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Department of Business, Innovation and Skills' consultation on implementing the revised electronic communications framework in the European Union

Response from the Mobile Broadband Group

The Mobile Broadband Group ('MBG'), whose members are the UK mobile businesses of O2, Vodafone, Three and Everything Everywhere (which operates under the Orange and T-Mobile brands in the UK) welcomes the opportunity to respond to the consultation by Department of Business Innovation and Skills on the transposition of the revised Regulatory Framework for Electronic Communications in the European Union into UK law.

The MBG supports the Government's general approach of not 'gold plating' the Directives. In summary, the areas where the MBG would like the Government to give particular consideration are as follows:

- **Facilities sharing:** It is not necessary to collect any more information than is already being contemplated to fulfil the infrastructure reporting requirements arising from the Digital Economy Act. There must be a dovetailed approach to these two duties in order to minimise the burden on the regulator and operators. The data collected should be proportionate to the intended aim. Experience to date indicates that an infrastructure inventory database is not necessary for concluding infrastructure sharing agreements in the mobile sector.
- **Security breaches:** The Government and Ofcom must co-operate closely to ensure clear guidance and to avoid duplication of existing work and the work regarding resilience should continue to focus on systemic risk, to ensure that a weak link is not a threat to the system as a whole. Notifications to customers should be reserved for the most serious incidents, so that they do not become unnecessarily alarmed or, worse, blasé about an overload of information. Operators and regulators should agree on one basic minimum

security standard and it should be up to the operator to decide whether or not to do more.

- **Services for disabled customers:** It is welcome news that policy going forward will be based on research and evidence. The implementation of the previous package resulted in under-used investment at a time when the mainstream market is delivering new services and capabilities that can be used by customers with disabilities.
- **Cookies:** The MBG supports the Government's proposal of including clarificatory text from recital 66 to provide guidance on compliance with the measures on cookies. This will be absolutely vital to maintain the continued convenience and utility of services received by consumers and businesses over the Internet.

Appeals

***Q1** The Government welcomes views on whether an enhanced form of Judicial Review (duly taking account of the merits) would: prevent the risk of regulatory gridlock under the new Framework by reducing the number and nature of appeals against Ofcom decisions; and whether there are any disadvantages in such an approach.*

***Q2** We welcome views on whether there are steps the Government could take to ensure that appeals are focussed on determining whether Ofcom has made a material error.*

The MBG has no comments on questions 1 and 2 but please refer to individual operator responses.

Facilities Sharing

***Q3** Do respondents believe that a detailed inventory of infrastructure would be desirable in order to facilitate infrastructure sharing and if granted access, would this inform investment decisions?*

A variety of network infrastructure sharing arrangements have been concluded in the mobile sector without a database and so it does not appear to us to be that critical for mobile. Indeed, there are issues over commercial confidentiality (discussed more fully below), which could raise concerns.

***Q4** Do respondents believe that requiring undertakings to provide information to enable Ofcom to compile a detailed inventory of the nature, location and capacity of all UK infrastructure is proportionate, or should the powers only be exercised where there is an imminent prospect of infrastructure sharing in that particular location?*

Ofcom has recently consulted on how to implement its new duties under the Digital Economy Act, requiring the regular production of an infrastructure report.

In the consultation document Ofcom acknowledged that such a requirement could be burdensome on operators and has stated its desire is that *“the potential benefits of the new report can be realised while minimising the burden on operators.”*¹

In order to act proportionately and minimise this burden, Ofcom must align the infrastructure inventory requirements under new EU framework with the corresponding requirements under the Digital Economy Act.

Ofcom should also make use of any usable information already in its possession and not duplicate work for operators and should be proportionate to its intended aim.

Q5 *Do respondents believe it is appropriate for Ofcom to be the sole authority that is able to require this additional information from undertakers in relation to infrastructure? If not, which authorities should be able to require this additional information?*

Yes. The responsibility to respond to S135 requests for this information places a burden on operators (as Ofcom readily acknowledges). There would not appear to be any benefit to granting powers to other bodies to request this information too.

Q6 *Do respondents believe that commercial confidentiality could be compromised by a ‘national journal’ approach and are there ways to mitigate this?*

Yes.

Apart from that which is already in the public domain (such as basic information on the location of masts – through the Sitefinder database), much network information for a given operator could be confidential to that operator. Furthermore Ofcom is unable to guarantee that any information gathered for this purpose will not be capable of disclosure under the Freedom of Information Act and the environmental regulations. These sensitivities must be considered in order to find a practical solution that could assist competition without overburdening industry.

The MBG is also concerned about the level of detail that is being discussed, such as wiring in buildings, cabinets, and manholes. Collecting and keeping up to date such information would appear to be a huge amount of work that may easily not be justifiable or in proportion to the hoped for benefits. On the face of it a National Journal to this level of detail would not be desirable or useful for the mobile sector, which, to date, has seen sharing arrangements concluded between operators through commercial negotiation and, through confidentiality

¹ <http://stakeholders.ofcom.org.uk/consultations/uk-comms-infrastructure/summary>

arrangements, the parties involved have been able to share such information as has been necessary without a National Journal.

If the situation ever arose where Ofcom was mandating a sharing arrangement, it could also mandate an exchange of information between the parties involved that was sufficient, and no more, to conclude a contract.

Security and Resilience of Networks and Services

Q7 The Government welcomes any general observations on its proposed approach as set out in this section of this document and in particular the proposals in paragraph 111 to implementing Articles 13a and 13b of the Framework directive which address “Security and Integrity of Networks and Services”. We would also welcome your views on what needs to be covered in any Ofcom guidance.

The MBG believes that the Government and Ofcom’s work in respect of resilience should continue to focus on systemic risk. While resilience within the telecoms sector is traditionally strong, with the competitive pressure and the demands of customers driving a high availability of service, the recently published National Security Strategy makes clear that the threat of cyber attack is a Tier 1 risk and so there is no room for complacency.

Recital 44 of the new Framework package makes clear where the focus should lie, that is on *“Reliable and secure communication of information over electronic communications networks [which are] increasingly central to the whole economy and society in general. National regulatory authorities should therefore ensure that the integrity and security of public communications networks are maintained.”*

The MBG supports working towards agreement and clarity on resilience requirements between the communications provider community, BIS and Ofcom to guard against systemic risk. The MBG understands that at the Electronic Communications Resilience and Response Group (EC-RRG) it has been agreed that workshops involving legal, security, operations, and resilience representatives from the communications provider community, BIS and Ofcom should work through the level of standards that will be set and levels of reporting required. The MBG supports this process, and Ofcom’s commitment to discussions with EC-RRG. This is imperative to avoid duplication and or contradiction.

However, as the consultation document acknowledges, this is a complex area and there are significant challenges in setting security standards.

In paragraph 95 of the consultation document, the Government suggests that *“For services provided to users, there is an argument that the security level adopted should reflect legitimate consumer expectation. This would suggest that there should be transparent security performance details available to the end user... and, given the potential complexities involved,*

there may be benefit in industry adopting a small number of clear standard performance levels (such as, for example, a straightforward low, medium and high level) against which providers can choose to certify their services and networks..”

The MBG believes that this is an unnecessarily complicated approach at this stage. What the Government appears to be suggesting is that it introduces an additional dynamic to the competitive choice. In addition to choosing a network provider based on price, speed and levels of customer service, security would also be a consideration. While this is clearly an option, we think the primary purpose of the requirement in the EU package is not to introduce further competition but to guard against a weak link in the chain being a threat to the system as a whole. This is where the Government, through the EC-RRG, should concentrate its attention.

The MBG acknowledges that there may be some cross over between security breaches and personal data breaches and welcomes the suggestion that Ofcom and the ICO ensure that policy dovetails. However, we believe that, unless there are overriding personal data issues, or, as BIS suggests, important information to convey to customers about steps that could be taken to avoid any harm arising from a security breach, notifications to customers about security should be restricted to the most serious systemic incidents. This would imply a higher threshold than current ICO guidance for personal data breaches (i.e. where more than 1,000 customers affected). The reason is that customers, if overloaded with information that means very little to them, will become blasé and then ignore information that is important and needs their attention and action.

Dissuasive Sanctions

***Q8** What do respondents think would be a dissuasive level of sanction for failure by a person to comply with an information request?*

Mobile operators take their responsibility to respond in a timely and comprehensive way to information requests very seriously and would regard the current regime as adequately ‘dissuasive’. BIS and Ofcom have presented no evidence to substantiate the assertion that the current regime is not dissuasive. However, while this is not a point about which the MBG feels strongly, as a matter of principle, BIS/Ofcom should present better evidence to substantiate any new fining powers.

Universal Service Obligations

***Q9** Do respondents have any views on the proposed changes to the Universal Service Order?*

On the basis that the proposed changes to the Universal service Order are technical changes necessitated by the changes in Directives, the MBG has no comments.

Equivalence of Access for Disabled Users

Q10 *Do respondents agree that the approach outlined in paragraphs 189 - 193 is appropriate for implementing Article 23a (2) and encouraging the development of terminal equipment suitable for disabled users?*

The MBG has never challenged Ofcom's (and before it Oftel's) power to set General Conditions for customers with disabilities, as required by Article 7 of the old Universal Services Directive. If the Government believes that it needs to retrospectively confirm this power by altering Section 51 of the Communications Act, then that is acceptable, providing it does so within the terms set out in Article 23 of the new Universal Services Directive.

The Government is correct to point out that customers with disabilities already have access to text relay services and emergency services in the UK from both fixed and mobile locations. In the implementation of the previous package, Ofcom has been the only regulator in the EU to impose obligations for disabled customers on all providers outside the Universal Service Obligation². It should be noted, too, that the vast majority of mobile customers with hearing impairments use main stream services, such as text messaging and mobile instant messaging.

Only a small handful of customers use the mobile text relay service. This is likely to have arisen from a combination of the terminal design and a desire among disabled customers to use mainstream products available on a wider range of devices. It would be useful to understand these influences in more detail and would help assess whether a regime where the regulator is able impose conditions on the network operators but is not able to do so on the terminal equipment suppliers is causing detriment to disabled consumers.

We understand that Ofcom is currently undertaking research into whether there is an equivalence deficit in the UK, with a view to assessing whether it would be reasonable and proportionate to place further obligations on communications providers. The MBG will of course engage fully in such discussions. We believe, though, that the outcome last time round – for example, the imposition of mobile text relay – was based on a belief that what worked on fixed networks was easily transferable to mobile. This approach failed to take into account the other services available to disabled consumers on mobile and given the very low take up has resulted in wasted investment and minimal utility to those end users the regulation was designed to assist..

In the future, the MBG expects policy to be much more soundly based in research, with a greater understanding of which services disabled customers actually want to use in numbers that would make it proportionate to mandate specific technology solutions. This is particularly so when the

² BEREC [draft report](#) „Electronic communication services: Ensuring equivalence in access and choice for disabled end-users“ November, 2010.

context of mainstream provision is changing so quickly – with services such as speech to text conversion of voicemail, greater capability of voice recognition software and specialist mobile smartphone applications gaining purchase in the communications market.

Breach of Personal Data and Penalties

Q11 We welcome suggestions as to how the provisions of the Directive could be better enforced.

In general the MBG supports the Government's general approach (as set out in paragraph 220) to largely copy out the provisions of article 4(1) and to confer on the ICO powers to carry out any post-breach investigations that may be necessary.

The MBG is aware, though, that the measures on personal data breaches in the revised EU telecoms package are forerunners for equivalent revised data protection measures that will apply across the whole economy, not just communications providers, which will emerge from the EU's current review of data protection law.

It would therefore be prudent (and non-discriminatory) to forebear from tailoring enforcement regimes just for the electronic communications industry and to consider the matter in the round when data protection legislation will be updated for the whole economy. This is the best way of ensuring that regulation is proportionate and consistent for all data controllers. There is no case that communications businesses have to be treated differently to data controllers of a comparable size in other sectors of the economy.

These matters should be considered at the appropriate time, not as part of this review.

Cookies

Q 12 We welcome views on our proposed approach to implement the amendments to the Directive in relation to cookies by way of copying out the Directive text.

The MBG notes that the Government (as stated in paragraph 230) is considering including appropriate elements of recital 66 in order to incorporate useful clarifications of the Article text.

The MBG would support such an approach.

The members of the MBG are also members of the Internet Advertising Bureau and associate themselves with a paper sent to BIS by the IAB in May 2010.

In particular, the IAB stated:

Cookies are essential to the effective functioning of the internet (see Annex A for details). A narrow legal interpretation of Article 5(3) will have a direct and indirect impact upon the following:

- **Usability** – the impact upon the functionality of many websites (including government and political party websites), disrupting the consumer experience.
- **Economics** – the impact upon the digital advertising sector, worth £3.5bn in the UK in 2009 (IAB), and an important revenue stream for online publishing.
- **Commerce & Business** – the impact upon broader business, such as retail (ecommerce worth £50bn to the UK economy in 2009 (IMRG)).
- **Innovation** – the impact upon technological innovation and developing publisher and advertiser business models.
- **Self-regulation** – the significant investment businesses are making in delivering self-regulatory initiatives (eg IAB Good Practice Principles for Online Behavioural Advertising) based on current practice.
- **Political objectives** – the impact upon the UK Government’s Digital Britain vision, with publishing and advertising at its heart.

Recitals can play a significant part in the transposition process by influencing the manner in which operative provisions are transposed.

Recitals are particularly useful in resolving any ambiguity in the operative provisions and there are a number of examples in European case law where they have been used in this way.

- We do not believe that the revised ePrivacy Directive amounts to any radical changes in law within the UK. The EU legislator intended to preserve the existing regime.
- The intention of the European legislator is not to require “prior” consent for cookies. This is confirmed by the removal of this intention in earlier parliamentary drafts.
- The Directive seeks to draw a line between malware and cookies (Recitals 65 and 66 respectively) – the latter benefiting from much lighter treatment given that cookies are legitimate and essential functional tools of the internet whereas third party spyware “poses a serious threat to the privacy of users”.
- Recital 66 requests that the method of offering a ‘right to refuse’ should be as user-friendly as possible, allowing web browser settings to amount to consent. The UK can incorporate Recital wording into UK law in cases of ambiguity (such as this) as it has done previously.
- Various statements by senior European Commission officials confirm this approach and this is supported by assurances by 13 Member States, including the United Kingdom.

Impact Assessments and Equality Impact Assessment

***Q14** The Government invites views and comments from respondents on the impact assessments and equality impact assessment which have been produced to support implementation of the revised electronic communications Framework.*

No comments

General comment

***Q 15** Do respondents have views on the technical and practical issues that Government will need to take into account when implementing the review, bearing in mind that many of the changes are mandated?*

The MBG would like to make final observation on a new requirement that there be a maximum of 24 month contracts for **consumers** (article 30 of the Citizens' Rights Directive). During the EU legislative process, the European Parliament argued successfully for a change to the original text from 'subscriber' to 'consumer'. Clearly the intention behind this was that consumer should refer to private individuals and not businesses and other corporate organisations. There would be a concern if Ofcom were to bring SMEs into scope, as a result of any text in the Regulations that were judged to give it this power (albeit inadvertently).