are causing most complaints. Where companies have invested heavily in their brands, such publicity can be an effective punishment mechanism of a self regulatory regime”. The consultation document notes that it is important that “all consumers, including mobile consumers, are able to secure adequate redress when they feel that things have gone wrong. It is not yet clear whether they are able to do this. We are therefore looking at how we can ensure consumers are able to resolve disputes and complaints and in particular are aware of their right to escalate complaints and to use ADR when their disputes are unresolved”. Again this area involves both general and sector-specific issues as the phraseology of the consultation notes. **It would be very much better for all concerned if mobile customers had enhanced rights to redress in the context of general consumer law rather than reinventing variants of the general system within the subsector.**

Paragraph 6.48 of the consultation implies that Ofcom is considering further regulatory action in five areas set out in the document “and other areas to ensure that consumers’ interests are being met”. These areas which largely concern complaints and transparency of tariffs should not be a cause for the extension of sectoral regulation. If Ofcom’s consumer research reveals areas of concern they should be discussed with the sector and the sector invited to address the problems. If Ofcom’s Advisory Team begin to detect complaint levels which suggest the arrival of problem areas, this information should be shared with the sector at the earliest possible moment. This would allow a facilitative approach which is likely to be much more capable of speedy implementation and monitoring.

Paragraph 6.51 sets out better regulation principles, the importance of impacts assessments, proportionality and the options for self and co-regulation. It is important that these tests are carried out in full and that apparent urgency does not cause them to be overridden or abrogated. This makes early identification of trends arising from consumer research all the more important.

Paragraph 6.60 sets out an assessment of the circumstances in which **self-regulation** is likely to work. The section does not distinguish clearly between situations where **co-regulation** may be more appropriate to align incentives effectively and **statutory regulatory solutions**. Ofcom should make it clear when in its view co-regulation is unlikely to succeed and statutory regulation be necessary: in our view co-regulation is likely to be the better choice and the need for a statutory regulatory solution extremely rare.

Consultation questions

Ofcom raised three questions in this area: our summary responses are appended.

Question 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? *As we noted earlier we believe that the question poses a false choice between regulatory intervention and 'competition alone'. The real choice is between developing general consumer rights satisfactorily, or detailed micro-sectoral regulation which has many disadvantages.*

Question 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 a need to apply regulation only when effective and proportionate. Do you agree? *Past experience has suggested that enforcers were slow off the mark in e.g. the case of premium rate calls. By contrast the latest amendments to the general conditions are voluminous and unwieldy. We recommend a closer monitoring of complaint levels and the effectiveness of enforcement coupled with close discussion with the sector at the first sign of consumer problems, using the potential of self-regulatory and co-regulatory solutions in the facilitator model we have set out.*

Question 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? *Ofcom should prepare a timetable for phased regulatory withdrawal and a shift to a role as facilitator in co-regulatory relationship as it has successfully demonstrated in broadcast advertising. What the EU Consumer Commissioner has called 'the most far-reaching overhaul of consumer rights in thirty years' provides an opportunity for Ofcom to withdraw from detailed sectoral regulation.*