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# Ofcom consultation:

## Mostly Mobile

### Mobile Sector Assessment - Second Consultation, 8 July 2009

# Response from The Number UK Ltd

25 September 2009

## Executive Summary

There are **two significant problems** in the mobile market which currently directly impact consumers:

- Consumers are harmed by **arbitrarily high and inconsistent charges** when they **call directory enquiry services from mobile telephones**.
- Consumers are unable to obtain mobile telephone numbers via directory enquiries as **almost no mobile numbers are included in directory databases**.

Ofcom is **required by its statutory duties, UK and European law** to act to address those problems:

- Ofcom's primary **duty is to act in the interests of citizen-consumers**.
- Ofcom's other duties include **ensuring that consumers have choice and value for money**.
- The **UK is currently in breach of its European obligations** in relation to the inclusion of mobile numbers in directory databases.

Ofcom **has the power** to address these problems and should therefore act now:

- The high and inconsistent charges to call directory enquiry services from mobile telephones are the result of a 'network access' issue. Ofcom should now immediately move to consult on the **imposition of an access-related condition** to address the issue.
- Ofcom should **modify the current regulatory framework** to ensure that mobile numbers are included in directory databases.

## Introduction

The Number UK Ltd ("**The Number**") is the UK's leading directory assistance provider. We read Ofcom's Mostly Mobile Consultation ("**the Consultation**") with interest. However, in our view, Ofcom's assessment of the mobile sector in the UK and the Consultation fails to address two key issues:

- A. Consumers are harmed by **arbitrarily high and inconsistent charges** when they call directory enquiry ("**DQ**") services from mobile telephones.
- B. Consumers are unable to look up mobile telephone numbers via directory enquiries as **almost no mobile numbers are included in directory databases**.

This introduction sets the context for each issue and how and why Ofcom should address each issue, which are then addressed in detail in the main body of our response. For completeness, we have also answered Ofcom's specific Consultation questions in the attached Annex.

### **A High and inconsistent retail pricing of DQ services to mobile users**

Consumers (Ofcom's primary focus) expect that when they dial 118118 (or any other DQ service) the service will work on any network and they will pay a similar amount regardless of the network from which they call. That is not to say that the price must be exactly the same, as consumers do expect a small mark-up when calling from a mobile phone. Unfortunately, this consumer expectation of clear and consistent pricing is not met today.

The Number, in common with other third party DQ providers, has **no control over the retail prices consumers pay** when they access our service via a mobile network. This results in significant variations in price for consumers depending on which network they use, and in far higher prices being charged than would otherwise be the case. As can be seen from the table on the next page, a **caller may have the price of their 118118 call marked-up by their mobile operator by as much as 184%**<sup>1</sup>.

These material differences and high call charges inflate prices and hence **reduce take-up, ongoing use and access to DQ services**, and detrimentally affect our reputation, brand and our willingness to invest in new premium services via voice and SMS.

The clear regulatory regime governing wholesale access to BT's fixed network for third party DQ service providers<sup>2</sup> has delivered open, non-discriminatory access for providers like The Number to enable them to offer their DQ services to customers and to have a degree of control over the retail prices paid by those customers.

In contrast, the lack of a wholesale access solution for mobile networks has led to terminating communications providers ("**TCPs**") and third party DQ providers having no choice but to accept unfair and unreasonable terms for access to mobile networks and to consumers being vastly overcharged for calls to their DQ services.

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<sup>1</sup> Based on a 3-minute call from one of the top 4 mobile networks – correct at 21<sup>st</sup> September 2009.

<sup>2</sup> BT charges a regulated, cost-oriented price for originating calls and billing The Number's customers for 118118 calls.

### **Why consumers are harmed – some examples:**

#### ***For a one minute DQ call...***

The most common billable call length for 118118 calls is just under one minute<sup>3</sup>. A 118118 caller making that call:

- on **BT's** standard landline will pay **£1.05** – (the retail rate that The Number has requested and intended for 118118 customers);
- on **3's** mobile service will pay **£1.86** for the same call.

#### ***For a three minute connected call...***

Some customers like the convenience of being connected to the number they have requested. This is called 'call completion' and typically involves longer calls and longer billable call lengths. Three-minute calls are common for customers using this service. A 118118 caller making such a call:

- on **BT's** standard landline will pay **£1.66** for this call (a significant saving on calling BT's own 118500 service which costs £3.37 for this length of call<sup>4</sup>);
- on **T-Mobile** will pay **£4.50** for this call;
- on **O2** (the UK's largest network) will pay **£3.00** for this call.

In all of the above examples, **The Number receives exactly the same amount of money whether the call is made from a landline or mobile network.** The price differential is due to mobile operators applying a retail mark-up which The Number has no control over, and gains no benefit from, but which penalises its customers.

This consumer harm is directly caused by a "network access" issue<sup>5</sup> which urgently needs to be addressed through regulation. The continuing existence of this issue is inconsistent with Ofcom's duties, in particular its duties to further the interests of consumers and ensure choice and value for money.

We suggest that Ofcom should exercise its powers under the Communications Act 2003 ("**the Act**") to **impose an access-related condition on mobile network operators** requiring them to provide access to TCPs and third party DQ service providers on fair, reasonable and non-discriminatory ("**FRND**") terms. This will enable service providers to have a degree of control over the retail price paid by mobile users for their DQ services either by service providers being able to set a maximum retail price per service or by mobile operators being prevented from applying a mark-up above a fixed maximum percentage of wholesale charges for those services when retailing them to end-users.

<sup>3</sup> This example is based on a recent sample of calls where most common billable call length was 53 seconds.

<sup>4</sup> BT.com 22<sup>nd</sup> September 2009, "Calls to 118 500 cost 40p per call plus 99p per minute or part thereof, from BT landlines (excluding BT payphones). Mobiles and other networks may vary."

<sup>5</sup> See section 105 Communications Act 2003. "Network access" is defined in section 151(3) of the Act. Wholesale call origination to DQ services from mobile network operators constitutes a "network access" issue as it clearly satisfies the definition in section 151(3), being a service by means of which DQ providers are able, for the purposes of the provision of DQ services and call connection, to make use of mobile networks.

The setting of such a condition would be consistent with Ofcom's duties under sections 3 and 4 of the Act and would be a pro-competitive, proportionate and targeted response to the specific network access issue which has arisen. It would also be consistent with the approach which Ofcom says it is taking in the current Consultation and would contribute to the Digital Britain and Lisbon goals of growth and jobs<sup>6</sup>. In contrast, allowing the status quo to continue and taking no action would be inconsistent with Ofcom's duties.

**We therefore ask Ofcom to consult as soon as possible on whether there is a "network access" issue and options to address the issue, i.e. the imposition of an access-related condition.**

If Ofcom considers that an access-related condition would not be appropriate, **it should publish a notification setting out its reasons for that decision**<sup>7</sup>.

## **B Lack of mobile numbers in UK directories**

There are almost no mobile numbers in UK telephone directories. Despite the Universal Service Directive ("**the Directive**") requiring that a comprehensive database of fixed and mobile numbers is available to end-users in the UK, in 2009 **OSIS (the UK database operated by BT) contains less than 0.1%<sup>8</sup> of mobile numbers** – even less than in 2008.

Ofcom has not taken sufficient action to date to ensure that comprehensive data collection is taking place and that mobile numbers are being made available to directories. This is despite the UK having a legal obligation to implement the Directive in the UK and having already faced European Commission infringement proceedings for failing to have a comprehensive directory, as required by the Directive, because of a lack of mobile numbers.

We would note that The Number has previously drawn Ofcom's attention to this issue in its joint response with Conduit Enterprises dated 30 June 2008 to Ofcom's March 2008 Consultation on *Telephone Directory Information Obligations and Regulations* in which we made several suggestions of ways to tackle the problem of a lack of mobile numbers in UK directories. It is worth noting that there have been recent developments since our submission in other European countries to address this issue. For example Switzerland is now making mobile subscriber information available to DQ callers via a partial-privacy system that allows callers to be connected to subscribers' mobiles, but where numbers are not published. Such a system has been advocated and identified by The Number to Ofcom in the past. Developments in the Swiss market should be monitored to see if such a system could be effectively implemented in the UK.

**Finding an effective solution is likely to require regulatory action on the part of Ofcom with coordination and support from BIS.** Ofcom's ability to take such action should be unaffected by the ongoing litigation relating to the lawfulness of USC7, which is a discreet issue unrelated to the inclusion of mobile numbers in UK directories.

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<sup>6</sup> Our company is a significant employer. If the current situation of unfair terms for access and excessive price mark-ups is allowed to continue, the DQ industry will be forced to cut jobs and to reduce R&D into innovative services and databases due to consumers being priced out of the market by mobile mark-ups, resulting in declining usage of DQ products.

<sup>7</sup> Section 105 Communications Act 2003.

<sup>8</sup> There are approximately 70 million active mobile connections in the UK. There were about 62,000 mobile numbers in OSIS in 2008. On September 24<sup>th</sup> 2009 there are even fewer mobile numbers in OSIS - 55,715.

## **A Retail pricing of DQ services to mobile users – a network access issue**

### **How do DQ services work?**

1. DQ services<sup>9</sup> mainly consist of the provision via the telephone of information on subscribers of voice telephony services (directory information). They may also incorporate additional value-added services such as call completion (whereby the DQ provider will set up a telephone call connecting the customer to the person they wish to call), and/or alternative means of access and information delivery (e.g. receiving questions and then sending answers via SMS).
2. For the originating communications provider ("**OCP**") there is little difference at all from a standard user-to-user call. The only added feature is that the OCP (controlling access to the end user) bills the end user for the use of the DQ service on behalf of the third party DQ service provider. This billing function is performed as there is no ongoing contractual relationship between the DQ provider and the end user which would permit billing.
3. For landline services, DQ providers can purchase regulated access from BT where the transport of the call and the billing costs are charged at a standard cost-oriented rate. This model provides a framework which allows DQ providers to control end user charges for their services. There is currently no equivalent regulatory or pricing regime in respect of mobile networks.
4. This asymmetry is because BT has been found to have market power in the wholesale call origination market, whereas mobile operators have not. As a result, an SMP condition has been imposed on BT, but not on mobile operators.
5. However, whilst mobile operators have been found by Ofcom to not have market power in relation to wholesale call origination generally, the prices currently charged by mobile network operators to their subscribers to access DQ services provides clear evidence that there is a "network access" issue<sup>10</sup> which is not adequately addressed by the current regulatory framework.

### **Importance of independent value added services**

6. The importance of value-added services, and in particular DQ services, on digital platforms was highlighted in the Digital Britain Final Report as follows:

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<sup>9</sup> DQ providers register with national regulatory authorities ("**NRAs**") such as Ofcom. They are granted public numbering rights (e.g. to offer services via a 118XXX code in the UK) and are granted direct interconnection rights (and obligations) if desired. Larger players such as The Number employ their own SS7 switching platforms which interconnect with transit and access operators and are capable of managing their own call completion services. Smaller DQ providers may reach special network access agreements with transit operators who purchase and manage interconnection with the PSTN for them.

DQ providers are further required by national regulations such as The Phonepay Plus Code to provide information to customers on their tariffs. It is, accordingly, vital that DQ providers can control those retail prices.

<sup>10</sup> See section 105 Communications Act 2003. "Network access" is defined in section 151(3) of the Act. Wholesale call origination to DQ services from mobile network operators constitutes a "network access" issue as it clearly satisfies the definition in section 151(3), being a service by means of which DQ providers are able, for the purposes of the provision of DQ services and call connection, to make use of mobile networks.

***"A vibrant digital economy requires that independent value-added services can be delivered across digital platforms. Where this applies to voice services (such as directory enquiries) this might require Ofcom to mandate wholesale connection rates for operators with significant market power, including where the provider is shifting from one technology to another. It might also require a more active regulatory approach to ensure that services such as directory enquiries are kept relevant to consumers' expectations, and we support moves in Europe to ensure that requirements can be put on a wider range of operators to provide directory information to DQ service providers."***<sup>11</sup> (emphasis added)

7. As set out above, the Report also noted that regulatory action might be required to ensure that such services can successfully be delivered, and in our view, such **regulatory action is required to address access restrictions and should be taken as soon as possible.**

### **The economic and commercial context**

8. It is estimated that DQ providers have invested approximately €1 billion and created approximately 20,000 direct jobs in the EU as a result of liberalisation over the last five years or so.<sup>12</sup> Growth potential in DQ comes from two key areas of consumer demand:

- mobile users seeking access to advanced, high quality DQ services on the move (in liberalised markets, most DQ calls are generated from mobile telephones);
- services which offer access to more comprehensive and relevant information (including directory information on mobile subscribers).

9. In the Mostly Mobile consultation, Ofcom concludes that:

*"Our core finding is that competition within the mobile sector is generally working well: we see shifts in retail and wholesale market shares between existing players, switching levels are robust, new suppliers (such as MVNOs) are able to enter the market and providers are innovating with new product and price options."*<sup>13</sup>

10. Whilst this statement may be true for many areas, suppliers who offer third party services (such as DQ services) which require billing by mobile operators, but which are not MVNO offerings, **do NOT have the ability to innovate with price options.** 118118 is the most called phone number in the UK yet it cannot control its own retail price on mobile networks and finds that mobile operators mark-up the wholesale price significantly.

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<sup>11</sup> Digital Britain Final Report - chapter 3a, paragraph 23 – 'Conclusions'

<sup>12</sup> Providers include international companies such as: The Number, SEAT Pagine Gialle/Telegate, Yell and Pages Jaunes. The industry also creates a large number of indirect jobs for suppliers of DQ providers (database compilers, application and system providers, equipment suppliers, etc.) and providers of outsourcing services.

<sup>13</sup> Ofcom – Mostly Mobile consultation – 4.5

11. DQ providers' inability to innovate in pricing is due to the fact that mobile networks control access by their subscribers to third party services such as DQ. As in the case of mobile termination, a user's choice of mobile network confers monopoly power on that mobile operator with regard to the terms it can impose on third party service providers who wish to offer services to those users. This has a direct impact on the conditions under which these services can be offered to the end user. Like standard user-to-user call termination services, DQ connection services are non-substitutable interconnection services which DQ providers must purchase from each and every network operator.
12. **DQ interconnection services share the characteristics of call termination services, not MVNO agreements.** DQ services must be connected to the customers of each network to be viable<sup>14</sup>. The DQ service cannot just choose to negotiate with a different host network instead like a prospective MVNO may do.
13. We calculate that **DQ calls typically represent less than 0.1% of a mobile telephone bill.** Callers who want to use DQ services such as 118118 do not influence the wholesale charges or retail mark ups set by mobile operators as DQ services make up such a small proportion of total bills that consumers do not use these charges as the basis for deciding which mobile network to use<sup>15</sup>. DQ services are not purchased independently by users of telephony services but rather form part of the package of services which can be accessed via a telephone<sup>16</sup>. Consequently, mobile users have an insufficient incentive (given the cost and effort involved in doing so) to change network if the price of wholesale DQ connection services is increased, or significant retail mark-ups are applied. **The only way that retail prices will reduce for DQ services on mobile phones is if DQ service providers gain control of their own retail prices and onerous mobile retail mark-ups are removed in favour of cost-orientated access charges.** This will enable DQ service providers to pass savings on to consumer and to grow the market. DQ service providers have the most at stake in ensuring their consumers have the product they want at a fair price.
14. The issues described above have resulted in high and disparate charges for DQ access and a serious distortion of the DQ market to the detriment of consumers.<sup>17</sup>

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<sup>14</sup> Analysys observed in its report to the Commission on DQ liberalisation in 2002 that DQ is a high volume, low margin business.

<sup>15</sup> See, for example, the National Audit Office's survey on the DQ market in the UK, 18 March 2005.

<sup>16</sup> As Ofcom states in the Consultation:

*"The most intensive competitive pressure continues to be focused on the headline features of mobile packages – including, for example, handset offerings, line rentals and inclusive allowances. It may be the case that competitive pressure in other areas – less visible to consumers – is much less intense."*

*"This type of competitive behaviour is not uncommon in markets for complex bundled services and services with some switching costs. In particular, we would expect service providers to ...raise prices for those aspects to which consumers are least responsive (say, voicemail or roaming or calls to 08xx numbers)." (Ofcom, Mostly Mobile Consultation, section 4.46).*

<sup>17</sup> It should be borne in mind that mobile calls represent the majority of DQ call volumes in many Member States.

### **The need for DQ service providers to set their own retail price**

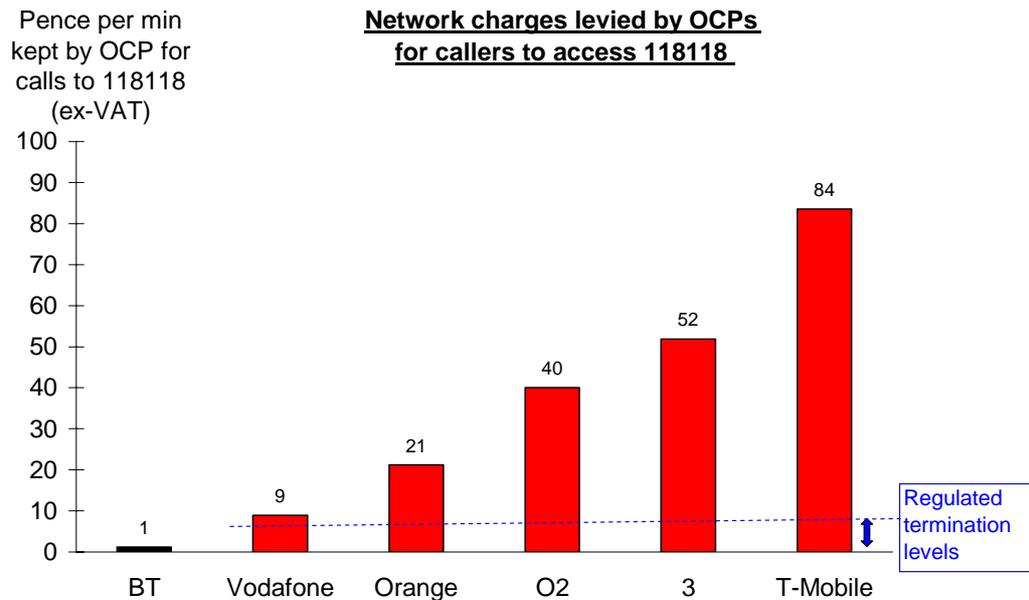
15. Consumers (Ofcom's primary focus) expect that when they dial 118118 (or any other DQ service) the service will work on any network and they will pay a similar amount regardless of the network from which they call. That is not to say that the price must be exactly the same - consumers do expect a small mark-up when calling from a mobile phone. Unfortunately, this consumer expectation of clear and consistent pricing is not met today.
16. **The Number and other DQ providers have no control over the retail pricing of their services on mobile networks.** This results in significant variations in price for consumers depending on which network they use, and in **far higher call charges** than would otherwise be the case.
17. For example, the most common billable call length for 118118 calls is just under one minute<sup>18</sup>. A 118118 caller making that call:
  - on **BT's** standard landline will pay **£1.05** – (the retail rate that The Number has requested and intended for 118118 customers);
  - on **3's** mobile service will pay **£1.86** for the same call.
18. Some customers like the convenience of being connected to the number they have requested. This is called 'call completion' and typically involves longer calls and longer billable call lengths. Three-minute calls are common for customers using this service. A 118118 caller making such a call:
  - on **BT's** standard landline will pay **£1.66** for this call (a significant saving on calling BT's own 118500 service which costs £3.37 for this length of call<sup>19</sup>);
  - on **T- Mobile** will pay **£4.50** for this call;
  - on **O2** (the UK's largest network) will pay **£3.00** for this call.
19. **In all of the above examples, The Number receives exactly the same amount of money. The price differential is due to mobile operators applying a retail mark-up which The Number has no control over, and gains no benefit from, but which penalises its customers.**
20. These differences and high mark-ups on call charges **harm customers, and impede access to, and ongoing use of, DQ services**, detrimentally affecting our reputation and brand and our willingness to invest in new premium services via voice and SMS.

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<sup>18</sup> This example is based on a recent sample of calls where most common billable call length was 53 seconds.

<sup>19</sup> BT.com 22<sup>nd</sup> September 2009, "Calls to 118 500 cost 40p per call plus 99p per minute or part thereof, from BT landlines (excluding BT payphones). Mobiles and other networks may vary."

21. In the case of DQ, the relationship between cost and price on mobile networks is not such as would prevail in fully competitive markets. Mobile operators set charges which bear no relation to either equivalent landline DQ connection services or cost-oriented mobile termination services (see graph below). This is clear, empirical evidence of market failure and of a network access issue that Ofcom should address.



Based on 3-minute call to 118118 averaged to per minute charge. Correct at 21st Sept 2009

22. The European Commission commissioned a study on the Pan-European Market for Premium Rate Services in 2004.<sup>20</sup> The scope of that study was all premium rate services (PRS), such as sports information, games, popular voting and chat lines, but was taken by the authors also to include DQ. The study recommended that a series of measures be adopted. One of the recommendations was that DQ providers should be able to determine the price and/or charge band for their services (Recommendation 24). This situation has not been achieved in the UK to date and these pricing problems have contributed to the decline in demand for DQ services in liberalised markets.<sup>21</sup>
23. In the Mostly Mobile consultation document, Ofcom states that:

*“A competitive market for communications ensures that companies are able to compete fairly, and allows businesses and consumers to benefit from a broad range of service provision. **Effective operation of competitive markets also has a role to play in driving economic growth, with lower costs helping to increase demand.**”*(emphasis added)

<sup>20</sup> Cullen International and WIK Consult report of 24 June 2005 (INFSO 2004/48614).

<sup>21</sup> See, for instance, the reports carried out for OFCOM on the DQ market in the UK and the market investigation carried out by the Consumer Association *UFC Que Choisir* in France.

24. As set out above, mobile callers to 118118 experience significant and unwarranted mark-ups. This situation clearly does not "lower costs" and is not "helping to increase demand" for our services.
25. If DQ providers can set their own retail price (or at the very least set a maximum retail price for each of their services) for their own services across all networks and there is a regulatory constraint on the wholesale origination charge (or retail mark-up), this would make prices cheaper and simpler for consumers to understand<sup>22</sup>. DQ providers could then implement lower and innovative retail tariffs, something which the current system of onerous mark-ups by mobile operators prevents.
26. The problems outlined above are increasing in significance as mobile communications become the primary medium for communications and content access, and as consumers are locked into longer and longer contracts<sup>23</sup>.
27. In the Consultation, Ofcom states that:
- "A few stakeholders asked us to launch a more wide-ranging review of competition issues. Some have been explicit in their desire that such a review be a platform for extending access regulation from the fixed sector (where regulated access is the norm) into the mobile sector (where it is not)... Our analysis shows that at the retail level the mobile sector is serving citizens and consumers reasonably well."*
28. The Number agrees that many aspects of retail mobile telephony are competitive and deliver considerable benefits to consumers. However, our concerns relate to a specific 'network access' issue arising where market forces fail to achieve desirable outcomes for consumers as evidenced by retail prices to access DQ services from mobiles.
29. During 2008, O2 overtook BT to become the largest UK telecoms provider in terms of connections with 21.5m subscriptions (19.5% of the total). In 2009 we now have a market where Ofcom deems there to be no single dominant player for retail telephony. This is a great achievement for competitive telephony but it is an oversimplification to view this as meaning that competition addresses all network access issues and that TCPs and third party service providers are able today to effectively and fairly access subscribers on all networks.
30. Ofcom goes on, in the Consultation, to say that:
- "The scope for service innovation and competition is likely to increase. Adding new services over next-generation mobile networks is likely to become easier and cheaper and new players may be able to enter the value chain without incurring high upfront network costs. As a result, the*

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<sup>22</sup> Third parties setting retail pricing already occurs in the Number Translation Service ("NTS") system, which introduced a range of service-level competition for independent value-added services wanting access to BT's customers. NTS enabled TCPs to offer their services at their chosen retail rates, with fair retentions levels.

<sup>23</sup> The following figures are from recent Ofcom reports into communications in the UK: 49% of customers in the UK are on contracts (not prepay) arrangements; In Q1 2009 13% of all mobile contracts locked in consumers for a 24-month period; in Q1 2009 nearly three-quarters of new connections were on contracts of 18 months or longer; "24-month terms are becoming increasingly common for higher priced contracts in order to subsidise high-end smartphones such as the iPhone, which is sold by O2 predominantly on 24-month contracts."

*pool of applications providers is already becoming larger and more diverse (including players based outside the UK).*

31. Adding new services over next-generation mobile networks may become easier and cheaper for the mobile networks, but if the networks retain control of the bottlenecks that govern mobile users' ability to access those services and the pricing of them, then any reduction in costs may never be passed on to consumers and innovation will be less likely.

### **How Ofcom should respond**

32. In our view, the evidence provided by:

- high and inconsistent retail prices; and
- low take up of DQ services on mobile networks,

raises a specific "network access" issue<sup>24</sup> which Ofcom should address in the interests of citizen-consumers. The continuing existence of this issue is inconsistent with Ofcom's duties, in particular its duties to further the interests of consumers and ensure choice and value for money.

33. Other national regulatory authorities ("**NRAs**") have recognised this problem (for example, the French Conseil de la Concurrence issued an opinion to the same effect on 31 March 2008).

34. In summary, as outlined above, the network access issue is as follows:

- in order to provide their services to mobile users, TCPs and third party DQ service providers require access to mobile networks and billing and collection services from mobile operators;
- access is currently unregulated and the terms offered to TCPs and third party DQ providers are unfair and unreasonable;
- in addition, third party DQ providers have no control over retail prices charged to mobile users for their DQ services, resulting in excessive mark-ups being applied by mobile operators when retailing these services to their 'captive' end-users;
- moreover, mobile operators with their own DQ services are able to distort competition and favour their services by pricing third party DQ services uncompetitively<sup>25</sup>.

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<sup>24</sup> See section 105 Communications Act 2003. "Network access" is defined in section 151(3) of the Act. Wholesale call origination to DQ services from mobile network operators constitutes a "network access" issue as it clearly satisfies the definition in section 151(3), being a service by means of which DQ providers are able, for the purposes of the provision of DQ services and call connection, to make use of mobile networks.

<sup>25</sup> For example, at least one network has a retail pricing structure in place for its own service which is not available to off-net services.

35. **We suggest that Ofcom should exercise its powers under the Act to impose an access-related condition on mobile network operators. The setting of such a condition would be consistent with Ofcom's duties under the Act.**

36. The following sets out:

- (a) Ofcom's powers under the Act to deal with network access issues;
- (b) Why exercising its powers would be consistent with Ofcom's duties under the Act;
- (c) Ofcom's exercise of its powers in the context of the current Consultation.

**(a) Ofcom's powers under the Communications Act 2003**

37. There are potentially several ways in which Ofcom could address this issue<sup>26</sup>, but we would suggest that the most appropriate and straightforward would be for Ofcom to use its powers under sections 45 and 73(2) of the Act to set an "access-related condition" on mobile network operators.

38. Under the proposed access condition, mobile operators would be required to provide access (including billing services) to terminating communications providers and third party DQ service providers on FRND terms. This should enable service providers to have a degree of control over the retail price paid by mobile users for their services either by being able to set a maximum retail price per service or by mobile operators being prevented from applying a mark-up above a fixed maximum percentage of wholesale charges for those services when retailing them to end-users.

39. An access-related condition may be applied to a person providing an electronic communications network (section 46(6)(b)), which would include the mobile operators.

40. Access-related conditions may include conditions relating to the provision of such network access and interoperability as Ofcom considers appropriate to secure:

- (i) efficiency on the part of network providers and those making associated facilities available;
- (ii) sustainable competition between them; and
- (iii) the greatest possible benefit for end-users of communications services (section 73(2)).

41. Such conditions can be set provided that they:

- (i) are objectively justifiable in relation to the network to which they relate;

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<sup>26</sup> For example, Ofcom could investigate (using its concurrent powers under the Competition Act 1998) the potential abuse by mobile operators of their dominant positions in access to their subscribers in terms of (i) their refusal to allow access to third parties to those subscribers on fair and reasonable terms, (ii) their discriminatory pricing of third party DQ services to those subscribers (as compared with prices for their own DQ services) and (iii) their excessive pricing of those services to their subscribers. However, such an investigation would not in our view be the most effective way of addressing the network access issue identified.

- (ii) do not unduly discriminate against particular persons or types of person; and
  - (iii) are proportionate and transparent in relation to what they are intended to achieve (section 47).
42. Taking each of these stipulations in turn:

***Efficiency***

43. At present there is little incentive on mobile operators to operate efficiently with respect to the provision of DQ services to their users. Users tied into long term contracts are unlikely to switch (with the associated cost that would entail) purely through dissatisfaction with the provision of such services. Absent access regulation, which would increase competition for those operators from third party DQ providers, operators are under little pressure to ensure that such services are provided in an efficient and cost-effective manner.

***Sustainable competition between providers***

44. Competition between mobile operators and third party providers in relation to the provision of DQ services is, at present, both distorted and limited as mobile operators control the pricing of both third party DQ services and their own DQ services.
45. Whilst third party DQ services, like those provided by The Number, might be more accurate and innovative than those offered by the mobile operators themselves, the operators' ability to price in a way which favours their own services means that consumers are accessing a more limited set of services or paying higher charges than would prevail were third party DQ providers permitted a degree of control over retail pricing for their services.
46. Allowing third party providers to specify maximum price per service at which their services can be retailed to end-users would be compliant with competition law and would enable third parties to better compete with the mobile operators. An alternative measure involving a maximum mark-up which mobile operators could apply to such services would also encourage greater competition than exists at present.

***Greatest possible benefit for end-users***

47. In ensuring access on regulated terms for third party DQ service providers and providing a mechanism by which the retail prices charged to mobile users for those services can be kept to a competitive minimum, the proposed access-related condition would offer the greatest possible benefit for end-users.
48. Without the control on retail charges, the condition would not be as effective at securing increased competition between mobile operators and third party DQ providers and the follow-on benefits of greater innovation, investment and choice that would bring.

49. If Ofcom takes no action at all, end-users would lose out on significant savings from lower DQ charges and on choice and innovation, neither of which is being encouraged by the current position.

***Objectively justifiable***

50. Imposing an access-related condition on mobile operators to provide access to third party DQ service providers on FRND terms is justifiable in that it would address the current situation where access is not being provided on those terms and consumers are, as a result, losing out through being overcharged for DQ calls and there being a lack of choice, competition and innovation in third party DQ services provided to mobile users.

***Not unduly discriminatory***

51. The proposed condition would not unduly discriminate against mobile operators as the condition would apply to all mobile operators equally and the fixed incumbent, BT, is already subject to a similar regime.

***Proportionate and transparent***

52. Such a condition would be proportionate and transparent in that it would be targeted only at addressing the specific network access issue which has arisen and would be the minimum action necessary to address it.

53. The condition would not be unduly onerous for mobile operators and the only material impact on those operators would be to reduce the excessive profits they currently make on retailing third party DQ (and other) services to their users, which would directly benefit those users. Third party DQ service providers would also have greater control over the prices being charged to mobile users (either by being able to specify maximum retail price per service or through a maximum mark-up being allowed on wholesale charges), which would in turn encourage the take up of such services and the creation of new services.

**(b) Why exercising its powers would be consistent with Ofcom's duties under the Act**

54. Both the EU Regulatory Framework and the recent Digital Britain report recognise the vital nature and value of DQ services (a universal service). Ofcom should therefore give serious consideration to the issues raised in this response and to how they should be addressed.

55. For example, Recital 11 of the Directive states that:

*"Directory information and a directory enquiry service constitute **an essential access tool** for publicly available telephone services **and form part of the universal service obligation**. Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers) and want this information to be presented in a non-preferential fashion..." (emphasis added).*

56. For that reason, Article 5 states that end users must have access to at least one comprehensive directory enquiry service (containing directory information on all telephony subscribers, subject only to data protection requirements), from any telephone terminal and at an affordable price, and Article 25(3) of the Directive states that:

*"Member States shall ensure that **all end-users** provided with a connection to the public telephone network **can access... directory enquiry services**".*

57. From the Digital Britain Final Report, which is also cited above:

*"A vibrant digital economy requires that independent value-added services can be delivered across digital platforms. Where this applies to voice services (such as directory enquiries) this might require Ofcom to mandate wholesale connection rates for operators with significant market power, including where the provider is shifting from one technology to another. It might also require a more active regulatory approach to ensure that services such as directory enquiries are kept relevant to consumers' expectations, and we support moves in Europe to ensure that requirements can be put on a wider range of operators to provide directory information to DQ service providers."<sup>27</sup> (emphasis added)*

#### **Ofcom's duties under the Act**

58. Of particular relevance in the present situation are the following duties of Ofcom under section 3 of the Act. In each case we set out why the continuing existence of the network access issue outlined above is inconsistent with these duties and why imposing an access-related condition would be consistent with them:

- (a) Ofcom's principal duty under **section 3(1)** "*(a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition*" – the interests of citizens and consumers would not be furthered by allowing mobile operators to continue to overcharge end-users for DQ services, whereas implementing an access-related condition as outlined above would do so and would also promote competition in those services;
- (b) Ofcom's **section 3(3)** duty to have regard, when performing its duties, to the principles under which regulatory activities should be "*transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed*" – imposing an access-related condition as set out above would be proportionate and targeted only at the specific network access issue identified;
- (c) Ofcom's **section 3(4)** duty to have regard, where relevant to the desirability of: "*promoting competition*" and "*encouraging investment and innovation*" - imposing an access-related condition as set out above would promote

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<sup>27</sup> Digital Britain Final Report - chapter 3a, paragraph 23 – "Conclusions".

competition in the provision of DQ services to mobile users and encourage investment and innovation in new services;

- (d) Ofcom's **section 3(5)** duty to have regard in furthering the interests of consumers to *"the interests of those consumers in respect of choice, price, quality of service and value for money"* – at present, mobile users are lacking a choice of DQ providers, paying excessively high charges for the services they can access and getting poor value for money as a result. Imposing an access-related condition as set out above would reduce prices and improve value for money, as well as encouraging new entry and therefore increased choice.

59. In addition, Ofcom has the following duties under section 4 of the Act, which transpose Article 8 of the Framework Directive<sup>28</sup>. In each case we again set out why the continuing existence of the network access issue outlined above is inconsistent with these duties and why imposing an access-related condition would be consistent with them:

- (a) Ofcom's **section 4(3)(b)** duty *"to promote competition ... (b) in relation to the provision and making available of services and facilities that are provided or made available in association with the provision of electronic communications networks and electronic communications services"* – imposing the access-related condition outlined above would promote competition in the provision of DQ services to mobile users, which is a service provided in association with mobile phone networks and services;
- (b) Ofcom's **section 4(5)** duty *"to promote the interest of all persons who are citizens of the European Union"* – the interests of citizens are not being promoted by allowing mobile operators to continue to overcharge end-users for DQ services, whereas implementing an access-related condition as outlined above would promote their interests;
- (c) Ofcom's **section 4(6)(a)** duty *"to take account of the desirability of OFCOM's carrying out their functions in a manner which, so far as practicable, does not favour – (a) one form of electronic communications network, electronic communications service or associated facility... over another"* – the present situation favours mobile operators' own DQ services over those of third parties. In allowing third party DQ service providers to set maximum retail price per service or limiting the mark-up which mobile operators can apply to wholesale charges for those services, an appropriate access-related condition would address this imbalance; and
- (d) Ofcom's **section 4(7)** duty *"to encourage [the provision of network access and service interoperability], to such extent as OFCOM consider appropriate for the purpose ... of securing – (a) efficiency and sustainable competition in the markets for electronic communications networks, electronic communications services and associated facilities; and (b) the maximum benefit for the persons who are customers of communications providers and of persons who make such facilities available"* – An access-

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<sup>28</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (the "Framework Directive").

related condition would encourage network access and service interoperability and therefore new entry and greater choice and value for money for consumers.

60. A further duty is referred to in section 105 of the Act - entitled "*Ofcom's duty to intervene on network access issues*" - which allows Ofcom, where it considers that a "network access" question has arisen and needs to be determined, to set an access-related condition under section 73(2) of the Act. Where Ofcom considers that there is a "network access" question – which in our view there clearly is here – Ofcom should either set an access-related condition or publish a notification setting out why setting such a condition would not be appropriate in this case. **We request that Ofcom considers the network access issue identified in this document and sets an access-related condition or publishes a notification setting out why that would be inappropriate.**
61. For all the above reasons, it should be apparent that allowing the status quo to continue and taking no action would not be consistent with Ofcom's duties, whereas imposing the access-related condition set out above would be consistent with those duties and would be a proportionate and targeted response to the specific network access issue which has arisen.
62. 118118 has been unsuccessfully trying to find a commercial solution to this issue. For example we have requested the mobile networks to treat 118118 in a similar manner to a Voice Shortcode. Voice Shortcode service providers can select a single retail tariff across the major mobile networks to set retail prices. However, we have experienced resistance to the proposed move and we can therefore see no alternative but for Ofcom to take the regulatory action outlined above.
- (c) Ofcom's exercise of its powers in the context of the current Consultation**
63. A proposal by Ofcom to impose an access-related condition on mobile network operators to address this specific network access issue would not be inconsistent with the approach which Ofcom says it is taking in the current Consultation.
64. Setting such a condition would not "*constitute a new regulatory approach*" or necessitate "*a wider market review*" and would be in line with the strategic principles set out in paragraph 1.15 to recognise the limits of markets (and respond to market failure) and to widen Ofcom's focus to reflect a changing world (wherein mobile services are growing in importance).
65. This is primarily a consumer issue and Ofcom has said it will continue to identify areas of consumer concern and take appropriate action (paragraph 1.17).
66. More pertinently still, Ofcom notes in paragraph 1.21 that service and content competition will become more important and it is therefore "*keen to encourage an environment in which third parties can access networks to offer innovative propositions to consumers*". Ofcom says that markets currently broadly achieve this objective, but it will use its competition and regulatory powers to ensure the market works effectively. We would suggest that this is just such a case where **Ofcom needs to exercise those powers to achieve its stated aim of encouraging third parties, here DQ service providers, to access networks in order to offer innovative services to end-users.**

67. We therefore ask Ofcom to consult as soon as possible on whether there is a "network access" issue and options to address the issue.

## **B The lack of mobile numbers in UK directories**

68. A further issue not fully addressed by Ofcom is that UK telephone directories contain almost no mobile numbers.

### **Directories must be comprehensive**

69. Article 5 of the Universal Service Directive requires that a comprehensive database of fixed and mobile numbers is available to end-users in the UK. However, OSIS (the UK database operated by BT) contains less than 0.1% of mobile numbers.

70. The Digital Britain Report noted that.

*"It might also require a more active regulatory approach to ensure that services such as **directory enquiries are kept relevant to consumers' expectations**, and we support moves in Europe to ensure that **requirements can be put on a wider range of operators to provide directory information to DQ service providers.**"<sup>29</sup>*

71. As set out above, Recital 11 of the Directive states that:

*"Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation. **Users and consumers desire comprehensive directories and a directory enquiry service covering all listed telephone subscribers and their numbers (including fixed and mobile numbers)** and want this information to be presented in a non-preferential fashion..." (emphasis added).*

72. Mobile communication is becoming increasingly important for voice communication. Every quarter, mobile voice grows whilst fixed voice declines. However, mobile numbers are not available in DQ services. This is both unacceptable from a consumer point of view and, in terms of mobile numbers, represents a failure on the part of the UK to properly implement the Directive.

73. Unless efforts are made to address this issue more fully, then DQ (which is recognised both by the Digital Britain Report and the Directive as being a vital and valuable service) will be increasingly diminished in value and comprehensiveness.

74. In the case of landline listings, critical mass was achieved by an opt-in methodology with suitable privacy protection. However, no effective efforts are being made to adopt a comprehensive approach to mobile listings and many NRAs continue to apply different rules for fixed and mobile numbers which impede the inclusion of mobile listings.<sup>30</sup>

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<sup>29</sup> Digital Britain Final Report - chapter 3a, paragraph 23 – 'Conclusions'

<sup>30</sup> For instance, NRAs may apply an "opt-out" system for fixed numbers as is currently the norm with the choice for the subscriber to be excluded from the directory database, and generally an "opt-in" system for mobile numbers.

### **The role of mobile operators**

75. There is variation between operators in the level of collection and inclusion of subscriber listings in DQ databases. Most mobile operators have historically failed, and continue to fail, to ensure the effective collection of customer consent (i.e. mobile operators do not offer subscribers a real and adequate opportunity to indicate their wish to be included in the directory database) and this is reflected in the low level of directory information available from mobile networks for inclusion in DQ directories. This continues even though innovative privacy options are now available from DQ providers like The Number, which would address many of the privacy concerns about directory entry which mobile users have. It is worth noting that Switzerland is currently implementing a system to make mobile numbers more widely contactable via Directory Enquiries services, but where mobile numbers are not published.
76. The situation also persists despite Article 25(1) of the Directive, which requires Member States to ensure that all subscribers have a right to have an entry in a directory, and Article 25(2), which requires mobile operators (among others) to make their subscribers' numbers available to directories and DQ providers.

### **Previous attempts to increase the volume of mobile numbers**

77. In our view, Ofcom has not taken sufficient action to date to comply with the UK's obligations under the Directive to ensure that mobile numbers are being made available to directories in sufficient volumes. This is despite the UK already having faced EU infringement proceedings in June 2007 for failing to have a comprehensive directory because of a lack of mobile numbers, and Ofcom having given assurances to the European Commission that corrective measures were being taken with mobile operators to rectify the situation.
78. We understand that those measures included:
- (i) establishing arrangements between mobile providers and BT for the provision of subscriber data to OSIS;
  - (ii) amending mobile operators' codes of practice and terms and conditions to enable directory listing; and
  - (iii) informing mobile subscribers and implementing procedures to meet subscriber requests for directory listing.
79. Notwithstanding these measures, the volume of mobile numbers in UK directories continues to be negligible and Ofcom should therefore now take further steps to increase the number of mobile numbers in UK directories, particularly in view of the importance of comprehensiveness of those directories (see Recital 11 of the Directive set out above) and to ensure that DQ services remain "*relevant to consumers' expectations*" (the Digital Britain Report cited above).
80. In the absence of an effective pan-industry approach to this issue, and appropriate regulatory action by Ofcom, it would not be surprising if there were to be a repeat of the fiasco that happened when 118800 tried to launch an independent mobile DQ service without the consent and involvement of the mobile networks and the mobile customers whose numbers were due to be listed.

## Possible solutions

81. In our response to Ofcom's March 2008 Consultation on *Telephone Directory Information Obligations and Regulations*, we suggested a number of actions which could be taken to address this problem as follows:
- (a) Ideally, an **"opt-out" system should apply for both fixed and mobile subscribers** so that a critical mass of mobile numbers can be added to UK directories. If, however, an "opt-in" methodology is used, mobile operators should take effective steps to allow customers to elect to be included when they subscribe to mobile phone services;
  - (b) In that regard, **mobile operators should be mandated to provide accurate and unbiased information to their customers about directory listing options** – they should also be encouraged to promote use of partial privacy options to their subscribers rather than simply ex-directory status. Partial privacy options involve inclusion in OSIS for certain products, but where a number is not included in publicly published directories (such as print and online). Such numbers are thus unlikely to be used for direct marketing, as their use is restricted and they are less readily available. The use of this type of listing should alleviate the privacy concerns of mobile operators and mobile users;
  - (c) **An independent third party (not a network operator) could set up and maintain a standalone database of mobile numbers.** This could operate in a similar way to BT's Pathfinder service and allow DQ providers to access the database online and query it directly. The DQ provider would never see the mobile number itself, but would be able either to connect a caller to that number or to have a text sent to the mobile number retrieved by the search to say that a particular caller was trying to reach them. In this way, numbers would never be leaked to companies who might want to target mobile users for marketing purposes;
  - (d) **General Condition 8 ("GC8") could be amended to require mobile operators to offer subscribers the opportunity to have a directory listing**, after giving them full information about the listing options available. This will require adequate retraining of mobile operators' call handling staff<sup>31</sup> - At present, directory entries are secured through a combination of GC8.1(b) and GC8.2, which require, in the case of operators generally, that they ensure that any End-User can access a DQ facility containing directory information on all subscribers in the UK (except those who are ex-directory). Alternatively, a direct obligation on BT to provide directory entries in OSIS to end-users may achieve the same result;
  - (e) **GC8.4 should be amended to prohibit communications providers from charging a fee for inclusion in a directory.** As we stated in our previous response on this issue (*Telephone Directory Information Obligations and Regulation*), this type of charge is inappropriate and, if put into practice, likely to discourage users from having an entry in a directory. The ability to

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<sup>31</sup> As evidenced in call transcripts annexed to our response to Ofcom's March 2008 Consultation on *Telephone Directory Information Obligations and Regulations*, mobile operator call handling staff rarely offer new subscribers the opportunity to be included in a directory and are unaware of the directory options available.

charge a fee is not contained in the Universal Service Directive and runs counter to the aims of that Directive, in particular that directories should be comprehensive;

- (f) **Ofcom should monitor** the level of numbers being made available to directories by individual mobile operators to identify those operators which are not making a concerted effort to increase the number of mobile subscribers being included in UK directories (e.g. to monitor the per cent of subscribers with a directory entry);
  - (g) A **contractual mechanism** could be put in place to allow mobile operators to take enforcement action themselves against anyone using data from OSIS for direct marketing where that data relates to their customers. One problem is that there appears to be an incentive at present for mobile operators to encourage their customers to be ex directory for fear that otherwise they will be stolen or marketed to by rival mobile operators. Although OSIS licence terms currently prevent use of the data for direct marketing purposes (clause 3.2.5 of the OSIS Standard Licence), this relies on BT for enforcement, which may not offer sufficient comfort to mobile operators. Some mechanism (e.g. contractual) needs to be put in place to allow mobile operators to take enforcement action themselves against anyone using data from OSIS for direct marketing where that data relates to their customers; and
  - (h) The **1998 code on fair processing and directory information** could be revised and reissued by the Information Commissioner. The revised code could make clear that use of directory information for direct marketing is prohibited and that mobile operators must provide full information to customers about the various listing options available in order to comply with their "fair" processing obligations. The code might also allow for operators and DQ providers to complain directly to the Information Commissioner and Ofcom about others misusing directory information to request that enforcement action be taken.
82. Taking any or all of the actions above would be consistent with Ofcom's principal duty under section 3(1) *"(a) to further the interests of citizens in relation to communications matters; and (b) to further the interests of consumers in relevant markets, where appropriate by promoting competition"* by ensuring that directories and DQ services are as comprehensive as possible. Such action would also be consistent with Ofcom's other duties under sections 3 and 4 of the Act.
83. More importantly, however, the UK is under a legal obligation to properly implement the Universal Service Directive in the UK and this includes ensuring the comprehensives of the UK database of directory information by ensuring that mobile numbers are included. This obligation was of course brought to the UK's attention in the June 2007 European Commission enforcement proceedings.
84. Finding an effective solution is likely to require regulatory action on the part of Ofcom with coordination and support from BIS. Ofcom's ability to take such action should be unaffected by the ongoing litigation relating to the lawfulness of USC7, which is a discreet issue unrelated to the inclusion of mobile numbers in UK directories.

## **Annex – Answers to Consultation questions**

### **2.1 Do you agree with our principles for mobile regulation?**

The Number broadly agrees with Ofcom's stated principles as long as closer attention is paid to items that respondents previously drew attention to (which are detailed in the Consultation document):

- *"Members of the public painted a mixed picture in terms of the services provided and questioned the competitiveness of a market in which some users perceived all operators' offers to be the same and prices to be high.*
- *Consumer organisations highlighted the increasing complexity of offers<sup>32</sup>...*
- *Representatives of service providers, and new entrants, stressed the need for a level playing field."*
- *"problems faced by particular groups of users, specifically elderly people and people with disabilities, in making the most of mobile services<sup>33</sup>."*

For Ofcom to achieve its stated goals, it needs to address the issues outlined above in the main body of this response in the manner suggested. Taking such action would be consistent with Ofcom's statutory duties.

Ofcom must take action now to ensure that consumers will be able to access services in a converged environment if it wants to ensure consumers can use services reliably while commuting, travelling, at home or in the office, whether accessing via mobile, VoIP, or other technologies.

### **The changing market environment**

#### **Q 3.1: Are there any additional sector trends that we should consider in our analysis?**

In Q1 2009 nearly three-quarters of new mobile subscriber connections were on contracts of 18 months or longer<sup>34</sup>. The introduction of longer contracts for mobile customers mean less frequent hardware upgrades (due to the role of contract renewals in subsidised handset lifecycles in the UK) and will likely mean longer life-cycles for any service innovations that rely on new technologies.

#### **Q 3.2: Have we identified the right regulatory challenges?**

We note the following consumer comment from the MSA 1 (Mobile Market Sector Assessment 1):

- *"I had to call the police once, and was horrified about the £10 added to my bill I got for a couple of minutes talking on 0800 number, there is little excuse for this behaviour."*

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<sup>32</sup> Ofcom, Mostly Mobile consultation – section 2.17

<sup>33</sup> Ofcom, Mostly Mobile consultation – section 2.18

<sup>34</sup> Ofcom, Communications market report P258, section 4.1.7

This consumer statement clearly shows that the current regulatory environment has flaws that need addressing to benefit consumers. So far, Ofcom has not dealt adequately with issues like this or issues such as DQ retail pricing and the excessive mark-ups added by mobile operators to those services. This shows there is a gap in the regulatory approach that needs to be addressed. Doing nothing, or continuing to rely on the status quo will not solve this issue for consumers and is inconsistent with Ofcom's duties.

In addition, Ofcom has not taken sufficient action to date to deal with the lack of mobile numbers in directories.

Please see our detailed submission on these issues in the main response above.

### **Competition and new entry**

**Q 4.1: We have outlined a number of factors which may affect the future market structure, including network sharing, spectrum and potential consolidation. Do you agree with this assessment, including risks and benefits that we have outlined?**

Ofcom has broadly outlined the correct factors that may affect the future market structure. One comment seemed particularly prescient:

*“the intensity of competition in today’s market seems to be linked to the market structure at the wholesale level (that is, the number of competing networks). If this structure changed materially, a much closer examination of the impact on competition of any change could be required.”<sup>35</sup>*

Since publication of this document, T-Mobile and Orange have proposed a Joint Venture which could significantly alter the competitive landscape in the UK and which will require careful consideration to ensure that it does not result in reduced competition for consumers.

**Q 4.2: Do you see any risks to competition that we have not highlighted?**

Please see our detailed submission on this issue in the main response above.

**Q 4.3: Do you agree that a market review in the mobile sector (other than in the call termination market) is not currently required?**

Ofcom states:

*“We do not see the need to consider regulating access by third parties (such as MVNOs or application providers) to mobile networks in a competitive market. It would be appropriate to revisit this decision if, for example, we see anti-competitive behaviour, including limitations in the supply of wholesale services to access seekers, that cannot adequately be addressed using ex post intervention...”*

Ofcom must address the issue of how to end the current system where independent providers of value added services (such as DQ) cannot control their own retail price, and where their customers experience excessive and haphazard retail mark-ups.

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<sup>35</sup> Ofcom, Mostly Mobile, clause 4.6

However, the specific network access issue we have identified can be addressed without conducting a market review.

This issue is discussed further in the main body of the response above.

**Q 4.4: We have concluded that competition in the mobile sector is currently addressing access concerns adequately. Do you agree?**

We disagree. Current unregulated terms for access to mobile networks for third party services such as DQ are unfair, distort competition and limit consumers' adoption of those services. Customers are tied to their mobile networks for long periods and their access to third party services is controlled by the mobile operator.

If a customer then chooses to dial a service such as DQ and discovers that their operator applies a significant mark-up that they were not expecting for those calls, it is unreasonable to expect that that customer will switch networks as a way to solve this issue, as the switching costs involved in doing so (in time, effort and money) are too great to merit that response.

Ofcom states:

*“ We believe that the mobile sector is currently serving citizens and consumers reasonably well and are not planning to conduct further assessment, such as a market review for mobile call origination, at this stage. We will therefore not be considering the imposition of remedies, such as wholesale access conditions, at this stage. In reaching this view, upon which we are consulting, we have considered the following factors:...*

- *service and price innovation continues to take place<sup>36</sup> ...”*

Whilst this assertion may be broadly right for a range of services, we do not see evidence of this as regards pricing methods and levels for services such as 118 services where extensive efforts to achieve simpler, better tariffs have been rejected by some industry players and so have made it impossible to achieve thus far. In addition, the extremely high levels of mark-ups and retentions is limiting the innovation that third party services would engage in if they could offer their services to consumers at lower prices. In effect, it has turned content and premium services into being a niche offering.

Phonepay Plus monitors outpayment revenues from value-added services such as DQ, and premium SMS. Outpayments report the levels of revenue earned by services offering premium content, as opposed to the level of retail pricing paid by consumers. Phonepay Plus has reported a trend of declining outpayment revenues for premium services (Q1 2007 = £157M, Q1 2008 = £152M, Q1 2009 = £135M<sup>37</sup>). These figures show the revenues in the UK are declining, instead of growing and seems to contrast with the governments aims to see the UK have a vibrant Digital economy including value-added services. The Number believes that steep mark-ups by OCPs have contributed to this.

*“Although there is no obligation for mobile operators to provide access to wholesale services, we may become concerned if mobile operators were to deny*

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<sup>36</sup> Ofcom, Mostly Mobile consultation, section 4.71

<sup>37</sup> Phonepay Plus – Quarterly Report 2009-10 Q1 published 5<sup>th</sup> August 2009

*or restrict such access in a persistent manner to the detriment of the MVNO market<sup>38</sup>.”*

Access to DQ calls is being priced in such a way as to persistently restrict access. It is essential for Ofcom to take action to remove mobile operators' persistent restrictions on access to DQ services.

Ofcom feels there is cause for hope:

*“Despite these potential access restrictions, mobile operators appear to be providing access adequately; we see that entry barriers for services such as VoIP over mobile are decreasing, new applications are launching over mobile platforms, and MVNOs continue to enter the market and secure unregulated access to wholesale services from mobile operators.”*

It is worth noting that these developments are focused on areas where mobile networks have been unsuccessful in gaining further revenues themselves. It is notable that access restrictions and mark-ups have largely remained unaltered for mature areas of existing and ongoing revenue and profit for OCPs (such as DQ, premium rated voice and Premium SMS services).

This issue is discussed further in the main body of the response above.

## **Investment**

### **Q 5.1: Do you agree with our assessment of investment in the UK mobile market and our priorities to secure future efficient investment?**

The most effective way for networks to reclaim investment costs is to accelerate network deployment in an open manner which enables access by third party services.

Efficient investment promotion must be an integral part of Ofcom's other duties in terms of promoting competition and protecting consumers. The promotion of efficient investment can only be achieved if consumers are protected during transition/migration phases from one platform or technology to another whilst also ensuring investors do not foreclose downstream markets (or create bottlenecks for upstream markets).

The same principles apply to encouraging the maximum amount of services to operate on those networks. Ad Scheepbouwer, CEO of KPN (Netherlands) has experienced the benefits of working with open networks. In February this year he said:

*“In hindsight, KPN made a mistake back in 1996. We were not too enthusiastic to be forced to allow competitors on our old wireline network. That turned out not to be very wise. If you allow all your competitors on your network, all services will run on your network, and that results in the lowest cost possible per service. Which in turn attracts more customers for those services, so your network grows much faster. An open network is not charity from us, in the long run it simply works best for everybody.”<sup>1</sup>*

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<sup>38</sup> Ofcom, Mostly Mobile consultation, section 4.90

The introduction of MVNOs in the UK is welcomed, but it is now time for Ofcom to ensure that access is available on reasonable terms that will encourage investment by third parties in new value added services and applications as well.

The particular problems which have arisen in the context of the provision of third party DQ services on mobile networks, and the regulatory action which Ofcom should take to address those problems, are set out in detail in the main response above.

## **Section 6 – Consumer protection and empowerment**

***Q 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?***

Yes. Please see our main response.

***Q 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 the need to apply regulation only when effective and proportionate. Do you agree?***

No. Please see our main response.

***Q 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?***

Yes. Please see our main response.

## **Access and inclusion for disabled and vulnerable citizens**

***Q 7: What steps could be taken to improve access to mobile for disabled people?***

*“Mobile telephony, with its focus on text-based communication, was felt to have changed the lives of many people with a hearing impairment, enabling them to communicate using a convenient, mainstream method.”<sup>39</sup>*

The Consultation identified ways to overcome barriers to entry and the list included, “reduction in cost barriers”. Current network retentions for Premium SMS services are unnecessarily burdensome and inflate retail prices, disproportionately burdening some of the very consumers that Ofcom has a duty to serve effectively.

Recital 11 of the Universal Service Directive states that:

***“Directory information and a directory enquiry service constitute an essential access tool for publicly available telephone services and form part of the universal service obligation.”***

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<sup>39</sup> Ofcom, Mostly Mobile, section 7.32

For that reason, Article 5 states that end users must have access to at least one comprehensive directory enquiry service (containing directory information on all telephony subscribers, subject only to data protection requirements), from any telephone terminal and at an affordable price, and Article 25(3) of the Directive states that:

*"Member States shall ensure that **all end-users** provided with a connection to the public telephone network **can access... directory enquiry services**".*

In order to enable lower prices and hence to widen accessibility, Ofcom should seek to reduce mobile network retentions on premium SMS information services to be cost-oriented, for services such as DQ which is identified in the Universal Service Directive as a universal service of importance to consumers.

### **Coverage**

***Q 8.1: Do you agree that our proposed facilitation role around mobile not-spot issues is a realistic and sensible thing to do?***

No comment.

***Q 8.2: Do you agree with our general approach set out in the table above? Are there are any other actions we should take and why?***

No comment.

### **Mobile content**

***Q 9.1: Are there any additional issues about mobile content and accessing content via mobile that should be considered?***

Please see our main response.

***Q 9.2: We have set out some differences between accessing content via the fixed internet and via mobile. Are there any further differences?***

We observe that the network access issue we identify in this response is also an issue in the VoIP market and similarly needs addressing.

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For questions and further information, please contact:

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