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Dear Justin

New Voice Services

O2 (UK) Ltd ("O2 UK") welcomes the opportunity to respond to Ofcom's consultation on new voice services¹. We are also grateful for the extension of a week in which to submit our response.

As the consultation illustrates, the emergence of new services raises difficult regulatory problems that Ofcom needs to deal with. O2 UK generally agrees that the criteria that Ofcom identify as relevant when considering the issue (encouraging competition, promoting the interests of consumers and minimising the degree of distortion to markets resulting from regulation) are right, although the principle of technological neutrality should also guide policy making.

However, we do have some concerns about Ofcom's proposed approach and these are set out below. In addition, our answers to some of the questions posed in the consultation document can be found in the attached Annex.

Uniform regulatory principles

O2 UK believes that the principle of technological neutrality should be a cornerstone of policy making in this area. We do not necessarily advocate that all regulatory rules should apply across the piece, but all regulation should adhere to good regulatory principles (proportionality, non discriminatory application, objective justification and accountability). Where an element of discretion is needed, this should be built into the wording of the regulation itself. Non binding guidance may be issued by Ofcom to inform stakeholders of the way that such discretion is likely to be exercised in practice.

¹ New voice services – A consultation and interim guidance, Ofcom, 6 September 2004



Interim policy

O2 UK is surprised that Ofcom has introduced its interim policy to forbear from enforcing PATS obligations against new voice services which offer access to 999. We believe that it might be regarded as discriminatory.

Firstly, it would seem that providers of new voice services that offer access to 999 could, in practice, comply with other (if not all) regulatory obligations. However, Ofcom appears to be providing them with a very wide ranging assurance that they do not risk enforcement action on *any* regulatory obligation, even those that they can easily comply with.

O2 UK does not understand how this policy can be squared with the concept of technological neutrality, the importance of which Ofcom acknowledges. It would seem that Ofcom is proposing not to enforce regulatory obligations on providers of new voice services, based on the form of technology they employ.

This is even more surprising when one considers that third parties may seek to enforce providers' regulatory obligations only with Ofcom's consent. It seems unlikely that Ofcom would be willing to give such consent in circumstances where it has decided not to take enforcement action itself. This point does not seem to be addressed in the consultation document.

Further, if Ofcom wishes to review its position, and seek to enforce the requirements under the General Conditions of Entitlement, it might find itself in a harder position than it would have been if it hadn't implemented its interim policy.

Proposal to allow providers to determine whether they provide PATS

O2 UK believes that Ofcom needs to consider carefully the consequences of its alternative approach on the provision of PATS, as described in paragraphs 4.72 – 4.76. The proposal appears to be made on the basis that providers of conventional voice services would wish to continue providing PATS. O2 UK does not share Ofcom's view – it is quite conceivable that there could be an incentive for an existing provider not to provide PATS. For example, a provider that does not provide PATS would not have to offer its customers number portability.

O2 UK believes that Ofcom should exercise caution when determining policy in this area.

Consumers' understanding of new services

O2 UK agrees with Ofcom that consumers are better off making informed purchasing decisions, than having their choice restricted artificially through regulation. However, we are concerned that this Utopian vision is unlikely to be realised in the case of new voice services, except in the medium to long term. In the intervening period, some consumer detriment may be experienced, and Ofcom needs to factor this into its analysis.



When new consumer services are introduced, consumers typically experience a learning curve. They are generally cautious at first - initially, take up might be slow. Over time, as consumers' understanding of new services increases, they feel more comfortable and consumption increases to an economically appropriate level (ie where marginal benefit though purchasing an additional unit equates to marginal cost).

The difficulty with the introduction of new voice services, however, is that consumers are likely to rely on an understanding of the nature of voice services based entirely on their perceptions of existing, conventional services. Where new voice services are not the same as existing ones, consumers are likely to be in a worse position than they are with the introduction of a brand new service. This is because they may well be labouring under incorrect beliefs, that a service may be more valuable than it actually is, rather than having no understanding at all. On this basis, consumers are more likely to make incorrect purchasing decisions (ie buy too much), rather than electing not to purchase when, given more knowledge, they might have.

The problem is likely to be compounded where the provider of a new voice service is also a provider of existing services – in order to make rational purchasing decisions, consumers would have to have an understanding of the distinction between conventional voice services and new voice services and be able to determine which of the two an established provider of conventional voice services is offering. The situation is likely to be exacerbated if the new voice service is marketed as a substitute for the conventional voice service. The following link is instructive: <http://www.btplc.com/Innovation/Mobility/everywhere/index.htm>²

The difficulty in educating consumers of new services should not be underestimated – the recent liberalisation of directory enquiry services is very instructive. In that case, consumers were confused about the relatively straightforward replacement of the 192 service with a plethora of 118xxx services. O2 UK believes that Ofcom should proceed on an extremely cautious basis.

O2 UK believes that educating consumers in these circumstances will be an enormous task. Ofcom should play a major role in this, establishing criteria for measuring consumer understanding, undertaking a programme of research to determine the extent of knowledge amongst consumers over time, and intervening as appropriate where consumer knowledge falls short. We are concerned that a more vigorous approach on consumer education was not set out in the consultation document.

² see in particular "The user needs to be within range of a Bluephone-enabled site - home, office or maybe some public sites such as coffee shops - to have the call go *across the PSTN* network. When out of range, the handset will act as a standard mobile phone and send and receive calls over the GSM network. We are aiming for seamless roaming as the project progresses." Emphasis added



Policy on information for consumers

Essentially, the problem identified by Ofcom is one of information asymmetry. Providers of new voice services understand the nature of those services better than potential consumers.

The problem of information asymmetry has been the subject of much analysis by regulatory authorities. In particular, the Office of Fair Trading commissioned academic research designed to propose a way of measuring consumer detriment resulting from information asymmetry and proposing appropriate remedies³. O2 UK believes that Ofcom would find this work useful. It can be found here: <http://www.ofcom.gov.uk/NR/rdonlyres/8B55B6C2-F4AA-471A-BD9B-89741B14A0C6/oft194.pdf>

Conclusions

O2 UK supports Ofcom's intention to encourage innovation and the proliferation of new services. Nevertheless, we feel that Ofcom should exercise caution in its approach to this matter, step back from informal and formal deregulation and consider the issues in the round.

Seeking to create exceptions to regulations that to date, have applied to all providers is likely to create problems in the future. There are social benefits that are realised through the obligation to provide certain services, including reliable access to 999. These may be lost if take up of new voice services is widespread. Ofcom's duty to protect the interests of citizens as well as consumers may be compromised by this.

In addition, any future decision to seek to rescind an assurance that enforcement action will not be taken may be very hard to implement in practice.

There is a great likelihood that the introduction of new voice services would result in an information asymmetry problem – it is likely that consumers would not be clear about the nature of the services they are buying. In O2's view, Ofcom needs to address this before it changes the regulatory regime to facilitate market entry.

Technological neutrality needs to be at the heart of Ofcom's approach. If the General Conditions of Entitlement need to be reviewed, then the review needs to be wider in scope than merely seeking to facilitate entry into the market of new voice service providers. The applicability of the General Conditions of Entitlement to all providers should be the subject of such a review.

³ Consumer Detriment under Conditions of Imperfect Information, prepared for the Office of Fair Trading by London Economics, August 1997. Research paper 11



I hope you find this helpful. Please contact me if you would like to discuss this matter.

Yours sincerely

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O2 (UK) Ltd's response to the questions posed in the consultation on New Voice Services

Section 4

Question 2: What are the main policy challenges raised by the introduction of new voice services for consumer protection and regulation?

We believe that Ofcom has identified the main policy challenge – the tension between promoting innovation and the introduction of new services, on the one hand, and protecting the interests of consumers, on the other.

Question 3: Do you agree with the initial top level aims identified by Ofcom?

Yes, but we believe that, in addition, technological neutrality should inform Ofcom's policy making. This is key to ensure the non discriminatory application of regulation and to avoid sub optimal investment.

Question 4: Are there other aims and criteria that Ofcom should consider?

See the response to question 3 above.

Question 5: Are there other key policy questions that Ofcom should be considering?

Clearly the introduction of new voice services needs to be considered in the review of universal fixed services. Issues might include the extent to which customers switch to new fixed voice services and whether providers should contribute to the provision of universal fixed services.

Question 6: Do you agree with Ofcom's initial view that it is not necessary for all voice services to provide the same standard features as traditional telephone services, and that we should instead focus on enabling consumers to make informed decisions?

O2 UK believes that regulatory intervention should be subject to the same analysis, regardless of the technology that provides for different services. We would prefer Ofcom to apply the principles of good regulation, as set out in European legislation, and the Better Regulation Task Force's five principles of good regulation, across the industries it regulates.



So, while we do not necessarily disagree with Ofcom's initial view, that is only because we believe that this outcome could be consistent with the proper application of regulation.

On the issue of consumers making informed decisions, Ofcom should not underestimate the task in hand and would be wise to adopt a cautious approach.

Question 7: Do you agree with Ofcom's initial view that it is not desirable to draw a distinction between the regulation of services that look like traditional services and those that do not?

Yes

Question 8: Do you agree with Ofcom's initial view that a distinction should not be drawn between the regulation of 'second line' services and 'primary' services?

Yes

Question 9: Do you think that a threshold should be set at which new voice services should be required offer the same features as traditional voice services? If so, how should the threshold be set?

This seems to be an unappealing option, for the reasons set out in the consultation.

Question 10: Do you agree that most providers would want to offer at least a basic form of access to 999?

Others would be in a better position than O2 UK to respond to this.

Question 11: Do you agree with Ofcom's initial view that consumers sufficiently value having access to 999 in order for them to wish to retain at least one means of 'high quality' (very reliable) access to 999 at home?

O2 UK would be interested to see the views of consumer representative groups on this. However, we believe the more relevant factor is the extent to which consumers understand the nature of the services they purchase.

There is also a wider social issue that needs to be addressed. In the consultation document, Ofcom refers to the "babysitter" scenario, where an end user has no idea of the nature of the service that they are using. However, it is conceivable that there are wider social benefits of the existing requirement to offer high quality access and that these may be lost if take up of new voice services with less reliable access becomes widespread. In the case of the babysitter, one might argue that the he or



she could use next door's conventional voice service if the house that they're baby sitting at doesn't have access to a high quality 999 service. But what if that house or the surrounding houses do not have access, either? It seems to us that the introduction of new voice services, while possibly providing benefits to consumers, may lead to detriment experienced by citizens, if citizens' access to 999 is compromised.

The social benefits that the existing obligation provides for need to be factored into Ofcom's thinking.

Question 12: Do you agree with Ofcom's initial view that not all voice services should be required to offer access to 999 but that decisions about subscribing to and using such services must be properly informed?

O2 UK believes that the current regulatory regime requires PATS providers to comply with all relevant General Conditions, including the duty to provide access to 999. O2 UK would welcome a review of the General Conditions of Entitlement, but such a review should be more wide ranging than merely seeking to allow providers of new voice services to escape their regulatory requirements, purely on the basis that they are new, delivered on a different technology and allegedly cheaper to provide.

If Ofcom wishes to implement a de-minimis General Conditions regime, then it should introduce this approach across the board and review the General Conditions of Entitlement for all classes of service and technologies.

Question 13: Do you agree with Ofcom's initial view that given some new services may not be able to offer the same degree of reliability for emergency calls as traditional voice services, it is better that these services are able to provide less reliable access to 999 rather than preventing them from offering any access at all?

Please see our response to question 12, above.

Question 15: Do you agree with Ofcom's understanding of the implications of the definition of PATS contained in the Directives?

Yes.

Question 16: Do you agree with Ofcom's understanding of the implications of this alternative approach?

There are potentially very wide ranging implications of allowing providers whose services conform to the definition of PATS, to determine whether or not they wish their services to be regarded as PATS.



It is not at all clear that such discretion ought to be afforded only to providers of new voice services. Indeed, to insist on this would seem to be discriminatory. And O2 UK does not share Ofcom's initial view that providers of "primary line services" would necessarily wish to continue to offer PATS. It seems to us quite conceivable that a large provider losing customers would not wish to offer PATS, in order to remove its customers' opportunity to port out their number.

Question 17: Are there policy initiatives in other areas related to new voice services that Ofcom should be considering?

O2 UK is unaware of any.

Question 18: Although Ofcom is not consulting on its interim position, it would welcome your views on its interim policy to forbear from enforcing PATS obligations against new voice services which offer access to 999.

O2 UK believes that this approach might be regarded as discriminatory.

It would seem that providers of new voice services are able to comply with some (if not all) regulatory obligations. However, Ofcom appears to be providing them with a very wide ranging assurance that they do not risk enforcement action on any regulatory obligation, even those that they are able to comply with.

O2 UK does not understand how this policy can be squared with the concept of technological neutrality. It would seem that Ofcom is proposing not to enforce regulatory obligations on providers of new voice services, based on the form of technology they employ.

This is even more surprising when one considers that third parties may seek to enforce providers' regulatory obligations only after Ofcom has intervened, or with its blessing. This point does not seem to be discussed in the consultation document.

Further, if Ofcom wishes to review its position, and seek to enforce the requirements under the General Conditions of Entitlement, it might find itself in a harder position than it would have been if it hadn't implemented its interim policy.

Question 19: Is it reasonable to have different network integrity requirements for nomadic services compared to services at a fixed location, and how should consumers be made aware of this difference?

It may be reasonable to have different network integrity requirements, if Ofcom has applied the same regulatory tests to both sets of services. Providers of new voice services may be in a better position to answer the second part of the question. However, Ofcom ought to determine what it regards as a sufficient level of consumer understanding, monitor consumers' actual knowledge and intervene as appropriate.



Question 20: Do you think that it is better for Ofcom to:

- 1. Retain the Essential Requirements Guidelines in their current form;**
- 2. Re-issue the Essential Requirements Guidelines, incorporating additional guidance in relation to Voice over Broadband and Next Generation Networks;**
- or**
- 3. Withdraw the Essential Requirements Guidelines, and apply the reasonably practical' test set out in General Condition 3**

O2 UK believes that the third option is most appropriate. Ofcom might consider issuing non binding guidance to stakeholders about what it regards as “reasonably practical” if it believes that such guidance would be useful. The removal of the Guidelines and the guidance should be subject of a public consultation.

Question 26: Do you agree that consumer information is required where services look and feel like a traditional telephone service but not where services are clearly different (e.g. PC based services)?

We do not think that enough is known about consumers’ understanding to determine whether or not this assertion is true. O2 UK believes that more research should be undertaken to establish whether or not this is the case.

Question 27: Do you agree with a two stage approach to consumer information, first to ensure the purchaser is aware of the nature of the service at the point of purchase, and second to ensure all potential users are aware the service does not provide access to 999 at the point of use?

O2 UK believes that consumer groups may be in a better position to offer advice about this.

Question 28: If consumer information is required to ensure that consumer interests are protected, which of the above frameworks regulatory framework, if any, is appropriate to ensure it is successful?

O2 UK generally favours a less interventionist approach in circumstances where there is a market failure. However, we believe that it is important that Ofcom establishes the level of consumer knowledge that it would regard as acceptable and monitors the actual level amongst consumers, in practice. The extent (if any) to which the actual knowledge is insufficient should determine whether or not the adopted regulatory approach is the right one.

However, even at this stage, it is clear that there could be plenty of scope for consumer confusion. Consumers have only been familiar with conventional voice services that provide services required by regulation. They will need to be educated to appreciate the distinction between new and conventional voice services and this would seem to be a major undertaking. Additional confusion is likely to arise where an established conventional voice service provider offers new voice services, particularly if they market the two as substitutes.



Consumers seem to be resistant to change and slow to understand the impact of new services. The liberalisation of directory enquiry services appeared to demonstrate this. We understand that the National Audit Office will publish a report soon about the liberalisation of the directory enquiry market and that that report may contain recommendations which might be pertinent to the issues subject of the consultation document. In O2 UK's view, it would be prudent if Ofcom resisted the temptation to settle policy in this area before the National Audit Office report is published.

