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Mr Bradley Brady
PhonepayPlus
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Dear Bradley

Business Plan and Budget 2010/11

The Mobile Broadband Group (MBG) welcomes the opportunity to respond to PhonepayPlus' consultation on the business plan and budget 2010/11.

The MBG supports the overall strategic direction of the plan – to foster trust in premium rate services through measures that seek to pre-empt and prevent problems and to protect customers from scams and malpractice. These goals are very much aligned with actions that mobile operators themselves take, through their codes of practice, to stamp out non-compliance in the PRS value chain. We also appreciate the more detailed and clearer presentation of the budget,

The MBG would like to make the following comments in relation to the draft plan and budget:

Market developments

The MBG notes PhonepayPlus' comments (on page 18) that the major mobile story in 2009 was the applications store on Apple iPhone and other applications stores and that

PhonepayPlus suggests the development of open platforms could have a major impact on the provision of paid for “applications, media and other premium content” on mobile.

PhonepayPlus does not however, go on to describe developments on other communications platforms where media and premium content is widely available and is charged to the customer’s communications provider bill. A recent adjudication by the Code Compliance Panel held that *“The service involves the user of an electronic communications service (‘ECS’) (in other words the customer of the relevant mobile network) making a payment for products or services by the making of a transmission on his/her network, accepting the obligation to pay and triggering the inclusion of the amount in question on the customer’s bill.”*¹,

Our understanding from this adjudication is that PhonepayPlus is of the view that any charge applied to a customer’s bill by the transmission of a message on a communications network is a Premium Rate Service and therefore regulated by PhonepayPlus. However, our experience, is that this is very selectively applied and that there remains total inconsistency in the way value added services are regulated (Are, for example iTunes charged to a BT bill regulated by PhonepayPlus?).

Ofcom’s PRS scope review did nothing to resolve such inconsistency, as, having developed the analytical framework, no analysis was actually carried out by Ofcom on the various value added platforms in the market, many of whom allow charging to be applied to the communications bill. Nevertheless, regardless of the Scope Review it is clear from the above adjudication of by the Compliance Panel that PhonepayPlus is clear in its interpretation of Section 120 of the Communications Act and as such the MBG expects PhonepayPlus to detail in its annual plan how it will address the inconsistency in the application of the current Code of Practice.

The MBG further calls upon Ofcom and PhonepayPlus to commit in the 2010 plan to complete the review of PRS scope and to establish a regulatory framework that is coherent, consistent and proportionate to the risks to customers.

The total level of expenditure

PhonepayPlus is correct to point out that the industry is going through an extremely challenging period. The overall economic outlook has compounded a situation that was already difficult. For the time being the market appears to be flat/falling rather than rising. The MBG therefore welcomes the real decrease in proposed expenditure. This is entirely appropriate in the circumstances.

However, PhonepayPlus should be mindful of the fact that levels of business for the coming year are likely to be roughly 20% below the industry value in 2003, when the ICSTIS budget was £2.4m. Moreover, in the period since inception to 2009/10, Ofcom has calculated that its own costs have fallen 21% in real terms. While the current proposal is welcome, it should be viewed as the first step in a medium term process to reduce the regulatory burden on the PRS sector.

¹ PhonepayPlus CASE REFERENCE: 792423/DL, 12th November 2009

With respect to the detail, we note that the lease at Maguire Street is coming to an end and welcome the objective of getting an improved deal in the current economic climate. There must also be further opportunities to share and save costs with Ofcom, PhonepayPlus' sponsoring regulator.

We also note that there is provision for more external legal resource, because of the departure of the in-house lawyer. This appears to be a reversal of the approach taken a few years ago, whereby an in-house lawyer was hired to save on external legal fees. The MBG would welcome an explanation as to whether this is a tactical move to cope with the particular circumstances or a recognition that in the long term it is actually more effective to rely on external specialist advice rather than maintain an in-house resource, where it may be difficult for one person to possess all the relevant skills.

Compliance Advice

The budget acknowledges an increase in demand for industry support services and compliance advice in particular, but fails to consider the reasons for such an increase in demand or the best method of managing it – other than to increase headcount. There is no detail to enable respondents to quantify the budget increase, or indeed whether the associated decrease in consumer support is cost neutral or cost reducing. Industry frequently has to respond to increased demands without necessarily increasing expenditure. MBG would like to understand the budgetary increase for the Industry Support Team and would also welcome some evaluation as to whether that team was under resourced in 2009. There is after all no suggestion that demand by Industry went unmet in 2009. Our industry partners tell us that the demand is a direct result of uncertainty about what the rules are and a lack of clarity and confidence about how they are interpreted. There is an array of rules sourced from Code provisions, help notes, statements of expectations and case law, not of which are consolidated in any meaningful way. We recommend that PhonepayPlus reconsider how it may best use its resources to target both the primary resourcing issue and also the root cause of increasing demand. A campaign for new or early entrants to the industry that educates and clarifies Code provisions, would be a good use of these resources.

Funding model for media campaigns

The MBG is encouraged to see the 'polluter pays' principle playing a part in PhonepayPlus' proposal to levy a 5% surcharge on offenders to fund media. However, we urge great caution against any funding model which has direct reliance on sanctions. The industry has observed increasing fine levels in the last year, without any seeming explanation. Should this upward trend continue it would be, at least, reassuring to know that it does so independently and not as a result of a need to fund an expensive media campaign. PhonepayPlus assures us that the Code Compliance Panel has secured the separation of judiciary and executive powers within PhonepayPlus; it would seem sensible not to introduce measures that could jeopardise this.

Putting aside from the funding model itself, there is little in the consultation document to objectively justify 'media campaigns' as the area of PhonepayPlus' work which should

benefit from an undefined budget. The MBG considers that there are other potential areas of PhonepayPlus' work which may be considered as having a greater pull on any additional revenue streams. For example, a fund to help customers obtain their refunds, increased monitoring activity or compliance advice for new and early entrants to the industry. PhonepayPlus' most high profile campaign encouraged children to develop and create compliant Premium Rate Services, but no equivalent industry support exercise was delivered to industry (other than for 0871 providers) – a group who, arguably, could benefit most.

Key Performance Indicators

The MBG notes that PhonepayPlus is to review its Key Performance Indicators in the coming year. We understood that this activity was due to happen last year and so we made comments in our response to the 2009/10 draft business plan. For ease of reference, we repeat what we said on the subject last year:

“The current measures are important but PhonepayPlus lacks an agreed and objective measure that justifies the high level of regulatory cost (PhonepayPlus has much higher costs than the Advertising Association and Ofcom, for example, in relation to the value of industry regulated). In the absence of such a measure, the board and stakeholders lack any yardstick against which to measure the appropriate level of budget. What objective measure would signal that it was ever justifiable to make real cuts in regulatory costs? As matters stand, the industry appears to be stuck with an ever rising budget and little prospect of returning to 2003 levels (in real terms), even if there was a substantial reduction in complaints. The MBG trusts that PhonepayPlus will engage with all stakeholders in the review of KPIs. The MBG would welcome the opportunity to contribute.”

Proactive monitoring of high risk services

The MBG is pleased to note that PhonepayPlus' Intelligence function is planning to further develop its monitoring and service testing of high risk services. This is something that the MBG has been advocating for some time. As PhonepayPlus knows, one MNO sub-contracts the systematic monitoring and recording of several hundred services per month. As it happens, the testing does not relate directly to PRS but the principle is the same. Systematic testing achieves good results, high levels of compliance and catches non-compliance before it can cause wider problems.

Regulation of 070

The MBG agrees with PhonepayPlus and Ofcom about the need to rid the market of information providers that attempt to scam customers through the use of 'one ring' calls.

We remain unclear, however, about how the cost of regulating 070 is covered. Presumably there is no system for collecting levy from these illegitimate services. The MBG observes that no retrospective breaches have been brought against any offending service providers or network operators for their failure to pay (or collect) the levy. The MBG feels that there is a strong case for asking Ofcom, on whose behalf PhonepayPlus is administering the Code, to cover any costs that are not covered by the collection of fines (070 scammers generally

seem to have a very low collection rate). This matter should be considered thoroughly as part of the funding model review.

In conclusion, the MBG will continue to work with PhonepayPlus with a view to developing more efficient and effective PRS regulation. We will also urge Ofcom and PhonepayPlus to resolve outstanding matters arising from inconsistent application of the regulations.

Yours sincerely,

Hamish

Hamish MacLeod
Chair, Mobile Broadband Group