Ofcom: Net Neutrality Review
Call for Evidence

Response from Mobile UK

November 2021

About Mobile UK

1. Mobile UK is the trade association for the UK's Mobile Network Operators (MNO) - EE, Virgin Media O$_2$, Three and Vodafone. Our goal is to realise the power of mobile to improve the lives of our customers and the prosperity of the UK.

2. As mobile increasingly becomes the device of choice for running daily life both at home and at work, customers want improved coverage and greater capacity. Mobile UK's role is to identify the barriers to progress and work with all relevant parties to bring about change, be they Government, regulators, industry, consumers or citizens more generally.

Summary of Response

3. Mobile UK welcomes the chance to submit a response to Ofcom's Call for Evidence for its review of the net neutrality regulations.

4. As Ofcom notes, there has been substantial change in the internet ecosystem since the rules were first agreed in the EU in 2015. Indeed, it is unrecognisable from the internet of more than a decade ago that gave rise to the initial concerns. Those concerns, centred on internet access providers, have either dissipated or shifted to other parts of the value chain.

5. Today's internet is characterised by considerable concentration at the service and application layer: a small number of 'hyperscalers' account for more than 70% of traffic carried over a typical network. The organisations that the rules were originally designed to protect now wield considerable power and have both the ability and incentive to influence internet outcomes, yet they are essentially unregulated. At the same time, the retail internet access market in the UK has, if anything, become more contestable. In recent years it has been subject to several additional regulatory interventions and voluntary measures undertaken by providers, which have combined to make switching easier, increase value, and facilitate comparison between providers. Furthermore, the companies operating in that market are considerably more constrained, given the power shift.

6. Technology too has moved on, yet the rules as they stand are not reflective of and cannot accommodate the latest technical capabilities; moreover, the rules inhibit innovation. This prevents internet access providers – and, more importantly, their customers – from realising the benefits of new technologies. We are thus left with a net neutrality framework that both enshrines a sharp regulatory inequality and stifles innovation at the access layer.

7. Mobile UK's response focuses on the next generation of mobile technology - 5G. The success of 5G, both for providers and the wider economy, will depend on meeting evolving customer needs, whether that's driving productivity improvements, helping industries reduce carbon emissions or supporting new applications and business models.

8. As such, 5G has been developed to provide the next generation of connectivity, with the overall goal of offering wireless connections tailored to specific applications rather than the general

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internet access service delivered by prior generations. This could be high reliability, low latency, virtual private networks, high mobility or a combination of such features. Radio connectivity is complemented by further network design innovations such as network function virtualisation and mobile edge computing, all of which could be hindered by an overly prescriptive, one-size-fits-all approach to net neutrality.

9. And so, as mobile operators develop new offerings in the 5G era, it is simply not right that the first question they have to ask themselves is 'is this product or service compatible with Open Internet Regulations?'

10. Nor is it right that the commercial freedoms available to large tech actors such as Google or Apple to develop products and services within their ecosystem are not available to internet access providers who are a fraction of their size.

11. Furthermore, it is not all clear that the market could respond with the required investment under the current rules in the face of rapidly increasing demand for mobile data. If purportedly 'pro consumer' rules interfere with the smooth transmission of market signals, this is not, in fact, in the interests of customers.

12. Finally, it is unnecessary to maintain a significant pre-emptive [ex ante] intervention targeted at one point in the chain, the internet access provider (IAP), irrespective of market power in the access provision market or up and down the value chain. The UK market is served by multiple internet access providers, who sit within a highly competitive retail market supported by clear and effective switching processes. The IAPs are overseen by a well-developed regulatory framework, including general competition law.

13. The rules as they stand are restrictive (i.e. something is not allowed unless…), whereas they should be permissive, with some basic safeguards to protect an open internet, access to all and free speech. This is ultimately what the market needs to drive innovation and investment.

14. Ofcom should feel empowered to take a more permissive, equitable approach to net neutrality and foster a more flexible environment in which all participants in the value chain are fully empowered to innovate. It should also adopt a forward-looking perspective rather than confining its consideration to the challenges of today.

Mobile UK's Response to the Specific Questions

15. **Question 1: Functioning of the net neutrality framework**

    a. **Which aspects of the current net neutrality framework do you consider work well and should be maintained? Please provide details including any supporting evidence and analysis.**

    b. **Which aspects, if any, of the current net neutrality framework do you consider work less well and what impact has this had? What, if any, steps do you think could be taken to address this and what impact could this have? Please provide details including the rule or guidance your response relates to and any supporting evidence or analysis.**

16. These questions are understandable in the context of the call for evidence, but they are not forward-looking.

17. As set out in our introduction, 5G is designed to meet a multiplicity of connectivity requirements. We need an approach in the UK that is pro-innovation and sympathetic to device and user diversity, always recognising that there should be basic safeguards that enshrine the right of all users to access all lawful content. This approach will allow services like 5G to thrive, providing a

platform to support truly transformational service innovation. The rules, as they stand, are restrictive (i.e. something is not allowed unless…), over-elaborate and thus can be confusing, particularly in the context of how they apply to new technology.

18. This leads to a cautious approach being taken, harming innovation. Mobile providers shouldn't have to seek prior permission from Ofcom each time a new use case emerges. While we note the ECJ (and indeed the BEREC guidelines) no longer have jurisdiction in the UK, the recent ECJ judgement on zero-rating and the different stances adopted by BEREC, NRAs and the courts illustrate just how confusing the rules can be and how different conclusions can be reached.

19. *What is required are rules that are permissive, with some basic safeguards to protect an open internet, access to all and free speech. This is ultimately what the market needs to drive innovation and investment.*

20. Also, concerning the overall framework of law and guidance, it is worth remembering that the self-regulatory (i.e. voluntary code of practice (CoP)) element of the current approach has worked well. As things stand, Ofcom takes adherence to the code as a proxy for compliance with the rules; nobody has raised a complaint under the code's complaint mechanism, and Ofcom has not found it necessary to intervene substantially in the market.

21. Bearing in mind the success of the voluntary CoP, which was in place (with Ofcom's blessing) well before the EU Regulations were transposed, Ofcom should also consider whether a voluntary approach would be the best way for the UK going forward.

22. **Question 2: Use cases, technologies, and other market developments**

    a. **What, if any, specific current or future use cases, technologies or other market developments have raised, or may raise, particular concerns or issues under the net neutrality framework?**

    b. **What, if any, steps do you think could be taken to address these concerns or issues and what impact could this have? Please provide details of the use case, technology or market development and the rule or guidance your response relates to, as well as any supporting evidence and analysis.**

23. Mobile UK would like to see that the rules can accommodate the distinct characteristics of 5G/mobile and an approach that allows providers to shape connectivity to match each device class, rather than a one size fits all approach. There is, for example, a big difference in the connectivity needs of Fixed Wireless Access kit, Smartphones, and IoT, and we need an approach that allows differentiation to take place without discrimination[1] or without infringing users' rights to open access.

24. As a corollary, IAPs should be able to have some reasonable control over which devices customers attach to the network; for example, some network applications may be designed to support sensors that have long-lasting batteries and very infrequent need to interact with the network; it could be very disruptive for all network users if customers had the right to attach high throughput devices.

25. Mobile networks have limited capacity, constrained by the availability of radio spectrum and have to be managed accordingly to deliver the best possible experience to customers, according to application and need.

26. The current net neutrality rules are standing in the way of common-sense outcomes and service

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[1] Differentiation: i.e. treating two similar services in the same way but allowing ISPs to take a different traffic approach with different types of non-similar services.

innovation that consumers ultimately value. Transparency and a right to access all lawful content would go hand in hand with the ability to shape connectivity to match the circumstances without discriminating between similar services.

27. Question 3: Value chain

Are there particular business models or aspects of the internet or other value chains that you think we should consider as part of our review? Please explain why providing details including any supporting evidence or analysis.

28. Today the rules are firmly focused on the wrong issue. While intense retail competition prevents internet access providers from acting to influence internet outcomes, the large content and applications platforms, who dominate the internet, sit outside the jurisdiction of net neutrality rules and can consequently favour their own applications and service inside their respective ecosystems. This imbalance in the regulatory approach is not only unjust, but it is also harming consumers. A case in point is the routing and encryption decisions, which are increasingly being made at the operating system, app store and platform level, and where devices can determine the parameters of access to applications and services. These actions are ultimately the biggest determining factor on an end user's internet experience, with those providing connectivity having little or no influence. Control of these matters sits outside the scope of today's net neutrality rules. This issue needs to be addressed by regulators as a matter of urgency.

29. This review must include consideration of whether the current rules are equitable in light of market realities. Many of the companies for which the rules were designed to protect are now the ones that are in the strongest position to influence internet outcomes. Ofcom has at its disposal other ways of regulating internet access providers and others than through an elaborate, confusing ex-ante intervention that applies, irrespective of market power.

30. Question 4: International cases studies

Are there any international case studies or approaches to net neutrality that you think we could usefully consider? Please include details of any analysis or assessments.

31. International comparators are, of course, relevant, but the UK has a long history of thought leadership in independent economic regulation and should not feel unduly constrained. The circumstances of the UK market should be the key consideration. UK communication retail markets are highly competitive. Ofcom has invested much regulatory effort on wholesale regulation in the fixed market, together with a highly competitive mobile market offering, with a broad range of MNOs and MVNOs. If consumers felt their communications provider was seeking to influence their internet experience, they would simply move provider. In such circumstances, there is little chance that a UK retail provider could seek to restrict the content accessed by their customers.

32. Question 5: Guidance and approach to compliance and enforcement

Are there specific challenges with the existing guidance that we should be aware of (e.g. ambiguity, gaps)? Assuming the rules stay broadly the same, which areas could Ofcom usefully provide additional clarity or guidance on? Please provide details.

33. Just by updating its guidance, Ofcom can make a real difference. New guidance that seeks to offer a simpler, pro-innovation code of practice that underpins universal access but allows a safe space for differentiation across a class of service and device types will be transformational.

34. Legislative reform may be needed in the future to ensure the UK's approach to internet rules aren't rendered obsolete, but new guidance is an important first step on this journey. While we fully appreciate that updating the primary legislation remains outside Ofcom's jurisdiction, we would hope that Ofcom would not be a bystander in such a process, feeling able to set out a series

of clear recommendations for legislative reform that the Government could consider.

35. *It is our firm view that the current approach is holding back our industry and that a new permissive approach is needed to benefit consumers by driving innovation, allowing more flexibility to serve different consumer and business needs and allowing providers to shape connectivity to match different device categories.*