



The Mobile Broadband Group
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8 September 2004

Caroline Wallace
Director of Competition Policy
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Dear Caroline

Ofcom Review of PRS Regulation

Further to our recent meeting of 17 August 2004 during which we discussed the ongoing Ofcom review of PRS regulation, the Mobile Broadband Group (whose members are O2, Orange, T-Mobile, Vodafone and 3) thought that it may be helpful to write to you to outline some of our further thoughts on the role of PRS regulation.

Firstly, on behalf on the MBG, can I thank you for agreeing to see us at short notice to discuss the review. Whilst we understand that Ofcom has been given a very short timeframe by the DTI during which to complete this review, we would welcome any opportunity to have a greater input into the review and should Ofcom believe that it would be useful to meet again, in advance of the final report being sent to the DTI, we would welcome this opportunity.

Even though we discussed at the recent meeting a number of headline considerations, the MBG is unfortunately still a little unclear as to the precise scope of the review and its intended outcome. It is also disappointing to note that it does not appear as if stakeholders will have an opportunity to comment on Ofcom's proposals before they are submitted to the DTI. This is somewhat surprising, particularly as it appears as if many of the proposals being considered by Ofcom may directly affect the UK mobile network operators (UK MNOs). The MBG believes that it would be a more appropriate course of action, to ask those interested parties for their comments on the draft proposals before they are submitted to the DTI. This would provide an opportunity for stakeholders to sanity check the proposals and hopefully provide some useful and constructive input that would improve the overall submission made to the DTI.

At our meeting, two distinct areas for review were raised: (a) making terminating network operators (TNOs) more accountable for compliance with the ICSTIS Code of

Practice and (b) consumer redress. The MBG members would like to take this opportunity to explore these issues in more detail.

Making TNOs more accountable for compliance with the ICSTIS Code of Practice

In principle, the MBG fully supports proposals to make terminating network operators more accountable for PRS abuse but only to the extent that they are guilty of some wrongdoing themselves, rather than simply as a substitute for service provider accountability. However, it is unclear as to how Ofcom intends to interpret this term and we are concerned that any extension to regulatory controls may be applied disproportionately.

An analysis of ICSTIS complaints completed in 2004 demonstrates that of the 14,705 complaints received by ICSTIS in 2004, 76% (11,114) of complaints were related to services hosted by a group of just four network operators. Indeed in 2004 one terminating network operator alone was accountable for hosting services which generated 31% of all lead cases.

By way of contrast in 2004, no ICSTIS complaints were received about services hosted by the UK MNOs, (down from 30 in 2003) despite the mobile networks having a total customer base in excess of 45 million. With this in mind it would seem unnecessary to extend regulatory controls onto the UK MNOs.

In the mobile space, the five UK MNOs have developed a common approach to shortcodes which provides the basis on which service providers are contracted to our respective networks. All of our contracts with service providers specifically include a condition that the service must comply with the ICSTIS Code of Practice and, where there is evidence of a breach of this code, we are able to take decisive action, where appropriate, to ensure that our consumers are protected. Where there is evidence of abuse we retain the right to bar the service provider in question from our respective networks. Furthermore, it should also be noted that all of the UK MNOs only contract with service providers following reasonable investigation and due diligence checks. This is evidenced by the low level of consumer complaints.

In addition the UK MNOs, with the support of service providers, have developed a new consumer protection scheme to enable users to cancel services by sending a single text message. From 1 August 2004 providers of new or existing services have to be able to recognise the keyword 'STOP'. We believe that this will give consumers more control over what is sent to them and indeed this scheme has been welcomed by e-Commerce Minister, Stephen Timms MP.

The UK MNOs are of the view that the checks and balances highlighted above represent industry best practice and this ultimately manifests itself through very low levels of customer complaints. It is however also recognised that the UK MNOs have a distinctive role in relation to the provision of premium rate services because they act as both the originating network operator and the terminating network operator. Within the more traditional voice PRS market, very often the TNO has no direct relationship with the End-User of the service. As such, the MBG would question whether, given this lack of End-User relationship, these TNOs are adequately incentivised to implement best practice consumer protection measures. There is a suspicion that some of the less customer focussed TNOs contract with SPs with little or no checks as to the type of services that are being offered and the MBG believes this is the area that Ofcom should be seeking to target during its review. TNOs

should be required to carry out proper identity and credit checking procedures before agreeing to carry PRS traffic.

At our recent meeting, there was some discussion about how terminating operators could be made to be more accountable from a financial perspective and one of the areas mooted for discussion was the payment of fines. Whilst the MBG believes that this suggestion merits consideration, we do not believe that, in this particular form, it represents an equitable response to service provider breaches of the ICSTIS Code of Practice. Under the provisions of the Communications Act 2003 (in conjunction with the provisions of the ICSTIS Code of Practice) the Service Provider is ultimately responsible for ensuring compliance with the Code. The terminating network operator has no direct relationship with ICSTIS, other than collecting the annual administration charges on behalf of its service providers. As such, in cases where despite due diligence checks a service provider deliberately or otherwise breaches the ICSTIS Code, the MBG believes that it is not necessarily appropriate to then try, in the event of non-payment of fine, to enforce the fine on the TNO. If such, drastic regulatory controls were to be considered by Ofcom, it is envisaged by the MBG, that terminating network operators would then seek to put in place security bonds with their service providers to cover off any potential fine. As Ofcom will be aware, under Section 123 of the Communications Act, service providers can now be fined up to £100k for breaches of the ICSTIS Code. It is therefore likely that TNOs would set security bonds at this level, due to the inability to estimate in advance the level of any fine which may be imposed by Ofcom. We would therefore suggest that this may effectively act as a barrier to market entry, thereby acting as a restriction of competition within the PRS market, meaning that only those large SPs with sufficient resource to pay such a level of bond would be able to enter the market. The MBG believes that if Ofcom is actively considering such proposals, they will be likely to damage the competitive dynamic within the PRS industry, which ultimately would be to the detriment of UK consumers and as such should be avoided.

Nevertheless, the MBG is very supportive of ICSTIS in trying to make TNOs more accountable for their actions and would support a modified approach to fining TNOs directly.

We would suggest that, if complaints about a given PRS are received, ICSTIS puts the relevant TNO on notice and instructs the TNO to withhold "outpayments" to the SP, pending an investigation into the complaint. The withheld outpayment could be used to settle a fine levied by ICSTIS as a result of their investigations.

The TNO would only be held liable to pay the fine in place of the SP if it could be shown by ICSTIS that an outpayment had been released to an SP after an instruction had been received to withhold it.

In addition to this measure, the MBG urges Ofcom to consider whether TNOs that are regularly responsible for thousands of complaints to ICSTIS should be held out as suitable and proper organisations for handling premium rate numbers.

Finally as an overarching principle, the MBG believes that ICSTIS must be funded on a polluter pays basis, which seeks to financially reward best practice, through a lower annual funding charge and punish those who generate the highest levels of complaints. This could be similar in concept to a "no claims bonus" in the insurance industry. Alternatively it could be achieved through the imposition of an annual funding levy paid by all service providers coupled with a per case fee for each complaint received about an individual service provider.

Consumer Redress

Some of the members of the MBG have recently discussed this issue with ICSTIS. Prima facie, we do not disagree with the principle that consumers should be compensated in cases where they have clearly been 'duped' unavoidably into making a premium rate telephone call and as a result have run up an unexpectedly high telephone bill. However, it is clearly a thin line between consumers who have been genuinely duped and those who may not have paid due regard to relevant terms and conditions, who would not be entitled to compensation and obvious issues of proof would arise in making that distinction. In any case, we believe that ICSTIS's resources are much better spent in attempting to deal with these rogue service providers than seeking to gain redress for individual consumers – a process which is likely to be very resources intensive and potentially duplicating work that is done by Otelio and other dispute resolution schemes. However, the MBG does believe that ICSTIS should have a greater consumer education role aimed at ensuring that consumers are better educated about rogue services and what action to take in the event, for example that they receive an unsolicited SMS. We believe that this would assist the wider public much more than seeking redress for individual consumers and indeed the MBG understand that ICSTIS is supportive of the position.

I hope that this points raised within this letter will go some way to assisting with the ongoing review of PRS. However, should you wish to discuss anything contained within this letter please do not hesitate me on 07967 711669 or Hamish MacLeod at mobilebg@btopenworld.com .

Yours sincerely

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On behalf of the Mobile Broadband Group