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A Communications Review for the Digital Age

Evidence submitted by the Mobile Broadband Group

The Mobile Broadband Group (MBG, whose members are the UK mobile businesses of Telefonica UK, Three, Vodafone and Everything Everywhere – which operates the Orange and T-Mobile brands in the UK) very much welcomes the opportunity to respond to the Government’s call for inputs for its ‘Communications Review for the Digital Age’.

Summary

- Mobile is widely adopted in the UK, with more than 80 million connections. But as far as mobile data is concerned, it’s very much in its infancy.
- Demand for mobile data will grow very strongly and mobile applications will make markets across the economy work more efficiently and people more connected and effective. This will drive economic growth.
- The regulatory regime must promote and sustain the investment in network infrastructure that will be needed to support growing demand for mobile data.
- The Government should not ‘pick winners’ by favouring one sector over another by, for example, regulating for net neutrality.
- Subject always to competition law, the content and infrastructure providers, who depend on each other for success, must be given the freedom to negotiate the business models that will assure long term benefits to customers.
- In the new extended value chain, bottlenecks can occur anywhere: application, content, search, browser, network or device, and can be used to leverage market power into related markets. Ofcom’s most effective interventions have been in opening up markets to competition.

- Future legislation should place greater emphasis on the need to promote competition and thus withdraw from micro-managing markets.
- There is a need to follow through on a National Audit Office recommendation that Ofcom be more accountable for its performance. Current bi-annual appearances before select committees are not adequate.
- Self-regulation will also have its place in future regulatory models. But Government needs to establish bi- and multi-lateral arrangements with international partners to deal with transnational issues raised by the Internet that cannot be dealt with through self-regulation.
- With respect to content, there is not a strong case for a great change from the *status quo*.
- In reviewing the Communications Act, Government needs to consider the future regulation of Premium Rate Services, to ensure that it is regulated proportionately when compared with the regulation of other, emerging payment mechanisms for e-commerce.

Introduction – mobile, a growth story

When mobile was first launched in 1985 in the UK, it was only possible to make simple telephone calls; you could not even leave a voicemail message. A handset cost about £2,000 and it was expected that only about 250,000 people would ever own a mobile phone in the UK.

Today, there are over 80 million active mobile subscriptions in the UK, with approximately 1.3 subscriptions per head of population (Ofcom CMR 2010). Virtually every 12-15 year old owns a mobile with 35% of them now using smartphones. Uptake of mobile broadband is now at 15% of households. It is said that mobile is now the most owned personal possession on the planet, outstripping even the toothbrush.

Ofcom's annual international surveys regularly show that the UK consumer is receiving the best value for money in mobile, when compared to all the other major developed economies.

A number of commentators are now forecasting that mobile broadband connections will outstrip fixed connections in the next few years. Demand for mobile data is growing very rapidly. Ofcom's most recent market report, for 2010, recorded that data usage increased tenfold (1000%) between the first quarter of 2008 and the fourth quarter of 2009. New uses in sectors such as entertainment, transport, education, medicine, environmental protection, for all types of communication between individuals, organisations and/or machines will continue to drive demand for mobile data.

Mobile networks, including mobile broadband, will be among the key components of national infrastructure that will underpin the UK's future economic growth. The following case studies are examples of new applications based on mobile infrastructure. None of them by themselves will transform the prospects of UK economy. But the cumulative impact of all this type of activity, making markets more efficient and services and people more effective, will be transformational.

Health: Orkney Health and Care has launched a telehealth service to enhance healthcare delivery for patients with long term conditions. By remotely monitoring patients' vital signs, telehealth will reduce the need for patients and GPs to travel around the islands. The 'mymedic' unit can operate using landline connections or mobile data networks.

E-commerce: E-bay has revealed that it sells one car every five minutes via mobile and, globally, processes one transaction a second via its mobile services.

Advertising – machine to machine: Digital billboards connected via mobile networks are no longer hampered by pre-printed artwork. They are flexible, as different ads can run at different times. Ads that are not getting the desired response can be withdrawn and replaced. A response to market conditions can be made within minutes. For example, if heavy snow is forecast, for a product such as snow chains, it would be possible to create and post a new ad within minutes.

Environment – machine to machine: A UK mobile operator has signed a multi-million pound contract to assist British Gas in the utility's deployment of smart meters. The operator will provide nearly 1 million data connections within household meters to enable families to monitor the energy they use. The mobile network can send real time energy use data from the in-home smart meter back to British Gas.

A healthy climate for investment

While adoption is now very widespread and mobile voice continues to substitute fixed voice (it is likely to exceed it later in 2011), mobile data is in its infancy. In the very near future, we can expect to see ever more mobile applications, including machine to machine applications, becoming part of everyday life. The increase in demand for mobile data will require mobile operators to invest in upgrading network capacity. With a one minute mobile video clip taking up the equivalent network resource of 500,000 text messages, this is challenging.

The Government has already recognised it must press on with its spectrum modernisation programme, including the release of spectrum held by the state, in order to ensure that spectrum is made available in a timely manner, so that providers can meet customers' increasing demand for mobile data.

It remains critical that the regulatory environment sustains continued investment. For example, the Government must also allow infrastructure providers the commercial freedom to explore business models that will sustain such long term investment. It is too early to say what those business models will entail and so the Government must forebear from 'picking winners' and treat all actors across the value chain with an even hand.

This is particularly relevant in the discussions about Net Neutrality and the so called open Internet. While 'open Internet' has an appealing ring, it amounts to imposing 'must carry' obligations on the Internet service providers.

Net neutrality regulation would further distort the situation where the commercial power of the large content providers is already considerably greater than that of the ISPs. The Government should not be favouring content providers over infrastructure providers. The measures introduced by the recent amendments to the EU regulatory framework to promote transparency will ensure that consumers are able to make informed choices about the ISP that suits their needs best.

The infrastructure suppliers and the content providers are dependent on each other for success. If net neutrality regulation renders content providers impervious to the costs of delivering ever richer content, then it is only consumers, through their broadband subscriptions, that will have to pay for the investment needed to keep pace. This has the potential to price low income households, who need access to public services, out of the market and 'broadband for all' will be put at serious risk. There is also an opportunity cost if scarce bandwidth is devoted to entertainment services at the expense of other applications that drive economic growth and efficiency.

Content creators and infrastructure providers need to make mutually supportive commercial arrangements that will ensure that investment in infrastructure meets the needs of the application providers and their customers. Subject always to competition law, the infrastructure providers should not be working with one hand tied behind their back by 'must carry' type obligations. If the UK is to build the world leading on-line ecosystem to which it aspires, investment across the value chain must progress in tandem.

This is also relevant to the emerging business models for cloud computing, where customers' applications, content and data are stored remotely and are thus accessible from any connected device, whether that be mobile, PC, games console or TV.

Clearly it would be advantageous to our economy for the UK to be the best place for cloud service providers to be based. This will require a regulatory regime (including workable privacy and data protection rules), and commercial and tax environment that is internationally competitive. The UK would not want to repeat the experience with the Gambling Act, where a regulatory regime was established but the tax on the remote gambling operators meant that none of them registered in the UK. It will also be necessary to have world class digital infrastructure, with Government policy and a regulatory framework that nurtures investment throughout the value chain, including fixed and mobile broadband.

Ofcom's regulatory duty to promote competition

Given the requirement to promote investment, we support the sensible position suggested by Ofcom that issues such as net neutrality should be managed through their normal competition powers and that Ofcom should only intervene where bottlenecks or dominant operators are frustrating the dynamics of the competitive process.

As discussed earlier, given the respective market shares of the various actors, it is wrong to assume that bottlenecks are more likely to occur at the network level.

For example, the recent Hargreaves review of intellectual property rights alluded to the slow pace of change in music industry. This slow pace has undoubtedly contributed to the growth of on-line piracy and has as one of its causes the very concentrated market structure in that industry.

The converged world, with its extended value chain, is undoubtedly more complex. Whereas an early mobile customer interacted primarily with his or her mobile operator, today's customer is accessing m-commerce platforms, payment platforms, search, location services, app stores and the wider Internet, through an increasingly diverse range of tablets and phones. Competition issues could arise in any part of the ecosystem and the regulator will have to devote more of its resources to understanding market trends and spotting issues of emerging dominance.

This is particularly true where economies of scale and the network effect, present in some sectors of the on-line ecosystem, have a tendency to deliver a '*winner takes all*' type of outcome. The market leaders in search, social networking and on-line auctions all have very large, potentially dominant, global positions, some of which are closed user groups. In addition, some have recently been making acquisitions that will leverage their significant positions to create market leading positions in related markets – for example, through the acquisition of ad networks, building up dominance in on-line advertising.

In considering the future regulatory framework, one of the Government's and Parliament's most important tasks will be to frame Ofcom's regulatory duties to meet this complex challenge. The MBG believes that, going forward, a future Act will have to place much greater emphasis on the promotion of competition (at present, it ranks *pari passu* with other duties).

Ofcom has achieved its most transformational changes through effective use of its powers as an economic regulator and a competition authority. The discussions with BT, for example, and the subsequent undertakings that led to the creation of Openreach transformed the fixed market, after years of very limited success by Oftel.

Ofcom has been much less successful where it has tried to micro-manage communications markets. The Codes of Practice that regulate operators' rules on the provision of information to customers are an example. The mandated information rarely contributes to a customer's purchasing decision. As a further example, it really does not seem to be a good use of the regulator's resources to publish a 400+ page consultation document as part of a project for improving pricing transparency for non-geographic numbers. The pricing information is available in all communications providers' price lists; beyond this competition and choice should be allowed to operate to deliver consumer benefit.

In this example and elsewhere, it is as if Ofcom does not entirely trust the competitive process and has instead intervened at a micro level in an attempt to deliver what is arguably marginal consumer benefit.

In the long run Ofcom will operate much more efficiently and consumers will get a much better deal if the regulator re-focuses its efforts on economic regulation, including using its Competition Act powers (which have typically been underutilised). In a future Act we would like to see the promotion of competition assume primacy over other duties.

Parliament also needs to find a better way of holding Ofcom to account for the performance of its statutory duties. An annual appearance in front of the relevant Select Committee is an inadequate way of overseeing a regulator that spends around £100m per annum and presides over a sector of the economy worth roughly £50bn.

The National Audit Office, in its 2010 report, stated *“For greater accountability and demonstration of value, Ofcom should communicate more clearly how it defines success in terms of the outcomes that it is striving to achieve and how its outputs contribute to delivering these. It should also develop, in consultation with the relevant Government Departments, the industries it regulates, and the citizens and consumers on behalf of whom it acts, a more integrated performance measurement system. This should include a framework for external reporting of performance against the outcomes it has set itself to deliver, in pursuit of its statutory duties.”*

Part of this will be for parliament to place greater emphasis on enforcing OFCOM’s duty under Section 6(4) of the Communications Act to *“from time to time, publish a statement setting out how they propose, during the period for which the statement is made, to secure that regulation by OFCOM does not involve the imposition or maintenance of unnecessary burdens”*. There is little apparent evidence that Ofcom formally reviews the efficacy of past interventions.

Given the expansion of the communications market since 1984, government policy of opening up markets has been broadly successful. The underpinning legislation has also been relatively effective at coping with the expected and, indeed, unexpected turns taken by the market. For the future, though, the MBG would like to see Ofcom, through its statutory duties, to be given more encouragement to place greater faith in dynamic competitive markets to get the best deal for consumers.

International aspects of regulation

One of the greatest issues that Governments and regulators face is how to deal with transnational challenges posed by organisations and individuals using the Internet. The growth in Cloud based services, which may operate from more than one jurisdiction (or frequently move to arbitrage cost efficiencies), will accentuate this effect.

It is incumbent upon government, though, to ensure that market actors compete on more or less a level footing and that service providers active in the UK market, whether based here or not, face similar responsibilities to UK consumers (for example, should ‘over the top’ VOIP providers have similar responsibilities to disabled customers, emergency services etc. as locally based communications providers?) or what information Government requires in terms of security, data or privacy protection for UK citizens. Self-regulation will undoubtedly have a role to play in promoting responsible behaviour.

Nevertheless, where legal enforcement is required and where remote services are hard for the law to reach, the Government should resist the temptation to regulate vicariously or indirectly by placing obligations on those with a physical presence in the UK, such as network and Internet service providers, but who have no commercial relationship with overseas, cloud based providers.

It is more appropriate that the Government develops multi- and bi-lateral arrangements with other jurisdictions to deal with providers that are attempting to harm UK consumers while operating outside their legal jurisdiction. The self-regulatory Advertising Standards Authority, for example, has developed such relationships with its counterparts in other EU countries, so that advertisements served from other parts of the EU that are not legal, truthful and decent can be referred for investigation and sanction to partner organisations.

The MBG would not like to see further examples of the Digital Economy Act, where ISPs have been co-opted into dealing with copyright theft – a problem not of their making and that has mostly arisen because the industries in question have failed to adapt their business models to the realities of the digital age.

In its recent communiqué, the OECD recommended cross-border enforcement co-operation on matters related to privacy but not for piracy; that was down to ISPs. This is a strange anomaly in thinking, which needs correcting.

Other matters to consider in a future Communications Bill

Content regulation

It is questionable whether there is a strong case for changing the *status quo* in relation to broadcast and on-demand TV regulation. Free to air television is a public good; if one can see it, all can see it. It has long been established that broadcasting standards need to conform to a general consensus about what type of content can be broadcast to the public at large and at what time of day.

Content available on the Internet is not broadcast, it is delivered to individuals on-demand. Other than at the extremes of what is legal, each person (or in the case of children, the parent) is in a position to decide for themselves what content is harmful or offensive. There is no need for a general consensus. The evidence from ATVOD's time as a self-regulatory body suggests the level of complaints about mainstream TV-like on demand content is negligible.

In addition, the internet raises questions about jurisdiction over parties which it would be harmful and ineffective for the UK Government to seek to regulate on a national basis.

Content available on the wider Internet, where the vast majority of potentially harmful and offensive content originates from outside the UK, has to be dealt with through other techniques – the most prevalent of which are Internet filters. The mobile operators have been providing these for many years. Filters are now receiving much more attention in the domestic setting too. Efforts to promote their use in a domestic, family setting should continue, as, ultimately, this will be the best way of ensuring that children are accessing content that their parents deem appropriate.

As discussed above, the Government should also be seeking out bi-lateral and multi-lateral arrangements with other governments to deal with the most problematic content, to ensure appropriate notice and take-down procedures are in place. The Internet Watch Foundation, as a self-regulatory organisation, has made notable progress internationally in promoting 'notice and take down' for child abuse images.

Payment mechanisms

The Government should also consider the future regulation of payment systems. At present, Premium Rate Services (PRS), which are charged to the customer's communications account, are regulated by PhonepayPlus. Other payment mechanisms such as Paypal and a raft of emerging micro-payment solutions are regulated as financial products by the Financial Services Authority (or its successors). The former is essentially consumer protection that focuses on the service delivered; the latter is consumer protection that focuses on the financial probity and safeguarding of client funds.

Where a service is purchased, in say, an 'App store' using a PRS, the protection afforded the consumer will be of a very different nature to a purchase using an FSA regulated payment mechanism. The review of the Communications legislation should not pass without due consideration of the regulation of consumer payment mechanisms, so that there is a reasonably level playing field for competitors in the payments market and so that consumers are protected by a clear and consistent regulatory regime. This would be a significant step in promoting trust and growth in e-commerce.

Self regulation

Self-regulation undoubtedly has a role to play in the future regulatory panoply. Self-regulation is not easy and requires considerable resources from the market actors – mostly because the activities that would be carried out by a legislator or regulator are internalised. Self-regulation is not necessarily much quicker than formal regulation but it tends to be much more tailored to the specific needs of the matter in hand, because it is developed by people on the front line who have very direct practical experience of what is being regulated.

It can also be more flexible than formal regulation. The regulation of video on demand was much more successful as a self-regulatory regime, because common sense determined what it was proportionate to regulate, as opposed to a legal definition that is very hard to target with precision.

The mobile operators have had a good experience with self-regulation. For example the MBG published a self-regulatory code of practice on new forms of content on mobile in 2004. The code was independently reviewed by Ofcom in 2008 and found to be an effective form of self-regulation. Being the first of its kind, the code was also used as the template for a mobile code throughout the EU.

The MBG is represented on the Committee for Advertising Practice, a model of self regulation that has long established authority and credibility. Mobile operators are also members of the Internet Watch Foundation, a world leading example of a self-regulatory body, supported by industry and at the forefront of the battle against the circulation of child abuse images.