



The Mobile Broadband Group

PO Box 34586, London SE15 5YA

Ofcom's consultation on "Initial assessments of when to adopt self or co-regulation – a response from the Mobile Broadband Group"

Introduction

1. The Mobile Broadband Group ("MBG", whose members are O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to Ofcom's consultation on initial assessments on when to adopt self and co-regulation.
2. The MBG has considerable first hand experience of self-regulatory schemes, including those mentioned in Ofcom's consultation document.
3. We are a firm believer that self-regulation, when appropriately deployed, can deliver clear consumer benefit both in terms of protection from harm and transparency of information. The MBG and its members have participated in the development of a significant number of codes and guidelines for best practice. A full list is set out in the Annex to our response.
4. In 2004, the MBG published the first code of practice for the self-regulation of content on mobiles. The Code was subsequently used as the basis for the EU's framework for the safer use of mobiles by teenagers and young children. The MBG appointed the Independent Mobile Classification Body (IMCB) to set an independent framework by which content providers can classify adult content. The IMCB also acts as a body to which the public can complain if they come across content that they feel is inappropriate for minors to access.
5. The members of the MBG are all members of the Internet Watch Foundation and abide by its Code of Practice. In addition, mobile operators have all agreed to use the IWF's database of illegal child sexual abuse images to block customer access to the listed sites.
6. The MBG has recently joined the Committee for Advertising Practice. Mobile has the potential to become a significant channel for the distribution of advertising in a multitude of new media formats. The mobile operators realise the importance of having this channel properly regulated and will support the Advertising Standards Authority in its independent administration of the CAP Code.

Significant Benefits of Self Regulation

7. The MBG believes that self-regulation as a method of regulation in the new media sector has been central to its success and must continue to be very much encouraged and supported. In the consultation document, Ofcom lists the main advantages of self-regulation as being usually lower cost and more flexible.
8. The MBG believes that the advantages are much more profound than that.
9. First, for a given issue, successful self-regulation requires the signatories to take ownership and responsibility that is much more deep rooted than with formal regulation. Contrary to general belief, self-regulation is not an easy option. There is an enormous investment made in developing Codes of practice, with each contentious point being argued out extensively by the sponsors. Once that investment in time and effort is made, huge efforts will be made to defend the outcome and maintain its integrity.
10. In the absence of any formal study, the MBG would suggest that the higher the initial and ongoing investment (time, energy and financial) in a self-regulatory scheme, the more likely it is to succeed. Self-regulation engenders a level of commitment across an organisation that is very hard to match with formal regulation. One MBG member stated that, even during 3G roll-out, the implementation of the mobile content code was the second largest project throughout the company in 2004.
11. Secondly, a self-regulatory model allows many more organisations to be drawn into a scheme than can ever be achieved through formal regulation. For example, the good practice guidelines for Social Networking incorporated signatories from many overseas organisations that are not subject to the UK jurisdiction. Ofcom will realise that with Internet type issues, it is often more important to have global participation and co-operation than to have the formal powers to enforce compliance in a very limited geographic region.
12. Thirdly, self-regulation is more conducive to innovation and competition in many instances. It ensures adherence to best practice whilst avoiding unnecessary red-tape. Take the code of practice for the responsible selling of mobile airtime. In addition to defining the principles of best practice for promoting and selling mobile airtime subscription, the Code publicly underpinned MBG members' commitment to adhering to industry best practice in due diligence. Mobile operators regularly have to decide whether to do business with this or that independent dealer and the consequence of not implementing due diligence under the self regulatory Code is considerable reputational damage.
13. In theory, the argument may be that regulation adds further consequences and deterrents (e.g. fines). However, in practice, where an effective deterrent is already in place (reputational damage in this case), regulation tends only to serve to foment over cautiousness in an otherwise vibrant and competitive market. The additional costs and processes that are imposed only serve a compliance function, rather than, in this case, further encouraging responsible selling by dealers and operators alike. .

14. Fourthly, self-regulation allows companies to take the risk of aspiring to standards that they would be less likely to support under formal regulation. While this may mean that there is the occasional failure to turn aspiration into reality, it is often preferable than settling for the lowest common denominator which can often characterise formal regulation.
15. Fifthly, self-regulation can provide a low level entry point to regulation that builds up over time. For example, the Internet Watch Foundation started off life in a much more low key way than it operates today. Initially there were about six Internet service provider members and the code of practice dealt only with notice and take down. Today, the IWF has around 80 members, drawn from all sections of the new media landscape: search providers, mobile operators, filtering companies and general media organisations.
16. The IWF's database of illegal URL is deployed voluntarily by search engines and ISPs outside the UK, beyond its formal jurisdiction. The small self-regulatory seed sown by the ISPs in 1996 has had a far wider deployment than could ever have been achieved by the UK's regulatory authorities.
17. Finally, the biggest advantage of self-regulation is that there is no safety net. The signatories are ultimately responsible and answerable for their own actions. If the signatories allow their scheme to fall into disrepute, they only have themselves to blame. In a formal situation, the regulator is ultimately responsible and tends to get a very large proportion of the blame (perhaps beyond which they deserve) when things go wrong. This dynamic incentivises organisations to make far greater efforts to defend self-regulatory codes and good practice guidelines.
18. While the MBG welcomes the clarity provided by the detailed criteria for the assessment of whether self or co –regulation might be appropriate, we are concerned that rigidly set criteria might act as a disincentive and barrier to new Codes being developed, as companies may have to tick all the boxes before a scheme could be considered. However, good-self regulation is driven primarily by groups of organisations with clear objectives and a common interest and must be allowed some latitude to develop organically, as the situation demands. .
19. The MBG, in the light of the arguments presented, urges Ofcom to reconsider and amend its 'Initial assessment' document and spell out the potential benefits of self-regulation more fully. Such a re-evaluation should make Ofcom more pre-disposed to self-regulation than they have appeared to be hitherto. It would also be extremely worthwhile for Ofcom to re-assert its commitment to a bias against intervention and make clear that the benefits of self-regulation go far beyond lower cost and greater flexibility.

Shortcomings of formal regulation

20. Formal regulation, after all, is not perfect. There is an ever-present risk of unintended consequences, regulator error and lack of applicability across national boundaries. Moreover, formal regulation is usually very inflexible and cumbersome to change.
21. The MBG therefore welcomes Ofcom's acknowledgement (in para 2.7) that legislative and regulatory practices must recognise and address the dramatic

changes in the communications sector, brought about by, among other factors, convergence.

22. An example of where Ofcom, even though it was formed as a converged regulator, acknowledges that it has had difficulty in keeping pace with the changing environment is the anomaly whereby communications provider A, supplying value added products and services charged to a mobile account, is regulated under the premium rate code, whereas communications provider B supplying products and services charged to residential multi-service account (such as TV, internet and telephony) is not.
23. In order to remove this anomaly, (which is required given Ofcom's duty to regulate on a platform neutral basis), Ofcom would have to undertake a comprehensive review, consult and, if it required changes to the premium rate code, seek approval from Europe. Such a protracted process amply illustrates the downside of formal regulation in a rapidly changing communications market.

Duty to promote self-regulation

24. Despite the clear advantages that self-regulation brings, Ofcom has been reticent to support self regulation. This has been perplexing, given its duty under the Communications Act to promote and facilitate the use of effective self-regulation and the clear statements from the Government during the passage of legislation in favour of a light touch approach. Although the Act precludes self-regulation in specific areas, Ofcom has a general duty to review the regulatory burden to consider whether matters it is responsible for regulating can be furthered or secured by effective self-regulation. This reluctance may flow from a desire to avoid criticism from the media or Parliament of failing to take tough action. Responsiveness to public concerns is important in a regulatory regime, but Ofcom must balance this with its statutory requirement to encourage investment and innovation in the markets it regulates. Ofcom should therefore be prepared to defend robustly its regulatory approach and actions taken in accordance with the statutory framework under which it operates.
25. It is the MBG's experience that Ofcom have been interested and supportive stakeholders in areas that fall outside their direct remit – such as the mobile content code or the passive location code. However, Ofcom's record of allowing self-regulation to proceed where formal regulation is an option is relatively poor.
26. In fact only two examples spring to mind. First, the Broadband Stakeholders's good practice principles for content information and secondly the Code for the selling of mobile airtime services. The latter was published in July 2007 and Ofcom allowed only eleven weeks before declaring it had failed and announcing a formal review. While the MBG recognises that there was political interest in this topic, Ofcom is an independent regulator and needs a regulatory regime that is conducive to long term investment and not guided by short term pressures.
27. Allowing a self-regulatory code to run for eleven weeks before effectively calling a halt will hardly give other stakeholders the encouragement to make the considerable effort and organisational investment to engage in self-

regulation in the future. In this particular instance, the mobile sector was performing better, pro rata, to the formally regulated fixed sector and Ofcom could have put much more effort into helping operators sustain self-regulation of airtime selling.

28. In a future Communications Act, it would be sensible for Parliament to give greater consideration as to how the regulator could be given greater encouragement to promote self-regulation in areas of its remit.
29. The MBG believes that one significant barrier is the relative risk and reward for the regulator itself. If Ofcom allows a self-regulatory scheme to proceed and all goes well, no-one (other than perhaps the signatories) will praise them for their enlightened approach or, in all likelihood, allow them to retain any consequent budgetary savings. If the scheme goes wrong, the regulator can receive every bit as much blame for not acting as the code signatories receive for any apparent shortcomings of their code.
30. This aspect of the equation is not addressed in Ofcom's consultation document. It is hard to know how this dynamic can be changed. As a first step, it should be explicitly acknowledged as an issue. Perhaps Ofcom's simplification of regulation report should specifically record what steps have been taken to encourage self-regulation along with an assessment of the benefits so derived.
31. The MBG believes it is absolutely vital to the future competitiveness of the UK's new media industries to establish the right ecology in which self-regulation can flourish.

Co-regulation

32. The MBG has less experience of co-regulation. The MBG is not currently a member of BCAP, which appears to be the best example of co-regulation in the communications sector. In this model, industry is primarily responsible for setting the Code, which, having been signed off by Ofcom, is administered and resourced by the ASA.
33. A less good example is the recent experience with ICSTIS. Prior to the Communications Act, the ICSTIS Code was nominally a co-regulatory exercise between industry and the Committee. In fact industry had minimal input, other than normal consultation, into the writing of the Code. Since the Communications Act, where Ofcom has to approve the Code, all appearance of co-regulation with industry has been dropped and the renamed Phonepayplus is now an agency of Ofcom with co-regulation in effect meaning co-regulation between the two regulators and not in partnership with Industry – despite the regulator's reliance on network operators to exercise due diligence, financial control and, where necessary, bar access to the premium rate services.
34. It is conceivable that co-regulation is a half-way house that provides the worst of all worlds. It has neither the flexibility of self-regulation or the simple 'command and control' of formal regulation. The MBG believes that co-regulation will only be successful if Ofcom can genuinely demonstrate that it has a hands-off approach, restricting itself to code approval and intervention as a last resort.

35. If Ofcom encroaches on the day to day decisions of the co-regulatory body, then industry members will not invest the time and effort and leave Ofcom to do the 'heavy lifting' of developing regulation.

36. The MBG understands that the Government's preferred approach to implementing the Audio Visual Media Services Directive is to use co-regulatory bodies where appropriate. The MBG believes that, once approved, any co-regulatory bodies should be able to operate in a reasonably unfettered way, in order for the benefits a quasi self-regulatory approach to be realised.

Suggestions for co/self-regulatory schemes

37. Ofcom specifically asks whether stakeholders have any suggestions for possible co- and self-regulatory schemes within the UK Communications sector. The MBG has listed numerous schemes where mobile operators have participated in some form of self or co-regulation. By way of example, we set out how one of them, the scheme rules for the trusted mobile payment framework governing Payforit, would match up against the draft criteria. In this instance not all the criteria are met because the scheme is new and there is still some continuing discussion with Ofcom about the exact legal status of Payforit. Nevertheless, the table demonstrates that the basic factors on which a self-regulatory scheme could be built are in place.

Criteria	Criteria met
Public awareness and visibility of schemes	The scheme is new. Awareness only at industry level presently.
Transparency	Scheme rules are transparent and publicly available
Significant number of industry are members	All mobile five mobile network operators are signatories
Proportionate cost	Administration costs are reasonable
Enforcement measures	Contractual measures in place to require service providers to abide by the scheme rules
Audit of members and scheme	Not presently in place
System of redress in place	Customers, in the first instance have access to their network providers customer services. Thereafter, they have access to alternative dispute resolution schemes
Involvement of independent members	Not presently in place
Pro-active and planning in research and regulation	Continuous and front line exposure to market developments
Non-collusive behaviour	Scheme rules are carefully set to comply with Competition Law

Conclusion

38. Self regulation has a significant contribution to make in relation to the new media landscape, not only because of its lower cost and greater responsiveness but also because the value of the time and energy its

promoters devote to it, its greater potential for having cross border influence and the focus it brings when there is no regulatory safety net. The MBG agrees with Ofcom that not all of its criteria will be applicable on all occasions. Indeed, it is important to recognise that self-regulation can provide a more proportionate and targeted entry point to regulation, which can evolve over time, as the situation demands. The MBG would like to Ofcom to recognise that the benefits of self-regulation are far more profound than lower cost and greater flexibility and to be more pre-disposed to self-regulation in topics that are within its direct remit.

Annex

Self Regulatory Codes developed either specifically by UK Mobile Operators or where they have been active participants in a broader industry scheme

UK Code of practice for the self regulation of new forms of content on mobile

UK Code of practice for passive location services

Mobile Industry Good Practice Guide for Service Delivery for Disabled and Elderly Customers in the UK

Code of Practice for Common Shortcodes

Code of Practice for the sales and marketing of subscriptions to mobile Networks

Scheme rules for the Trusted Mobile Payment Framework (Payfort)

Mobile Operators Ten Commitments to best siting practice

Internet Watch Foundation Code of Practice

Home Office Taskforce on Online Child Safety Good Practice Models for chat, Instant Messaging and web based services.

Home Office Taskforce on Online Child Safety Good Practice Models for moderation services

Home Office Taskforce on Online Child Safety Good Practice Models for interactive services

Committee of Advertising Practice Code

BSG's Common Principles on Content Information

Mobile Phone Industry Crime Reduction Charter