



The Mobile Broadband Group
PO Box 34586, London SE15 5YA

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Mr Neil Buckley
Ofcom
Riverside House
2a Southwark Bridge Road
London SE1 9HA

Dear Neil,

Ofcom consultation on “Promoting effective self-regulation”

The Mobile Broadband Group (whose members are O2, Orange, T-Mobile, Vodafone and 3) welcomes the opportunity to respond to Ofcom’s consultation “Promoting effective self-regulation.”

Summary

In summary, the MBG supports Ofcom in its desire to promote both self and co-regulation. The main points in our response are:

- It is important to maintain a clear distinction between the three modes of regulation – self, co- and formal.
- Self-regulation should be an important component of the future of communications media regulation.
- There should be a clear process for first establishing whether **any** form of regulation is required to address a perceived problem.
- Self regulation may be just as onerous on business as other forms of regulation but it may not fit quite so neatly into the uniform structure envisaged in Ofcom’s consultation document. Flexibility is required.
- Ofcom needs to remain open minded about giving self-regulation the chance to perform in preference to co-regulation or formal regulation, even though self regulation may not conform to the pre-defined format described here by Ofcom.

The MBG agrees with much of what Ofcom proposes in the consultation document but would like to make a few points around definitions, process and the criteria.

Definitions

The MBG believes that this whole area could be much better understood by consumers and industry, if there were a much tighter use of language, where the three modes of operation, self-regulation, co-regulation and formal regulation are clearly distinguishable.

Self-regulation applies where the regulatory authority has no hand in the development or day to day operation of the applicable regulations. The responsibility for this lies with the body that has promulgated the self-regulatory initiative.

The characteristic of co-regulation, by contrast, is that its velvet glove is reinforced by the steel fist of Ofcom within. The co-regulatory body's codes are formally approved by Ofcom.

Formal regulation is, of course, where Ofcom takes direct action itself.

It is competitive markets, rather than regulation, that deliver most benefits to consumers. However, where regulation is justified, our interpretation of the Communications Act is that Ofcom has a duty to promote self-regulation, where appropriate. Because it is only self-regulation that ultimately leads to regulatory withdrawal. The other two scenarios still require the involvement of Ofcom.

In essence, co-regulation seems to be a way of sub-contracting formal regulation to a third party, while maintaining a high degree of control through a service level agreement. Self-regulation is different and is a step towards regulatory withdrawal; it may also be cheaper, more flexible and in certain circumstances more appropriate. Ofcom have a wide-ranging ability to obtain backstop powers if things go wrong.

Included within the term 'promote', would include forbearance from co-regulatory or formal regulation when a credible self-regulatory alternative is on offer. The mobile operators were particularly disappointed when Oftel chose not to recognise the self-regulatory proposals for developing services for the elderly and disabled and put in place formal general conditions of entitlement. Such action constituted the opposite of promoting self-regulation.

If self-regulation is not possible – if there is no credible vehicle through which it can be delivered – then the MBG would urge Ofcom to consider co-regulation as the next option.

Process

If Ofcom is confronted with an issue that may require some sort of regulatory response, there should be a standard way of dealing with it, within the framework established by the Communications Act.

First, Ofcom should consider whether **any** action is required at all. The trigger should be a regulatory impact assessment that demonstrates the existence of or potential for significant consumer harm.

Only then should Ofcom suggest remedial action. Its first option is to consider whether there is the possibility of self-regulation. By definition, Ofcom cannot impose self-regulation but it can encourage it (i.e. promote it) by making clear that formal regulation (or co-regulation) will be used unless there is a viable alternative.

If no self-regulatory options present themselves, then co-regulatory approaches should be considered and, finally, formal regulation.

Self-regulation is not a soft option and should not be taken on wantonly or lightly. It is not necessarily less burdensome than formal regulation on the businesses that are subject to it. Operators often incur significant compliance costs in implementing self-regulatory schemes. For example, considerable resources are being deployed to implement the mobile operators' content code.

Its advantage is that it can be much more flexible and tailored to the needs of the situation and is implemented by those that are very close to the issue to be addressed.

There are a number of occasions where **self-regulation** can add more value for consumers than formal regulation. We consider that the reasons include:

1/ To avoid the imposition of requirements that have a fossilising effect on the industry.

In the absence of industry providing solutions the regulator may feel compelled to impose specific requirements which can force the industry down particular technical paths. Those technologies can quickly become left behind by the market place but cannot quickly be withdrawn because of the customer base which invests in the use of them. This diverts resources away from more useful initiatives;

2/ To improve a regulatory solution by bringing more industry expertise to bear on an ongoing basis;

3/ A larger available workforce in the industry – Ofcom may have difficulty recruiting the right people for a one off initiative;

4/ Where Ofcom does not have all the necessary powers but propose to seek them.

Criteria

The list of criteria identified by Ofcom for delegating functions to a co-regulatory body is generally sensible and represents good practice. These criteria might also be used in judging whether completely self-regulatory schemes are likely to succeed. However, that is not to say that self-regulation will not succeed unless all criteria are met. There are other factors at work. Ofcom should not always insist that all criteria are in place before giving the opportunity for a self-regulatory scheme to proceed, in preference to a formal alternative. If Ofcom were to, it could easily smother at birth initiatives that would otherwise be established and grow. A self-regulatory initiative should not have to be perfect from day one; it just has to be a good start and be capable of forming the basis of future development. If Ofcom is too cautious in this area, opportunities for self-regulation may be lost.

An important factor for judging whether self-regulation is likely to succeed is the degree to which members of an industry have clear incentives to work together on

public policy matters on an ongoing basis. In the mobile sector, where there are reasonable size companies and considerable reputations to protect, the opinion of customers and the public in general is just as powerful a motivation to initiate self-regulation as pressure from the regulator.

It is also important that Ofcom judge the likely effectiveness of self-regulation and indeed co-regulation against the right benchmark, acknowledging that formal regulation is never perfect either. Self-regulation should not be judged against the perfect world but against the co-regulatory or formal alternatives.

While the MBG acknowledges that the proposed criteria are generally sensible, it may not be that they are always relevant or appropriate, whether they are being used to evaluate either self-regulatory or co-regulatory schemes

For example:

Accessible to members of the public (para 2.7)

We assume that accessibility to the general public is about transparent consultation and use of procedures rather than access to industry meetings if, for example, technical matters were being discussed. Self-regulatory bodies should be able to make charges to prevent vexatious use of procedures, if necessary. The MBG welcomes Ofcom's proposed flexibility in this regard.

With regard to effective public consultation, Ofcom knows how hard this is to achieve, as it is very difficult to get the public to engage in these sorts of topics. Self and co-regulatory bodies should be expected to conduct consultations for significant changes in procedures only, actively seeking views from interested parties, rather than the public at large (although, of course, their views would still be welcome). The costs involved in consultation have to be proportionate to the matter being consulted on.

Independence from Interference by Interested Parties

The MBG questions whether it is necessary to be so categorical about a ratio of 75% of a co-regulatory organisation being made up of independent representation. It is almost certainly too ambitious for self-regulatory bodies and, the MBG would suggest, it is not a proven requirement for co-regulatory bodies. After all, until recently it was the norm in the UK for our main regulators to be individual Director Generals.

In this section, it would also be useful to have some guidance on the extent to which a co-regulatory body would have independence from interference from Ofcom. In conjunction with para 2.5 (*clear division of responsibilities*) para 2.15 (*auditing and review by Ofcom*), this area needs to be explicitly addressed in the setting up of co-regulatory schemes.

Consistency with similar regulation

It is certainly a laudable aim that regulation should be consistent. It was one of the main reasons for establishing Ofcom – to provide consistent and coherent regulation across the media sector. In real life it may be difficult to arrange matters so tidily. The predominant principle is that regulation should be proportionate and targeted. If it is consistent with other similar regulation, so much the better.

Divergence from the criteria

The MBG welcomes Ofcom's proposed flexibility, in that it acknowledges that co-regulatory schemes can be established without all the criteria being fully met. There are bound to be situations where flexibility is required. The list should not be regarded as conclusive. This also applies to self-regulation. Ofcom should be prepared to give self-regulation the opportunity to be set up in preference to co- or formal regulation, providing the attempt is credible and even if not all criteria are met.

The MBG believes that this is an extremely important topic and that, in the wake of the Communications Act, Ofcom needs to make strenuous efforts to promote regulatory withdrawal by placing more reliance on self and co-regulation. We look forward to seeing Ofcom's updated proposals on this area. Finally, the MBG would be happy to meet with Ofcom and discuss in more detail any of the points made in our response.

Yours sincerely

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