



TELEFÓNICA O2 (UK) LIMITED RESPONSE TO:

“MOSTLY MOBILE”

OFCOM’S MOBILE SECTOR ASSESSMENT, SECOND CONSULTATION

16 SEPTEMBER 2009

TABLE OF CONTENTS

I.	EXECUTIVE SUMMARY	4
	THE DYNAMIC MARKET ENVIRONMENT	4
	THE RIGHT TOUCH SUPERVISORY ROLE	4
	SECURING CONSUMER PROTECTION	4
	FOSTERING A POSITIVE INVESTMENT CLIMATE	5
	CONTENT	5
II.	INTRODUCTION	6
	THE LEGAL FRAMEWORK	6
	A SHIFT IN OFCOM'S VIEWS?	7
	AVOID A DETERMINISTIC APPROACH	7
	THIS RESPONSE	8
III.	THE MOBILE CONSUMER	9
	SECURING CONSUMER PROTECTION AND EMPOWERMENT	9
	UNDERSTANDING THE MARKET	10
	TARGETED ACTION	10
	ROBUST DATA INTERPRETATION	10
	A CONSUMER FRAMEWORK MUST BE BASED ON CLEAR, OBJECTIVE CRITERIA	11
	DON'T PRE-SET THE AGENDA	12
	TEST CURRENT INITIATIVES AGAINST THIS FRAMEWORK	13
	ASSESSING THE EFFECTIVENESS OF INTERVENTIONS	13
IV.	ACCESS & INCLUSION	15
	DIVERSITY AND INCLUSION	15
	THE EXPERIENCE OF TEXT RELAY	15
	WHAT STEPS COULD BE TAKEN TO IMPROVE ACCESS TO MOBILE FOR DISABLED PEOPLE?	15
V.	THE CHANGING MARKET ENVIRONMENT	17
	OFCOM STARTS WITH THE WRONG PREMISE	17
	[<]	17
	OFCOM PERPETUATES THE SUB-1GHZ FALLACY	18
	CONVERGENCE REQUIRES REGULATORS TO ACT CONSISTENTLY, RATHER THAN ADOPT A DETERMINISTIC REGULATORY APPROACH	18
VI.	COMPETITION AND NEW ENTRY	20
	INTERCONNECTION AND MNP	20
	CONSOLIDATION – STRUCTURAL CHANGE AT THE WHOLESALE LEVEL	21
	NETWORK SHARING	21
	PRICE TRANSPARENCY	21
	RESTRICTING ACCESS TO THE HANDSET FOR CERTAIN APPLICATIONS	22
VII.	INVESTMENT	23



GROWTH ATTRACTS INVESTMENT 23

THE TREATMENT OF HISTORICAL INVESTMENT RISK AFFECTS FUTURE WILLINGNESS TO INVEST..... 25

INVESTMENT RESOURCES ARE FINITE AND CHOICES HAVE TO BE MADE 25

FOSTERING A POSITIVE INVESTMENT CLIMATE 25

VIII. COVERAGE..... 28

 COVERAGE, CAPACITY AND QUALITY..... 28

 APPLYING THE FIVE POINT PLAN FOR INCENTIVISING EFFICIENT NETWORK INVESTMENT..... 29

IX. CONTENT 31

 MOBILE CONTENT..... 31

 MOBILE CONTENT RAISES THE SAME ISSUES AS THE FIXED INTERNET CONTENT, BUT CERTAIN CONCERNS MAY BE
 EXACERBATED BY THE PORTABLE AND PERSONAL NATURE OF MOBILE..... 32

 MOBILE CONTENT IS LARGELY SELF-REGULATED 33

 THE CONTENT AGENDA IS EVOLVING..... 33

 NEXT STEPS 35

X. CONCLUDING COMMENTS..... 36

I. EXECUTIVE SUMMARY

1. Telefónica O2 UK Limited (O2) welcomes the opportunity to respond to Ofcom's "Mostly Mobile" Consultation¹ (the Consultation).
2. We generally find common ground with Ofcom with regard to its objectives in relation to consumer protection, albeit we often have a very different view as to how consumers can be protected. However, it is in the treatment of investment, coverage and in particular Ofcom's "vision" for the sector where O2 takes most issue with Ofcom's approach in this response.

The dynamic market environment

3. We believe the dialogue generated by Ofcom's MSA/ Mostly Mobile Project is positive. If a regulator is not fully engaged with the mobile market, then there is the risk that it may misinterpret the outward expression of the dynamic nature of the market. Continuing senior level engagement with the industry is vital in addition to the other elements of engagement discussed below.

The right touch supervisory role

4. We understand the temptation for Ofcom to talk about its "vision" for mobile. However, as we said in our response to the Mobile Sector Assessment, Ofcom must avoid being directional since this inherently risks skewing the market (to fit with the "vision"), including the allocation of finite investment resources.
5. We think that one of Ofcom's principle commitments: "*operate with a bias against intervention, but a willingness to intervene firmly, promptly and effectively where required*", remains as valid today as it has ever been and so we welcome Ofcom's reiteration (at §1.14) that it will continue to work to this.

Securing consumer protection

6. Ofcom must operate with an informed understanding of the market (including how it can respond to concerns of consumer detriment). As such, an engaged dialogue with industry coupled with sound data must be central to Ofcom's approach (and, for example, in respect of access and inclusion, we are encouraged by Ofcom's comments at §7.50 that it will facilitate a dialogue between stakeholders and industry).
7. We support Ofcom in setting a Consumer Policy framework. We recommend that the subjectivity of the Consumer Policy framework assessment criteria outlined in Mostly Mobile is replaced with a clear and objective mechanism – which will help focus Ofcom's efforts

¹ Mostly Mobile, Ofcom's Mobile Sector Assessment, second consultation, 8 July 2009.

and encourage targeted and prioritised intervention as necessary. We would also recommend a review of how Ofcom complaints data is assessed, analysed, interpreted and shared with industry.

8. Where it is determined that markets have failed and intervention is justified, Ofcom should first utilise its existing powers – targeted wherever possible - before it reaches for new interventions. Furthermore, Ofcom must ensure that it assesses the effectiveness of its interventions.

Fostering a positive investment climate

9. O2 welcomes the Government's intent to promote to a primary duty Ofcom's existing duty to act with regard to encouraging efficient investment. It would appear to O2 that a set of regulatory principles consistent with those set out for super-fast broadband would deliver a favourable investment climate for mobile and would be useful in guiding Ofcom's thinking. In addition, building on Ofcom's work on NGA would ensure that Ofcom's approach to investment and regulation was both technology neutral and consistent (in accordance with its duties).
10. A competitive market leads to different operator strategies – differing ways of investing finite capital resources in response (or not²) to consumer demand. As such, without robust evidence based justification, Ofcom's pre-occupation with coverage may lead to a worse customer experience for the millions of existing 3G customers. We recommend that Ofcom take a balanced, holistic approach to coverage, capacity and quality. If there is a strong public policy case to intervene –i.e. there is an externality – then that needs to be funded in some way from the public purse.

Content

11. We are supportive of Ofcom's Media Literacy work (indeed we believe that this can provide a significant cornerstone for encouraging the Digital Confidence necessary to underpin Digital Britain). Ofcom is right to conclude that mobile content is evolving. We believe this evolution is understated in *Mostly Mobile*, and in Section IX of this response, we have some suggestions in respect of Ofcom's monitoring activity in this area. In addition, clarity of roles between the various UK and international bodies is important.

² As we discuss in Section VIII below, 3G Customer Experience Research shows that some operators have striven to maintain the customer experience, whereas others have sacrificed customer experience – either by diverting funds to coverage build or filling up the network without expanding capacity.

II. INTRODUCTION

The legal framework

12. In 2003 Oftel determined that the UK mobile market, as then defined, was effectively competitive such that *ex ante* economic regulation was no longer required. By 2007 the European Commission had determined that the mobile access market was no longer one suitable for *ex ante* economic regulation across Europe, as Ofcom points out at §4.73 of this Consultation. It is important to understand what this landmark means, the best way of illustrating the point is to look at the three criteria for markets which are candidates for *ex ante* regulation³:
- a. The first criterion is the presence of high and non-transitory entry barriers whether of a structural, legal or regulatory nature.
 - b. The second criterion admits only those markets the structure of which does not tend towards effective competition within the relevant time horizon. The application of this criterion involves examining the state of competition behind the barriers of entry.
 - c. The third criterion is that application of competition law alone would not adequately address the market failure(s) concerned.
13. At Recital 16 to the Recommendation, the Commission states that: *“whether an electronic communications market continues to be identified by subsequent versions of the Recommendation as justifying possible ex ante regulation would depend on the persistence of high entry barriers, on the second criterion measuring the dynamic state of competitiveness and thirdly on the sufficiency of competition law (absent ex ante regulation) to address persistent market failures.”* [our emphasis]
14. The fact that the mobile access market has been removed from the Recommendation and that Ofcom acknowledges that the UK market is the most competitive in Europe⁴, confirms that the UK mobile access market does not have high barriers to entry, there is vibrant competition and competition law is an effective remedy to address any residual market failure going forwards.

³ Extract from the EC Recommendation on Relevant Markets <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:114:0045:0049:EN:PDF>

⁴ For example, *“The UK has the most competitive mobile industry in Europe with five mobile network operators”*, Ofcom, Editors Note 3, News Release, 08/07/09. http://www.ofcom.org.uk/media/news/2009/07/nr_20090708

A shift in Ofcom's views?

15. Ofcom's Mobile Sector Assessment (MSA) has sought to pick over a wide range of issues across the industry, but with its focus firmly on the five mobile network operators which it regulates, albeit not economically in the access market. This second consultation, entitled "Mostly Mobile" builds on that ground work and the insight provided in the consultation responses. However, notwithstanding the findings of the European Commission and the benefits identified by consumers themselves, it appears to us that some may mistakenly interpret "Mostly Mobile" as re-classifying the mobile market from "harmless" to "mostly harmless".

Ofcom's approach

16. When we look at the discussion of consumer policy, we generally find common ground with Ofcom with regard to objectives, albeit we often have a very different view of method. However, it is in the treatment of investment, coverage and in particular Ofcom's "vision" for the sector that O2 takes most issue with in this response.
17. Ofcom's regulatory principles include (at §1.14) one to *"operate with a bias against intervention, but with a willingness to intervene firmly, promptly and effectively where required."*
18. However, we do not see this overarching principle reflected in the so-called strategic principles that Ofcom proposes to regulate the mobile market going forwards, notwithstanding that the market is no longer one suitable for *ex ante* regulation (sic).

Avoid a deterministic approach

19. Ofcom's first strategic principle is stated as *"using markets where we can: we will rely on market forces to deliver our vision for the mobile sector wherever possible."* [our emphasis]. In our view, creating a vision for a market and shaping those markets, rather than letting them operate unfettered, risks regulatory failure. Furthermore, in the context of markets which are not subject to *ex ante* regulation, this form of words appears misplaced. O2 would suggest *"monitoring the development of the mobile market and intervening only where there is a demonstrable risk to competition"*.
20. The second principle is more populist given the current economic climate *"recognising the limits of markets"*. O2 welcomes Ofcom's commitment to utilise its consumer protection powers robustly, going forward.
21. O2 takes most issue with the third strategic principle. The phraseology shows too great an appetite for scope creep, for example, *"widening our focus"* (i.e. looking at more things to regulate) or *"keeping regulation relevant by ensuring that it evolves"*. It should be

remembered that sectoral regulation is only a stop-gap measure awaiting the day when the telecoms market can be managed as any other functioning market (e.g. groceries), solely by competition law and consumer protection legislation. Ofcom should not be seeking to evolve regulation, rather it should continually strive to reduce the sector specific regulatory burden to zero, where this is warranted.

22. As we will show later in this response, these strategic principles remain too directional in nature and fail to reflect the fact that, in law, Ofcom's role in the mobile access market must now be supervisory.
23. O2 accepts that from time-to-time markets may lead to imperfect outcomes, but are they any more perfect than the outcomes that form part of the regulator's vision? Especially given the demonstrable information disadvantage suffered by regulators. In our response to the first consultation we clearly stated that *"given our preference for competition law, it is arguable that Ofcom should have no articulated "vision" for the sector. The existence of "vision" implies a desired outcome, rather than a willingness to let market forces play out.*"⁵

This response

24. In recognition that the consumer should be at the heart of Ofcom's thinking, where markets are competitive, we address the points raised in Ofcom's Sections 6 and 7 first, with regard to the mobile consumer and the issues of access and inclusion. We then move onto the potentially more contentious subjects of the changing market environment, investment and coverage. Finally, we address issues related to the regulation of content and the increasingly anachronistic approach of regulating the delivery of content on a platform specific basis.

⁵ <http://www.ofcom.org.uk/consult/condocs/msa08/responses/o2.pdf> §13

III. THE MOBILE CONSUMER

Securing consumer protection and empowerment

25. Ofcom raises the question: *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?*
26. O2 recognises that, in some circumstances, market forces alone will not always be sufficient to protect consumers⁶. Where competition fails in this regard, the current regulatory environment already offers the protection of a myriad of rules as a 'safety net'. Consequently, our support for *continued* and *additional* regulatory intervention is limited and heavily qualified by the premise that Ofcom do not consider any additionally regulation without first utilising and testing existing powers (of enforcement or otherwise).
27. O2 considers that, on the whole, Ofcom fails to employ its existing powers, in favour of increased regulatory burden, all too frequently. Were Ofcom to take a more robust approach to the enforcement of existing rules then, arguably, some recent regulation would have not been necessary and in fact, it would have resulted in a more swift, efficient and proportionate resolution to many of the most harmful consumer issues. We refer Ofcom to its regulation of the '070' number range as an example. O2 called for Ofcom to protect consumers quickly and efficiently by using its powers to enforce the breach of numbering policy that had arisen in cases where the services operating on those numbers were found not to be 'follow-me' type services. Instead, Ofcom increased the obligations of General Condition 14 to include publication obligations on mobile networks in relation to '070' numbers and deferred enforcement to PhonepayPlus. In our view, this was the wrong response to problems caused by flagrant abuses carried out by some terminating network operators.
28. Complaints about 070 numbers remained high for several years and appear only to have depleted since PhonepayPlus began taking its own enforcement action. However, if Ofcom had, instead, utilised its own enforcement powers when the matter first became apparent, then opportunistic operators might not have spent the following two or three years exploiting consumers, before PhonePay Plus first took action. Additionally, it is not clear whether the amended General Condition has resulted in any material benefit to consumers beyond that already addressed by PhonepayPlus enforcement action.
29. We note that in Ofcom's recent 'porting process' consultation, it indicates a wish to use its enforcement powers before considering further regulation. O2 is encouraged by this approach and welcomes more of the same.

⁶. [X]

Understanding the market

30. Looking ahead, we urge Ofcom to engage, wherever possible, with the mobile industry to gain a better understanding of how it already seeks to meet consumers' needs, when determining consumer policy priorities. We note that in its consideration of complaints handling it is only in the last few months that Ofcom has accepted our invitation to visit our contact centres and obtain first-hand experience of the complexities of managing customers with a diverse range of products and services.
31. Only this type of engagement will provide Ofcom with a fully informed perspective from which it can determine not only its priority issues, but more importantly, the practical options it proposes to resolve those issues. This approach will not only save Ofcom time but will also build a more constructive working relationship between industry and regulator and enable providers to develop a better appreciation of the regulator's concerns. By adopting a more collaborative approach to complaint data and concerns as they arise, Ofcom's consumer work can be targeted, more efficient and more effective as a result.

Targeted action

32. It seems to O2 that, as a matter of principle, Ofcom's response to any particular consumer protection problem needs to be tailored to the problem itself. For example, in circumstances where there is no systemic failure, (as with complaints handling or mis-selling) but where complaints can be identified as being sourced by a single or few companies with imperfect practices, it would be more proportionate to take action (enforcement or otherwise) to address those companies. Such an approach rewards those companies who are proactive and can differentiate themselves by the quality of their customer experience, and seeks to impose a proportionate regulatory burden on those who fail to meet satisfactory standards.

Robust data interpretation

33. In assessing its consumer priorities, the complaints data and research that Ofcom relies upon is a useful starting point. However, our experience is that rather than the data being used as a springboard for formulating policy priorities and proposals, Ofcom often forms firm and absolute conclusions on it, without first subjecting it to rigorous analysis and detailed segregation (particularly on the point of identifying the source of complaints by operator). In O2's view it is essential to provide the most robust of complaints data before it can be used to provide a sound base from which to influence policy. A recent example of Ofcom's misplaced eagerness to use generalised complaints and research data to support specific policy propositions is in the Scope Review for premium rate services. The Scope Review suggests that complaints and research indicated that consumers were unclear about the cost of premium rate services. Ofcom's proposal was to introduce pre-call announcements for fixed-line 090 premium rate services, so that users of fixed line PRS will

be given greater price transparency. What Ofcom fails to account for is that the complaints data and research included consumers of both fixed and mobile PRS but there was no indication of what proportions of each suggested costs were not transparent. If the majority of complaints were from mobile PRS users, then the proposed regulation offers no solace. If the majority of complaints were from fixed PRS users, but the proposal fails because of the unsound evidence base, they too are offered little solace.

34. We suggest that a review of how Ofcom complaints data is assessed, analysed, interpreted and shared with the industry is itself a priority for the Ofcom Consumer Policy team, to ensure that urgent issues are not missed and that less urgent issues are not given disproportionate attention.

A consumer framework must be based on clear, objective criteria

35. Ofcom also raises the question: *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?*
36. We agree with Ofcom that a consumer protection framework is a useful tool which the regulator should use to identify proportionate and desirable regulatory intervention. However, we disagree that the existing framework provides sufficient certainty or assistance to determine the relevant factors to ensure a balance between taking timely action and applying effective and proportionate regulation.
37. The disparity stems from the undefined criteria relied upon by Ofcom in its framework which is then, in some parts, inconsistent with the subjective assessment criteria beneath it.
38. The terms 'effectively protected' and 'unreasonable annoyance' are undefined terms which, on their own would not necessarily be a problem. However when those undefined terms are assessed against further subjective and undefined criteria, like 'easy switching' and 'a good deal', it is easy to see how an inconsistent and disproportionate consumer policy agenda could result. Assessing whether switching is 'easy' does not inform Ofcom as to whether switching causes consumers 'unreasonable annoyance' or causes them 'financial harm'.

Don't pre-set the agenda

39. Ofcom appears to have built-in the 'issues' that it wishes to focus on into the framework, instead of designing an objective framework against which any potential issue could be tested and considered. The framework should also incorporate a process for consistently checking the 'issue' against the existing measures available to Ofcom to remedy an issue. This is a step that appears to be often missed in favour of new regulation. This habit may explain the industry's feelings of over-regulation in the recent past.
40. As an alternative approach O2 suggests that Ofcom retains its consumer policy objective as a starting point for assessing priorities; but that the subjectivity of the existing assessment criteria is replaced by simply assessing each issue against the constituent parts of the objective. To illustrate:
- a. The objective is to ensure consumers will benefit from well-functioning markets, are effectively protected from financial and physical harm, unreasonable annoyance and anxiety and are enabled to make informed choices.
 - b. From that objective, the questions or 'tests' that need to be satisfied are:
 - i. Does the issue show evidence of financial or physical harm to consumers?
 - ii. Is there evidence that the issue is unreasonably annoying or causes anxiety to consumers?
 - iii. Is there evidence that consumers are unable to make informed choices?
 - iv. Does the evidence demonstrate a systemic market failure or is the source of complaints limited to a specific sector or company?
 1. If there is demonstrable evidence of a market failure then further consideration of regulatory intervention appears proportionate.
 2. If, however, there is no evidence of market-wide failure, then regulatory action on a market-wide level should be ruled-out, or at least set aside for the time being.
 - v. In either case, the next step should be a detailed consideration of Ofcom's portfolio of existing powers including its ability to influence in terms of self-regulation and specific enforcement. This carries the added benefit of ensuring that if harm is occurring, it is addressed in a timely fashion, as it saves time-consuming assessment, consultation and implementation.
 - vi. Where existing powers have not been deployed or tested first, Ofcom should not automatically consider additional regulation.
 - vii. Where existing powers have been tested and found wanting, then Ofcom should initiate and consider wider regulatory intervention.

Test current initiatives against this framework

41. Issues such as porting, customer service, quality of service information should all be tested against this framework. O2 is confident that applying a more objective approach to consumer policy would not only ensure that priorities are easily identified, but that there are also additional benefits.
42. It provides Ofcom with greater opportunity to restore confidence in its assessment of when regulatory intervention is warranted whilst giving consumers a clear understanding of what can be achieved.
43. It also allows Ofcom to target its finite resources more specifically whilst rewarding those who choose to differentiate themselves from competitors with higher standards of customer care, attention and services.

Assessing the effectiveness of interventions

44. We consider that the use of a more objective, effects-based framework, would provide Ofcom with an opportunity to re-assess issues and identify the effectiveness of existing regulation and where it could be scaled back.
45. Whilst the Consumer Experience report is informative, the policy evaluation that accompanies it would, we feel, benefit from an overview of the measures that already exist and where Ofcom has utilised these measures to deal with that harm. It is essential and, generally, good-housekeeping to ensure that the portfolio of measures that Ofcom has is regularly reviewed and assessed for their continued effectiveness.
46. Not only is this a healthy exercise to complete for any regulator, but additionally it strengthens Ofcom's aim to be proportionate whilst reassuring the industry that self-checking measures exist to prevent regulatory creep.
47. Ofcom raises the question: *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?* We believe that Ofcom must measure its effectiveness across its entire remit, not simply those that are considered to fall within "consumer policy". For example, in its preliminary consultation on wholesale mobile call termination, Ofcom has asked whether mobile termination rates might be brought down as far as possible to address a problem in fixed and mobile retail markets. Ofcom has suggested that in those markets, operators have insufficient pricing flexibility, because high mobile termination rates act as a "floor" for the prices of retail calls to mobiles. If termination rates were lower, it is argued, fixed and mobile operators would respond by reducing prices and innovating to create larger and more comprehensive call bundles.

48. Thus, instead of continuing to seek to mimic, through regulation, prices a competitive wholesale termination market would generate, Ofcom proposes to reduce termination rates as far as possible, to allow greater flexibility at the retail level.
49. Although at first sight, this might seem intuitively appealing, O2 believes that there would be serious repercussions, which would act *against* consumers' interests as a whole.
50. As O2 explained in its response to Ofcom's consultation on wholesale mobile call termination, if operators were not allowed to recover their efficiently incurred costs in providing termination services, they will seek to recover them elsewhere. There would be pressure on subscriptions, handset subsidies and call charges. Prepay customers, who tend to receive more calls than they make, might be particularly impacted; operators might be expected to seek a continual revenue stream, perhaps by implementing time expired credit. The main detrimental impact of the approach that Ofcom has suggested would be felt, unambiguously, by low income pre-pay customers of the other operators, and, in particular, the MVNOs.
51. There is also likely to be pressure to introduce charges for receiving calls. Ofcom's own research suggests that 5½ million pre-pay customers would stop using mobiles in these circumstances. The effect on welfare would be significant, particularly bearing in mind that almost a quarter of the lowest income households, who mainly use pre-pay, rely on mobiles for their communications needs.
52. However, it is not just pre-pay customers who would be adversely affected. Contrary to Ofcom's assertion, medium-usage consumers and some, if not all, high-usage consumers are also likely to be worse off, insofar as they are likely to experience an increase in their average monthly bills, as mobile operators rebalance tariffs in an attempt to recover lost termination revenue.

IV. ACCESS & INCLUSION

Diversity and inclusion

53. O2 agrees with Ofcom that communications services should be available for all citizens. However, we do not think it is always necessary or appropriate to consider disabled or elderly customers as a marginalised sub-set of citizens who either want or require 'different' services or levels of service.
54. O2 is a firm believer in diversity and inclusion, not segregation. Our aim is to ensure that all our customers are served well and have the best experience of O2's services and products, regardless of individual abilities.
55. O2 has succeeded in maintaining top-ranking positions for its customer service and support. We do this by making sure that all our customer advisors are skilled individuals who can empathise with customers regardless of their age, background, physical or mental ability.
56. We raise this to illustrate how it would be rash to make assumptions about the needs of disabled and older customers - the reality is that many of our customers do not necessarily want or need to be treated differently from other customers. Our approach appears to be supported by the Ofcom Advisory Committee on older and disabled people, whose presentation on 9 June 2009 advocated this approach in terms of universally designed products and services.

The experience of Text Relay

57. Ofcom notes that it is currently reviewing the Text-Relay service as part of its Access and Inclusion agenda. The Text-Relay service is a good example of how assumptions about the needs of disabled mobile users and their desire for this specialised service was unfounded, demonstrated by the significantly low take-up of the service in mobile.
58. Whilst Text Relay was undoubtedly revolutionary in providing fixed line customers with hearing impairments access to telephone communications previously unavailable to them (and consequently was a 'needed' service to them), the advent of mobile technology and its ability to offer instant messaging applications, text and video messaging and calling, rendered the Text Relay service largely redundant in the mobile arena. It is no longer a 'necessity' for hearing impaired mobile customers, though it may be desirable.

What steps could be taken to improve access to mobile for disabled people?

59. It is essential that Ofcom accurately distinguish 'needs' from 'wants', particularly in this area of regulation. Services beyond that which the law requires, and those that are necessary should be a commercial matter. Those companies that can offer inclusive services will, no

doubt, succeed with particular customer segments in which other competitors will fail. It is important that Ofcom recognise that desirable services must be left to the market to offer or withdraw as they see commercially fit to do so. Regulatory interference at this level could result in 'creep' and a lack of encouragement for operators to invest and innovate commercially.

60. Nonetheless, O2 considers that Ofcom can play a significant role in facilitating communication between specific sectors and the mobile industry with a view to encouraging companies to develop differentiated services. The report by Ofcom's Advisory Committee on Older and Disabled People, "Exploring how manufacturers, suppliers and retailers address the needs of older and disabled people: what are the barriers and drivers?" suggests there is a significant gap in industry's access to knowledge and research on this customer segment and Ofcom's assistance in bridging this gap would be appreciated.
61. Furthermore, we also encourage Ofcom to consider chairing a working group of special interest representatives and industry technicians, such that there is better understanding across the board about technical limitations and opportunities for customers. And in this respect, we welcome Ofcom's comments at §7.50 that it will facilitate such dialogue.

V. THE CHANGING MARKET ENVIRONMENT

Ofcom starts with the wrong premise

62. Ofcom closes this section of the consultation document at §3.92 by saying “*We need to be ready to adapt our approach to ensure that competition remains – to the maximum extent that it is feasible and sustainable*”. This position starts from the wrong premise. The UK market is demonstrably (and legally) effectively competitive and as such Ofcom is required to rely on competition law to address issues that may arise. No adaptation of approach is required with regard to “regulation” beyond Ofcom’s role in implementing consumer protection legislation. What Ofcom may need to do is to adapt its skills and resources in order to more effectively perform its function as the national competition authority with concurrent powers to intervene in the mobile sector.
63. The consultation identifies a series of possible trends, which Ofcom has evaluated in detail. We believe that it is very important that Ofcom retains a good understanding of the functioning of the sector and that it remains engaged with the operators at a senior level. Fostering a high level of understanding and key relationship management are essential elements in Ofcom’s exercise of a supervisory function for an effectively competitive market.
64. Therefore, we feel it important to correct a few misconceptions that are included within this Consultation and we look forward to discussing their implications with Ofcom going forwards.

[&]

Ofcom perpetuates the sub-1GHz fallacy

65. At §3.86 Ofcom perpetuates the fallacy that ownership of sub-1GHz spectrum confers a significant competitive advantage on mobile operators. Ofcom will now be aware of the fundamental flaws in its most recent analysis⁷; specifically:
- a. Achievable speed at cell edge is interference limited, such that any network below 2GHz could cover urban areas with about 11,000 cells
 - b. As user demand rises cell size is not determined by carrier frequency, but by the amount of capacity provided to end users. Cells become capacity rather than coverage limited; and
 - c. It is only in the most rural of areas, where the rationale to invest in network is at its lowest, that sub-1GHz spectrum conveys a small cost benefit.
66. O2 is disappointed that Ofcom persists in seeking to rely on assertion when some parts of Ofcom are well aware the available evidence does not support these assertions.

Convergence requires regulators to act consistently, rather than adopt a deterministic regulatory approach

67. In O2's recent response to Ofcom's consultation on mobile voice call termination (MCT)⁸ we were highly critical of Ofcom's proposal to adopt one (new) regulatory policy towards the price control regulation of mobile services and another towards the regulation of fixed services.
68. The law under which prices are regulated has not changed since the most recent price control decision for MCT. The use of LRIC+ as the price control method for MCT is well established and existing MCT prices are regulated based on that approach. As we state in our consultation response:

"Under the existing approach, it has been the role of Ofcom to do the job of the market, in the absence of effective competition for the provision of voice call termination. That is, Ofcom's role has been to set a charge control at a level that an effectively competitive market would generate; it was a proxy for a competitive price. The LRIC+ methodology has always been selected to do this job because, in the words of Ofcom:

"The LRIC of voice termination is the additional cost an MNO incurs to provide termination. This can also be seen as the cost that the firm would avoid if it decided not to provide voice termination, taking a long-run perspective. It corresponds more closely to the charges that would prevail in an effectively competitive market than

⁷ <http://www.ofcom.org.uk/consult/condocs/spectrumlib/spectrumlib.pdf>

⁸ http://www.ofcom.org.uk/consult/condocs/mobilecallterm/responses/Telefonica_O2_UK_Limited.pdf

accounting based measures of cost; it is a fundamental goal of price regulation to mimic the effects of a competitive market and this consideration underpins the use of LRIC.”

Hence the notion of setting a charge control to mimic a competitive market and the use of LRIC+ are inextricably linked”

69. Therefore, we could not understand why, on the one hand, Ofcom is careful to ensure that prices for BT’s regulated products ensure an appropriate allocation of fixed and common costs, whereas Ofcom was proposing to jettison this well established economic approach in the name of the ill-defined concept of “*greater retail price flexibility*” in a completely different economic market.
70. Whilst BT is free to argue inconsistent positions and be judged on that basis, Ofcom is not.
71. Furthermore, the direction of travel in Ofcom’s policy as set out in Mostly Mobile and Government’s recent consultation on a new duty for Ofcom⁹ is to place greater weight on the interests of consumers with regard to investment¹⁰. How a regulator deals (consistently) with historical fixed and common costs when setting price controls (or other regulations) is critical to providing the regulatory certainty to underpin future investment.
72. O2 cannot see how Ofcom can, on the one hand, consistently satisfy its statutory duties with regard to investment towards both BT and the MNOs, whilst on the other hand changing only the regulatory approach to the five mobile termination markets of the MNOs in order to create some hypothesised outcome in a completely different (and unregulated) relevant market.

⁹ Consultation on the proposed new duties for Ofcom; to promote efficient investment in infrastructure, to provide a full assessment of UK communications infrastructure every two years, Department for Business, Innovation and Skills, August 2009. <http://www.berr.gov.uk/files/file52538.pdf>

¹⁰ “*The Government considers that over recent years Ofcom’s duty when carrying out its functions to further the interest of consumers of communications services where appropriate by promoting competition, has tended to put the emphasis on short term cost reduction rather than longer term investment in future infrastructure.*”

VI. COMPETITION AND NEW ENTRY

73. At §4.6 Ofcom identifies five observable features of the market which it believes *may* have the *potential* to limit competition or change the nature of competition in the future. *A priori*, a change in the nature of competition should not give rise to concern, there is after all competition. We agree that in its supervisory role Ofcom needs to be alive to the possibility of restrictions of competition emerging, but again we point out that its competition law powers are sufficient to deal with such outcomes. Furthermore, Ofcom's role as a competition authority plays a part in two of the issues identified.

Interconnection and MNP

74. It appears to O2 that the question of timely provision of interconnection services and MNP are two distinct problems and it is inappropriate to lump them together under one umbrella.

75. Interconnection is freely available from BT, as it has an obligation to provide end-to-end connectivity to all the existing mobile operators. The more vexed question of the appropriate termination rate for new entrants is the subject of a dispute, as Ofcom highlights, and potentially a market review. So with regard to interconnection, the issue is not about the provision of the service, rather the terms under which the service is provided – more specifically, these terms are dictated by the new entrant when it determines the termination rate it wishes to offer to the market. BT cannot be required to accept prices that are unreasonable¹¹ and so, to a degree the issue must rest with the new entrant itself.

76. With regards to MNP, if we put to one side issues caused by the new entrants themselves which Ofcom highlights at §4.62, the speed with which signalling interconnection agreements can be negotiated, implemented and tested will always rise with the number of new entrants. If all eleven DECT Guardband licensees (O2 being the 12th – not Orange as suggested at footnote 69) had MNP and the five MNOs were still on the market then the 17th player would need to agree sixteen agreements. The market as a whole would have one hundred and thirty six agreements that at some stage would have had to have been negotiated, implemented and tested.

77. Ofcom's current consultation on changes to the onward routing regime could have taken the opportunity to address this mathematical problem (as opposed to the implied competition concern¹²) by examining the benefits of signalling hub(s), such as those provided for international roaming, in order to provide smaller operators with a one-stop shop for an MNP signalling service.

¹¹Mobile call termination rate disputes between T-Mobile and BT, O2 and BT, Hutchison 3G and BT and BT and each of Hutchison 3G, Orange and Vodafone

<http://www.catribunal.org.uk/238-1928/Judgment-Core-issues.html>

¹²“Routing calls to ported telephone numbers”, Ofcom, 3 August 2009

http://www.ofcom.org.uk/consult/condocs/gc18_routing/routing.pdf

Consolidation – structural change at the wholesale level

78. At §4.9 Ofcom sets out a set of actions to enhance the already competitive nature of the mobile sector. Essentially they boil down to further spectrum release and liberalisation (to increase the supply of suitable spectrum for mobile services) and enforcement of access to both MNP and interconnection.
79. As Ofcom highlights, it has a role to play in conjunction with the OFT and the European Commission in reviewing and, where appropriate, approving agreements and mergers in the UK market. Consequently by definition Ofcom will play a key role in shaping the competitive landscape, albeit in its role as the competition authority rather than the specialist sector regulator.

Network sharing

80. Another example of Ofcom's existing effective supervisory role in the market (as a competition authority) relates to network sharing agreements. By their nature, such horizontal agreements attract the interest of competition authorities. Ofcom has undertaken preliminary enquiries regarding the three network sharing agreements recently entered into by T-Mobile/3UK, Vodafone/Orange and Vodafone/O2. Having made initial inquiries, to our knowledge in no case has Ofcom decided to formerly investigate such arrangements.
81. Ofcom's supervisory role as a competition authority is perfectly adequate to deal with such agreements on their merits. One of O2's major concerns is that Ofcom's desire to have a "vision" for the sector (as the sector regulator) may unwittingly cloud its judgment as the competition authority. Consequently, we believe that Ofcom should not determine a vision, but supervise an effective market and deal with consumer issues using its sector specific powers and national consumer protection law, as appropriate.

Price transparency

82. Ofcom concludes that it will monitor "the issue" of complexity of pricing. As we said in our response to the Mobile Sector Assessment, O2 believes that it is important that Ofcom uses a robust and objective framework to assess any consumer protection issues it identifies. Any intervention in relation to pricing transparency is fraught with regulatory risk and must be approached with caution.

Restricting access to the handset for certain applications

83. Current 3G networks were not designed to be used for VoIP. The data transport layer of a 3G network is only “best efforts” and it was designed to be used in parallel with switched circuit voice. [X]¹³.
84. VoIP uses the radio interface less efficiently than circuit switched voice on 3G networks. O2 is mindful of Ofcom’s duty to ensure efficient use of the radio spectrum and Ofcom’s regulatory approach to mobile VoIP must be consistent with this duty.
85. Some operators have offered data tariffs that will support VoIP (for example, Vodafone and T-Mobile), other operator have chosen not to. One reason why O2 doesn’t offer or support VoIP over its mobile data network is the variable quality of the service for the consumer – which runs counter to our strategy in the market.
86. It would appear to O2 that there are a wide range of approaches to VoIP amongst the MNOs and that assertions by certain parties regarding tacit collusion to exclude VoIP applications from the handset are not sustainable.
87. We therefore welcome Ofcom’s position as set out at §3.42 that its principle concern is to ensure that operators are suitably transparent with their customers.

¹³ [X]

VII. INVESTMENT

88. Ofcom identifies that the relationship between investment and competitive conditions within a market is a complex one. Specifically Ofcom identifies that:
- a. There has been a healthy level of investment to date, albeit that level of investment was associated with a growing market; whereas
 - b. The UK market is maturing, overall levels of profitability are falling; and
 - c. Credit conditions are uncertain, [X]; but
 - d. Ofcom views the presence of the four major globally active players as a stimulus for investment in the UK, notwithstanding the lower profitability of this market when compared to the peer group of markets.
89. Ofcom rightly identifies that it should continue to encourage efficient investment which is unhindered by regulatory obstacles. In particular, increasing regulatory certainty [§5.28] is identified as one major way of creating a positive investment climate.

Growth attracts investment

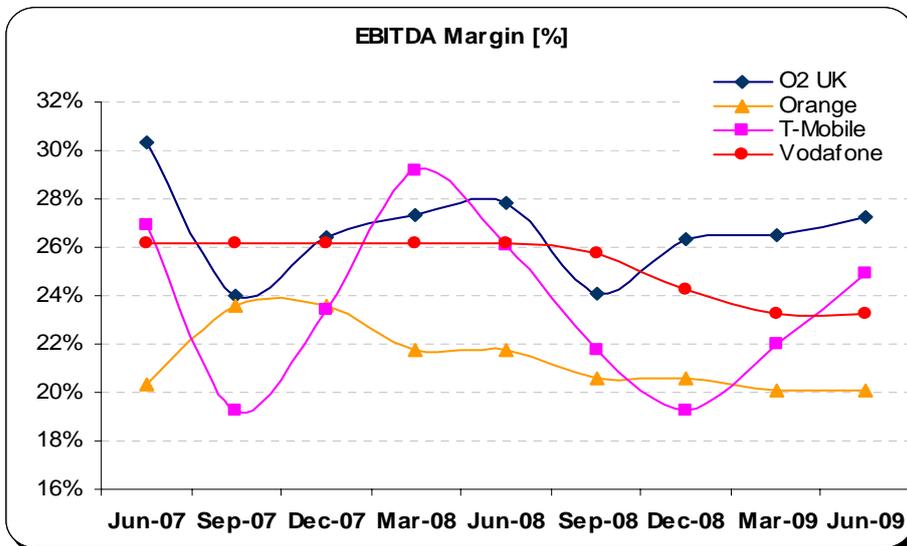
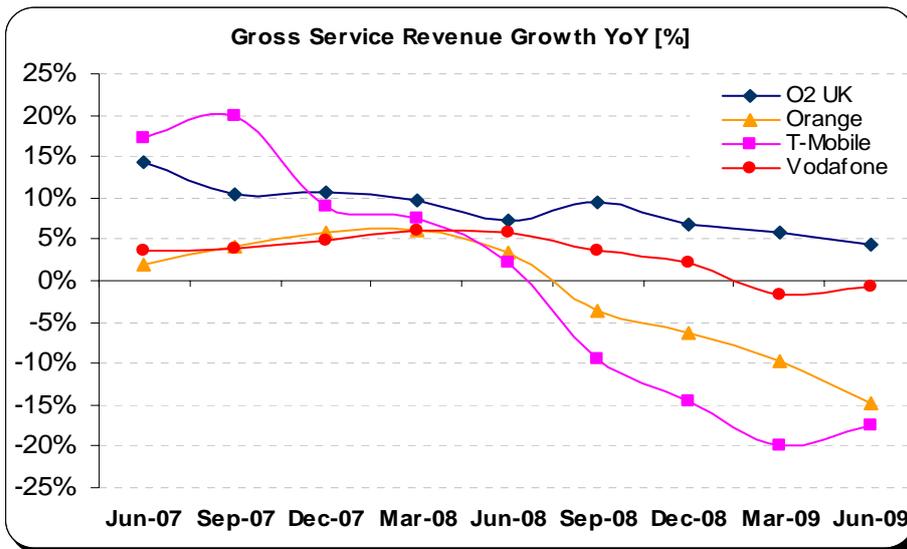
90. At §5.16 Ofcom appears to paint a rosy picture of the investment climate in the mobile sector in the UK. Notwithstanding profitability lower than any other European market (Figure 22), Ofcom suggests that *“lower returns in the UK do not seem to have held back investment compared to other European markets”*. In our view, these data and others available to Ofcom present quite a different picture.
91. Back at §4.52, Ofcom observed that *“in a competitive market, competition should result in firms earning normal returns in the medium to long run, i.e. returns consistent with the cost of capital.”* The WACC of the mobile sector in Ofcom’s most recent charge control decision was 11.5%¹⁴. Whereas research by AT Kearney for the GSMA shows that in Europe MNOs are achieving a rate of return (over the long run) of 9%.¹⁵ If Europe, on average, is achieving a return lower than the WACC of the investments being made, how can the UK, with margin levels 20%pts below its peer group be a good place to invest? The UK is unattractive compared to other European markets and doubly unattractive compared to growth markets in Latin America, Africa and Asia-Pac. A glance at the Vodafone figures on Figure 23 clearly point to the maxim that investment will chase opportunities for profitable growth.
92. The key question for operators today is how to increase revenue and profit growth in Europe, in order to make the market more attractive for investment? As Ofcom highlights,

¹⁴ Pre-tax

¹⁵ Mobile Industry Observatory 2008, AT Kearney / GSMA

the UK benefits from the presence of the four major international mobile groups, but these groups will have more attractive calls on their finite resources than Europe, especially the UK.

93. There are clearly opportunities to grow an individual operator's profits and revenues, as can be seen from Figure 14 in the Consultation (in terms of subscriber growth) and from the following tables which show revenue and profit growth.



94. Uniquely O2 has grown its customer base, revenues and profits during the period 2006-2009. The very nature of competition will create winners and losers (amongst the operators) but that competitive dynamic will provide a demonstrably good outcome for consumers.

95. The overall pie of available profit can be grown by diversification or innovation. Within the mobile market, there may be products or services that are not delivered profitably and where prices may need to rise to cover costs, or efficiencies may need to be realised in order to deliver services at the market price.
96. All of the mechanisms described above (with the exception perhaps of taking market share of profitable growth) require change. Changes to business models, product sets, prices and potentially market structure.
97. Change is a positive force for consumers, as the benefits of this innovation flow through into products and prices in competitive markets. If a regulator is not fully engaged with such a dynamic market then it may misinterpret the outward expression of such changes. This is why we believe that the discourse created by the MSA project is inherently positive, as is the continuing senior level engagement with the industry. It is vitally important for Ofcom to understand “why” certain events happen, as much as it is for Ofcom to react to the “what” of certain events.

The treatment of historical investment risk affects future willingness to invest

98. Above we highlight the finite nature of investment resources, within efficient capital markets, and how the relative attractiveness of the UK market to the parent companies of the MNOs will affect the size of the “pot” of investment capital that is available in the UK. Regulators have their role to play in creating a positive investment climate for the UK. In particular, Ofcom’s need to act consistently and not pander to *ex post* opportunists in their treatment of historical investments.

Investment resources are finite and choices have to be made

99. Rational firms will allocate resources across a range of capital projects including IT hardware, buildings and in particular systems/software. [X].
100. [X] it is incumbent on regulators to set their own priorities and subject proposed interventions to rigorous cost benefit analyses, in the same way that investment choices by operators are required to produce a business case. The more intervention from regulators the less available capital there is for innovation – the choice for Ofcom is stark.

Fostering a positive investment climate

101. Ofcom, in exercising its duties, must have regard to the desirability of encouraging investment¹⁶. Furthermore as Ofcom notes, if parliamentary time allows, the Government

¹⁶ The 2003 Act s3(4)d

has decided to promote this duty to become a primary duty. Investment must be at the forefront of Ofcom's thinking going forwards.

102. In order to be compliant with such a duty O2 believes that Ofcom will need to have a structured and consistent approach to fostering a positive investment climate, both with regard to fixed communications (BT's investment in fibre for example) and mobile communications. The Community duty to act in a technology neutral way¹⁷ underlines the need to treat such investments consistently. As the Government identifies, Ofcom may be able to emphasise dynamic benefits (such as securing funding for efficient investment) rather than focussing solely on static consumer benefit.
103. In its recent statement "Delivering super-fast broadband in the UK - Promoting investment and competition"¹⁸ Ofcom identifies that it *"has a central role to play in enabling both investment and competition [in super-fast broadband]."* This is echoed at §5.27 in Mostly Mobile: *"The most important thing that we believe we can do to encourage efficient investment continues to be to promote competition and where possible provide regulatory certainty to ensure that we support a vibrant industry in which competition drives efficient, unhindered investment."*
104. It would appear to O2 that a set of regulatory principles consistent with those set out for super-fast broadband would deliver a favourable investment climate for mobile and would be useful in guiding Ofcom's thinking. Furthermore, building on Ofcom's work on NGA would ensure that Ofcom's approach to investment and regulation was both technology neutral and consistent (in accordance with its duties).
105. In its NGA statement Ofcom sets out five points that will characterise its investment friendly approach:
- a. *"allow wholesale pricing flexibility to enable returns appropriate to the considerable risks of building new networks, but constrained by the market in the interests of customers;*
 - b. *ensure that any regulatory pricing allows investors the opportunity to earn a rate of return that genuinely reflects the cost of deployment and the associated level of risk;*
 - c. *minimise unnecessary inefficiencies in network design and build as a result of regulatory policies, while continuing to protect the consumer interest;*
 - d. *support the use of new, more flexible wholesale services by BT to offer super-fast services to other service providers and consumers at competitive prices; and*
 - e. *safeguard the opportunity for further competition based on physical infrastructure, by facilitating fair opportunities for companies to synchronise their investments*

¹⁷ Ibid s4(6)

¹⁸ http://www.ofcom.org.uk/consult/condocs/nga_future_broadband/statement/statement.pdf

with BT's deployments, should reasonable demand arise, and encouraging network design that takes future potential competition into account."

106. When thinking about the mobile sector and its specific challenges, the equivalent five points, in our submission, would be:

- a. no regulation of wholesale access markets, without a full market review, including justification of the market review against the three qualification tests (see paragraph 12 above)¹⁹;
- b. ensure that any regulatory pricing allows investors the opportunity to earn a rate of return that genuinely reflects the cost of deployment and the associated level of risk;
- c. refrain from stipulating how, where and what networks should be built, allow the competitive market to shape efficient investment decisions – unless there is a well evidenced public policy case to do otherwise²⁰;
- d. support innovation at the wholesale level, by removing regulatory barriers where they exist; and
- e. safeguard the opportunity for further competition based on physical infrastructure, by releasing spectrum and fostering a secondary market.

107. As we set out in our recent response to Ofcom's preliminary consultation on the mobile voice call termination market review²¹ point (b) would lead to continuation of the LRIC+ approach with a proportionate allocation of fixed and common costs already risked by operators, to termination services. To do otherwise would lead to inconsistent interpretation of Ofcom's duties. Future investment cannot be fostered, if regulators cannot be trusted to consistently account for sunk investments.

108. In Section VIII we discuss how these five principles must guide Ofcom's approach to coverage investment going forwards.

¹⁹ This would place the mobile sector on a par with competitive providers in the fixed market such as Virgin Media, which have been provided with a similar level of regulatory certainty "have given cable the predictability that, absent a Market Review and a finding of Significant Market Power- highly unlikely in the foreseeable future- network access is a commercial decision for Virgin not a regulatory one for us" Lord Currie, then Chairman of Ofcom http://www.ofcom.org.uk/media/speeches/2008/10/annual_lecture .

²⁰ To the extent that such public policy decisions can be made, they will still carry considerable regulatory risk. One case may be the inclusion of rollout obligations in spectrum licences. We note that the "inefficient" level of investment inherent in prescribed rollout obligations should be priced into the receipts to the Treasury from the sale of such spectrum. However, this assumes perfect information for the purchaser, which is unlikely.

²¹ ibid

VIII. COVERAGE

Coverage, capacity and quality

109. At §§8.1-8.86 Ofcom presents a fairly balanced assessment of the various factors that give rise to existing coverage levels and potential future solutions to areas of poor coverage.
110. O2 looks forward to working with Ofcom on its programme of work identified in Figure 41, in particular in improving Ofcom's "*understanding of network quality and performance*". We are glad that Ofcom recognises the need to expand its knowledge base in this area, [X]
111. In Section VII we discussed the future investment climate for the sector. Fostering the right investment climate is critical to ensure that mobile coverage is incentivised and grows moving forward. In Section VII we also highlight the finite nature of investment funds and the need for the access network to compete for funds. So to a degree, the level of network is really in the hands of the consumer – if they value network coverage or quality then operators will respond to this insight and invest the appropriate capital to match that demand. However, if customers place a higher value on applications or online functionality then operators will place their bets there.
112. The physics of 3G networks entails the sharing of the medium within each cell between the available users. Therefore, if there are a lot of users or a few users making very high capacity demands, experienced speeds may fall as a consequence of the aggregate power being allocated amongst all users.
113. This underlying trade-off is reflected in the investment trade-off for the access network, given that investment resources are finite. As demand grows operators may choose to:
- a. Build more coverage – increase the size of the footprint to either serve currently unserved customers or benefit from an externality created by having greater coverage
 - b. Build more capacity – serve more customers in the existing footprint, and/or provide for more data to be downloaded by those customers at a given speed; and/or
 - c. Maintain or enhance quality – most easily expressed as end user speed.
114. When 3G networks are constructed they will have had a "design capacity", that is the available capacity inherently created by the number of cells built (assuming that backhaul etc was configured to carry that design capacity without contention). As 3G devices have penetrated the market, and more particularly as dongles have been introduced, that design capacity has been rapidly used up. Indeed, to a degree it is widely accepted that dongles have been a success because they are priced at marginal cost – in order to make most use of the available design capacity.

115. As these networks begin to fill up towards their design capacity, operators are faced with interesting choices. If they are to deal with capacity growth, they may:
- Increase capacity whilst maintaining quality – albeit, if dongles are priced at marginal cost this would be uneconomic without changes to data consumption by dongle customers or changes to the pricing structure within the mobile broadband market²² (much of the investment is fixed cost in nature – e.g. cell splitting); or
 - Allow quality to degrade – i.e. leave the network at its design capacity and see the quality of service progressively reduce as the network fills up; or
 - Strike some balance between (a) and (b) above; or
 - Cannibalise the coverage budget in order to refocus resources on quality and or capacity upgrades.

116. The following research was undertaken by O2, to evaluate how different UK operators were dealing with this capacity challenge. The first chart shows the download time for a set of web pages and the consequent downlink speed by MNO 3G network in 18 cities.

[X]

117. What we can see from this chart is that some operators have striven to maintain the customer experience that they offer (O2 in particular), whereas others have sacrificed customer experience – either by diverting funds to coverage build or filling up the network with customers and not expanding the capacity. One operator consistently delivers end user speeds at around ¼ of O2 (the market leader on quality).
118. What this chart shows is that a competitive market leads to different operator strategies – different ways of investing finite capital resources in response (or not) to consumer demand.
119. Our concern with Ofcom's focus on coverage is that regulatory intervention in this area would effectively reduce resources for capacity and quality enhancements. Without robust evidence based justification, a pre-occupation with coverage may lead to a worse customer experience for the millions of existing 3G customers.

Applying the five point plan for incentivising efficient network investment

120. At §106 of this response we identify a five point plan to foster a positive investment climate.
121. Point 1 in O2's five point plan will provide some of the requisite regulatory certainty needed for operators to continue invest in network (be it coverage, capacity or for quality).

²² It is easy to draw an analogy with the impact on investment if mobile voice call termination is priced at marginal cost and the consequent inefficient investment signals that this sends to operators.

122. Point 2, if applied to mobile termination rates, would underline the importance that Ofcom places in regulatory certainty and consistency – and make it clear to operators that their historical investments are important. After all, today's future investment is tomorrow's sunk cost.
123. Point 3 should suggest that Ofcom take a balanced view about networks, not just focus on coverage, but taking a more holistic approach to coverage, capacity and quality. If there is a strong public policy case to intervene – i.e. there is an externality – then that needs to be funded in some way from the public purse.
124. Finally, on point 5, Ofcom needs to resolve the issue of 2G liberalisation as soon as possible. Ofcom has been consulting on the matter for four and a half years, created over 1500 pages of consultation documents and received mountains of evidence. [X]

IX. CONTENT

Mobile Content

125. We would generally agree with Ofcom's headline that for mobile "*content issues are real, but industry self regulation has helped reduce those risks*". Indeed, in many aspects, working with its stakeholders the UK mobile industry has pioneered an approach to content standards and industry self-regulation which has now been put at the heart of a European approach to these issues²³ (and further, as Ofcom's recent research finds: "*Very few children and young people say they have encountered content that made them 'feel uncomfortable, upset, scared or worried, or which they think they were too young to see.'*"²⁴)
126. O2 is proud to have played our part in what the UK has achieved in this respect. However, looking to the future, we know there will continue to be challenges ahead and in this response we discuss some of the key things that we believe need to be realised to meet those challenges.
127. We welcome Ofcom's pledge to play its part and work with stakeholders to help ensure that mobile consumers can access the ever greater-greater variety of services on their mobile devices with confidence²⁵. We share the view that with 'Digital Confidence' consumers are better placed to not only to make the most of their mobile experiences but also to deal with any of the risks they encounter.
128. In the remainder of this section we respond to some of the observations Ofcom makes as well as responding to the specific questions raised.

*More people are accessing an increasing range of mobile content*²⁶

129. Ofcom is correct to highlight this aspect of the evolution of mobile content. As Ofcom also recognises, "content" is evolving to include applications which, in many respects mean content is a far richer and broader field than may traditionally have been the case.
130. Content can increasingly be created and consumed in "communities" and social media. This is a fast developing and complex area. Communities will only work if trust is built up. This may require more traditional forms of real world customer services (with appropriate privacy

²³ For example, http://www.gsmeurope.org/safer_mobile/european.shtml

²⁴ Children's and young people's access to online content on mobile devices, games consoles and portable media players, Report Prepared for Ofcom, September 2009,

http://www.ofcom.org.uk/advice/media_literacy/medlitpub/medlitpubrss/online_access.pdf

²⁵ As Ofcom recognises at §4.7 "...the increasing proliferation of content, applications and service providers has great potential to deliver significant benefits to consumers in the form of innovation and choice."

²⁶ Supported by new networks, devices, Internet access and smarter data plans. The multimode aspects (2G/3G and cellular/wifi) have particularly assisted this direction, even if cellular/DAB and cellular/DVB respectively for Radio and Broadcast TV may still be some way off.

and sometimes requiring moderation). This is not to say that these require roles for regulators – but rather, simply that Ofcom must recognise that what is deemed “content” is evolving and broadening.

131. Furthermore, content can be consumed over a variety of technologies: 2G/3G (and 4G to come), Wi-Fi, Bluetooth etc, all of which can help determine the user experience.

Mobile content raises the same issues as the fixed internet content, but certain concerns may be exacerbated by the portable²⁷ and personal nature of mobile

132. We agree that mobile content raises many of the same issues as the fixed internet. We also agree that some of the particular characteristics of mobile can attract particular attention: the portability, personal nature and (sometimes) anonymity of mobile. As §1.13 puts it:

“Just as mobility can make useful services even more useful, it can make particular types of risk more pronounced.”

133. We think “pronounced” is more accurate and is less loaded than “exacerbated”.

134. Furthermore, we think it is important not to underplay the benefits these very elements bring. For example, for many, the anonymity available on mobile is privacy enhancing and mobility enables ready access to content be it for work, entertainment, education²⁸, research etc; and the personal nature of mobiles allows for personalisation, search, location based²⁹ and contextual services which make content more relevant.

135. Ofcom is right to reflect that it is likely to be harder for mobile operators to control access to the internet, such that network filters can be bypassed when using other access routes such as Wi-Fi. Equally, as Wi-Fi itself develops, it is quite possible that tools will be available in that environment as well. In addition, in a richer content based world, in many respects the significance of “telephone numbers” is reduced as an identifier relative to other digital addressing frameworks.

²⁷ Whilst some of the concern relates to the potential for unsupervised use, Ofcom’s own research indicates that for both TV and fixed internet access, parental supervision is by no means ubiquitous: Ofcom research found that 57% of children aged 8-15 mostly watched TV without an adult in the room. Similarly, half of all children aged 8-11 and two-thirds of those aged 12-15 mostly use the internet without an adult present.

<http://www.ofcom.org.uk/consumer/2009/08/protect-your-children-in-a-digital-world-2/>

²⁸ Learning and skills. Educational interest is growing with Mobile access to Content for (handheld) learning and skills based activities. See for example the 5th annual conference www.handheldlearning2009.com 5-7/10/09. And for skills : LSN report Aug 08 - "The Impact of Mobile Learning".

²⁹ And here, as Ofcom is aware, the mobile industry also has a Code of Practice for passive location based services. Clear areas of content growth can be imagined in the Mapping/Navigation and geo tagging areas with the growing GPS capability coming to Mobiles (and here the Code approach will need to evolve appropriately).

Mobile content is largely self-regulated

136. O2 welcomed Ofcom's review of the mobile industry's UK Code of Practice for new forms of content on mobile. The Code signatories published their joint response to Ofcom's recommendations in June 2009³⁰ setting out the industry's response to the recommendations Ofcom made following its review (and which are mentioned at § 9.18).

The Content agenda is evolving

137. Ofcom asks: *Are there any additional issues about mobile content and accessing content via mobile that should be considered?*

138. Mostly Mobile considers how Ofcom's approach needs to evolve. We believe that there are some key elements to the evolution of Digital Safety which Ofcom's approach must monitor:

- a. The Agenda is increasingly being developed within a European and International³¹ framework. International businesses must develop international approaches and solutions (albeit with flexibility to deal with national cultural variations) and so self regulatory approaches are now international. Furthermore, the regulatory agenda is equally being framed at a European/ International level. Ofcom's approach must be consistent with European and International evolution. And in this respect, as Internet based risks are international, O2 would like to understand what mechanisms and structures Ofcom proposes to help deliver a consistency of Content regulation to apply at least across Europe³². Internet Watch Foundation and FOSI mechanisms³³ are a good start but the regulatory dimension and "who does what" seem unclear.
- b. In addition, in light of the remit the Government appears to foresee for Ofcom in relation to combating illicit P2P file sharing, Ofcom must keep in mind that file sharing is not just a UK issue, and so any mechanisms to limit inappropriate sharing need international consistency.
- c. Child protection is increasingly one element of the Digital Safety Agenda. The creation of a UK Child Safety Strategy by UKCISS is an important step. However, as the recent Digital Safety conference³⁴ discussed there are also the broader aspects of safety online which need to be considered (for example, cyber stalking,

³⁰ http://www.mobilebroadbandgroup.com/documents/mbg_cont_code_rev_responses_090609f.doc

³¹ For example, see the Internet Governance Forum (IGF), run by the IGF Secretariat. Its purpose is to support the United Nations Secretary-General in carrying out the mandate from the World Summit on the Information Society (WSIS) with regard to convening a new forum for multi-stakeholder policy dialogue - the Internet Governance Forum (IGF). <http://www.intgovforum.org/cms/>

³² For example, referencing any ERG work stream here.

³³ See FOSI Conference: <http://www.fosi.org/cms/index.php/events.html>

³⁴ www.digitalsafety.com

location, labelling, identity, fraud, payments, etc³⁵). In this respect, Ofcom's own Media Literacy journey must reflect the broader context of Digital Safety. Indeed, Media Literacy may itself offer a broader conductor (and "one stop shop") within which the UK approach can be co-ordinated along with UKCCIS and other bodies;

- d. Given the breadth of Digital Safety, a risk based approach is essential to ensure that responses are proportionate and resources are deployed where they are most needed. Furthermore, clarity as to the roles of regulator/ agency/ organisation is essential – in essence a simply "who does what" map can be important for all - industry and consumer alike. In this respect (and to an extent, Ofcom touches on this when it refers to the complexity of the framework) despite various initiatives there is, in effect, no broad risk analysis of Digital Safety – identifying, measuring and monitoring risks – around which a co-ordinated and proportionate evolution of the UK's approach to Digital Safety can be grown.
- e. We believe that Ofcom's §9 underplays the benefits brought by mobile access to content and that in reality, the benefits significantly outweigh the risks that are mentioned.
- f. E-Inclusion. The appointment of Martha Lane-Fox to look at e-Inclusion for the UK affords the opportunity to encourage more Mobile Content and Applications on the most inclusive Comms tool we have today - Mobile. It would be good to understand how Ofcom can capitalise on this. This should embrace the lessons/ examples from the European e-Inclusion report recently published³⁶.
- g. Micropayments. We would also highlight that payment mechanisms are key to Content development in the Digital world, and not all are PRS based. Having a clear range of payment options and how they should be regulated (including self regulation) in a proportionate way would seem to be understated and worth a wider discussion (although, in many circumstances, the FSA may be the relevant regulator, rather than Ofcom). Some of the Digital Britain requests for a Test bed were from the Content community who appear frustrated when they want to deliver their Content to a broader (Mobile) audience but are confused by both delivery methods and regulatory uncertainty. This has also been raised within the Creative Industries KTN who are together with the TSB looking to fund the Test bed.

³⁵ In this respect, we think the canvass is broader than that suggested at §9.11 (harmful/ offensive content, privacy and anonymity).

³⁶ Report on the public consultation on European e-Inclusion Policy, European Commission, June 2009
http://ec.europa.eu/information_society/activities/einclusion/survey/index_en.htm

Ofcom asks: We have set out some of the differences between accessing content via the fixed internet and via mobile. Are there any other further differences?

139. We believe that the UK mobile industry has demonstrated that it has a real – and sometimes unique - ability to work together alongside stakeholders to develop responses to issues³⁷.

140. Ofcom observes that the regulatory environment for mobile content is complex and fragmented. We agree, although, we believe that complexity and fragmentation are issues that also faced by fixed providers.

Next Steps

141. Ofcom concludes that there few “silver bullet” interventions for regulators to respond to the when it comes to content and the internet but that it will continue to monitor developments.

142. We are supportive of Ofcom’s Media Literacy work (indeed we believe that this can provide a significant cornerstone of encouraging the Digital Confidence necessary to underpin Digital Britain). It is also possible that Ofcom may itself be well placed to undertake the broader “digital Safety” mapping we mention above. This will be a useful contribution.

³⁷ As has been recognised, there are a range of self regulatory initiatives in the UK and also at a European level.

X. CONCLUDING COMMENTS

143. We believe the dialogue generated by Ofcom's MSA/ Mostly Mobile Project is positive and we welcome the opportunity to contribute to that dialogue.
144. We have set out in this response how we believe Ofcom should shape its approach to mobile going forward such that it finds the right touch supervisory role. A focus on investment (as encourage by the Government's proposals in relation promoting Ofcom's duties vis a vis investment) is welcome.
145. The mobile market is a dynamic one. Ofcom must ensure that it is engages fully with industry to understand the market and to inform its approach. However, we would caution Ofcom against proceeding with a "vision" for the market as this signals an overtly directional approach which brings with it "regulatory risk" and skewed outcomes. In this environment, we think Ofcom's underpinning principle of a "*bias against intervention*" remains as relevant today as it has ever been.

Telefónica O2 UK Limited
September 2009