



**Proposed Welsh Language (Wales) Measure – written evidence to
Legislation Committee No.2 from the Mobile Broadband Group**

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1. The Mobile Broadband Group (“MBG”, whose members are the UK mobile businesses of O2, Orange/T-Mobile, Vodafone and 3) welcomes the opportunity to provide written evidence to Legislation Committee No.2 with respect to the Proposed Welsh Language (Wales) Measure (the “Proposed Measure”).
2. The members of the MBG provide mobile communications services throughout the United Kingdom and operate shops both in Wales and other nations of the United Kingdom, selling network airtime, handsets, mobile broadband dongles¹ and other ancillary goods. In support of their UK operations, some MBG members also operate back office functions, such as customer service help desks, in countries outside the UK. Consequently the Proposed Measure has the potential to have a very significant impact.
3. The MBG is very supportive of the Welsh Assembly’s long term objective of increasing the use of the Welsh language in Wales. Many new mobile services are very useful for improving learning and communication in Welsh. For example, customers can now have a Welsh language dictionary application permanently at hand on at least one smartphone on the market and one handset manufacturer has recently introduced a mobile phone which provides Welsh language predictive texting.
4. While the MBG has expressed a preference for Welsh language services being promoted through voluntary measures, on the grounds that mobile operators already do more on that basis than simple economics or apparent customer demand would dictate, we strongly wish to engage with the Welsh Assembly on this matter to ensure that the Proposed Measure delivers regulation that will benefit Welsh citizens, the vast majority of whom are also customers of the mobile operators.
5. The definition of “telecommunications service” contained in Schedule 7 of the Proposed Measure and the extension of the category of qualifying persons to those providing “other services which relate to” telecommunications services results in an extremely wide-ranging potential scope of application. Voice telephony and data services can be accessed through a variety of networks and facilities including but not limited to traditional fixed telephony networks, mobile networks, publicly provided Wi-Fi networks/hotspots (e.g. community, municipal or universities)²,

¹ A wireless modem used to connect laptops to a mobile network

² WiFi hotspot A public location which provides access to the internet using WiFi technology

satellite, and VOIP applications³. Following the Digital Britain report, the UK's nations and regions have ambitious plans to develop these services further.

6. The task of balancing the Welsh Assembly Government's ('WAG') other priorities, such as those flowing from Digital Britain, and introducing Welsh Language regulation that meets the WAG's stated policy objective of providing a level playing field in the private sector and being reasonable and proportionate will be challenging. This will be particularly so for the telecommunications sector, which is extremely diverse and dynamic.
7. The MBG therefore urges that the Proposed Measure sets down requirements that will deliver a transparent and rigorous process that will provide the firm foundations for a proportionate, rational, and economically sensible outcome. In our written evidence below, the MBG sets out some proposals that we feel are necessary to achieve this.

Summary

8. The MBG's comments, suggestions and questions on the Proposed Measure can be summarised as follows:
 - **Welsh Language Commissioner ("WLC")** – the Proposed Measure needs to give a formal role to the WLC to prepare an advisory report for the Welsh Ministers. This process should be incorporated into the Proposed Measure and the Welsh Ministers should be legally required to receive and consider the WLC's advisory report before draft Regulations for Standards are drawn up. At a minimum, the report should assess levels of demand, likely benefits to consumers and costs to providers. There also needs to be greater clarity as to the role of WLC, including the extent of independence from government.
 - **Preparation of Regulations for Standards and Compliance Notices** – the Welsh Ministers and WLC need to take account of wider issues, such as WAG's other priorities (e.g. mobile coverage and investment incentives) and the impact of Regulations on competition in the private sector. With respect to telecommunications and related services, advice should be sought from Ofcom.
 - **Scope in relation to shops** - it needs to be made clearer that the provision of both goods and services through shops remains out of scope. To maintain a level playing field, this exclusion should also extend to the provision of goods and services on-line.

³ VoIP Voice over Internet Protocol. A technology that allows users to send calls using internet protocol, using either the public internet or private IP networks

- **Jurisdiction** – it should be clearer that the Proposed Measure relates to the provision of telecommunications services to Welsh customers in Wales.
- **Schedule 9** – this is a comprehensive list. It may be that an Impact Analysis would not justify Standards for all items. ‘Must be’ in the title should be changed to ‘may be’.
- **Appeals to Tribunal** – A provider should also be able to appeal against a Compliance Notice and not have to wait for WLC to determine non-compliance. This is required by the Legislative Competence Order (“LCO”). 28 days is too short a period in which to make an appeal on potentially complex topics.
- **Impact assessment for Proposed Measure** – the comparison of costs for ‘large organisations’ with public bodies and former publicly owned utilities already providing Welsh language services is not a fair comparison and cost estimates for what Schedule 9 entails are likely to be severely underestimated.
- **Operational and Policy Standards for public bodies** – The WLC should be the only source of regulation on Welsh language services for telecommunications providers. Requirements should not emanate indirectly from Operational and Policy Standards of public bodies. The Proposed Measure must be clear on this point.
- **Compliance Notices for providers entering the Welsh market** – the telecommunications market is very dynamic. The MBG understands the process for setting Regulations and issuing Compliance Notices for the market as it stands today. The Proposed Measure needs to be clearer on how new market entrants will be treated.

Background

9. The UK market, including Wales, is served by a very wide variety of market actors. At the network level there are O2, Vodafone, 3 and a recently formed joint venture between Orange and T-Mobile. In addition there are several Mobile Virtual Network Operators with service provider agreements with the mobile operators. Some MVNOs are large with one million plus customers, such as Tesco and Virgin Mobile. Others are much smaller, addressing niche markets such as university students or special interest groups.
10. Ofcom’s most recent figure for mobile subscriptions⁴ in the UK is 76.9 million (1.26 per head of population)), with 89% of individuals using a mobile phone. In their Nations and Regions Report for 2009, Ofcom states that a very slightly smaller

⁴ Ofcom Communications Market Report 2009

percentage of Welsh consumers own a mobile but that they are more likely than the UK average to have an advanced 3G (third generation) device.

11. There are numerous handset manufacturers such as Nokia, LG, Sony Ericsson, Samsung, Motorola, RIM (who manufacture the “Blackberry”) and Apple. And there are innumerable providers of ancillary services and applications to run on the handsets – many of which are now dual mode i.e. they can work either on 3G mobile networks or Wi-fi (which can either be at home, connecting wirelessly to the domestic Internet connection or through a variety of publicly/commercially provided networks.)
12. Customers can purchase handsets and airtime through a multitude of channels: on-line or in operator branded retail shops, in shops that are independent of the network operators, such as Tesco and Carphone Warehouse, or from thousands of small independent businesses. Handsets and other devices (such as 3G dongles) can be bought packaged with network airtime or devices and airtime can be bought separately.
13. In summary, the market encompassed by ‘*telecommunications service*’, as defined in Schedule 7 of the Proposed Measure (a unusual definition when compared to ‘*electronic communications networks and services*’ set out in section 32 of the Communications Act 2003 or ‘*telecommunications services*’ set out in section 2(1) of the Regulation of Investigatory Powers Act 2000), is very diverse. ‘*Other services which relate to services within paragraph (a)*’ draws the boundary very wide indeed. There will be a considerable amount of work for the WLC/WAG to define exactly what is covered by these terms.
14. Establishing Regulations which meet the stated policy goals (as set out in the Explanatory Notes) of supporting Welsh Language development, being proportionate and providing a level playing field in the commercial sector will need very rigorous analysis and careful execution.
15. The MBG comments on the Proposed Measure and the Explanatory Notes focus on the following points:
 - Role of the WLC in preparing proposals
 - Matters to consider when preparing Regulations for Standards
 - Scope – in particular the rules for retail outlets
 - Jurisdiction
 - Schedule 9

- Appeals to Tribunal
- Impact assessment for Proposed Measure
- Operational and Policy Standards for public bodies
- Compliance Notices for providers entering the Welsh market

Role of the WLC

16. The documents published by WAG give very mixed messages about the role of the WLC.
17. Section 3.10 of the Explanatory Notes states the WAG's objective is "*to provide a strong and independent voice for the Welsh language through the establishment of the Commissioner as a champion and advocate for the language.*"
18. The Proposed Measure, however, in clause 15, states that "*The Welsh Ministers may give directions to the Commissioner*" and the Commissioner must comply, which calls into question the Commissioner's supposed independence. Moreover, the Proposed Measure, at clause 25, does not appear to give any role to the Commissioner in preparing the Regulations for Standards.
19. Considering that the Commissioner has to prepare the Compliance Notices and to enforce the Standards (and the Proposed Measure gives considerable detail as to how this should be done), it is anomalous that the Proposed Measure gives no detail as to how Standards Regulations should be prepared or gives any advisory role to the Commissioner.
20. A more logical, transparent and rigorous process would be for the Proposed Measure to provide:
 - Step 1: WLC to prepare a report that sets out in detail what Standards could be appropriate for each sector.
 - Step 2: The Welsh Ministers consider the WLC's report and, by Regulations, specify Standards. Step 2 would, of course, include appropriate consultation and impact analysis, as we understand, Welsh Assembly Standing Orders require.
22. The Proposed Measure allows for any organisation to challenge Compliance Notices on the grounds that they are not reasonable and proportionate. However, we believe that it is in everyone's interests that the Standards and Compliance Notices are set in a way that is reasonable and proportionate in the first place.

23. It is therefore necessary that some form of report is prepared in advance of the Regulations being drafted that assesses, for each of the Schedule 7 categories, at least the following:

- The likely level of demand for Welsh language services in the telecommunications sector. While approximately 20% of the population of Wales are speakers of the Welsh language, the percentage that may want to deal with commercial matters in Welsh could be very different – e.g. reading contracts, talking to customer services on technical matters or placing orders on-line.
- An assessment and explanation of what it is intended and appropriate to include within the scope (in this example) of telecommunications and other related services for the purposes of the Regulations. In this sector, that could be a very wide definition indeed.
- A cost benefit analysis, underpinned by a rigorous methodology, which sets out the benefits for consumers and the costs falling to the organisations deemed in scope for delivering the schedule 9 requirements. If the methodology is transparent and thorough, Regulations on Standards will be far less susceptible to subsequent challenge.

24. The MBG's suggestion is that such a report should be prepared by the WLC and that Welsh Ministers be required to receive and consider such a report before preparing Regulations based on this advice.

Matters to consider when preparing Regulations for Standards

25. There are two very important further matters to consider when developing the Regulations for Standards: the WAG's other priorities, and the impact on competition.

26. In relation to the provision of mobile telecommunications services in Wales, the provision of dual language services appears not to have a high priority within WAG. In 2009 the WAG prepared a submission to Ofcom's Mobile Sector Assessment Part 2. The submission raised the following topics: Coverage, Femtocells (a method of improving essentially indoor coverage), Regional roaming and Emergency Roaming (a way of allowing customers to use another network when no home network is available) and voice telephony in areas with no coverage (WAG would consider financial support to cover uneconomic 'not-spots'). Welsh language provision for mobile services does not get a mention.

27. Mobile operators are very conscious of the pressure from customers, Government and regulators to improve coverage. A lot of research is being done by Ofcom to

understand the underlying reasons for coverage gaps and mobile operators, through investment in more coverage, both acting alone and negotiating network sharing agreements with each other, are doing a lot to meet this demand.

28. In common with all organisations, mobile operators work within limited resources in terms of capital, manpower and time. The time and cost involved in developing Welsh language services will mean less time and money is available to allocate to other consumer issues, which may be of greater priority to Welsh consumers.
29. The Proposed Measure must therefore provide for the Welsh Ministers and the WLC to have regard to consumers' and the WAG's wider priorities.
30. The second matter is the impact on competition. The Explanatory Notes state, at paragraph 9.10 that *"with regard to the small minority of private sector companies that may be subject to standards, the Welsh Assembly Government's aim is to create, for them, a level playing field with regard to the provision of services in Welsh between companies operating within the same sector and providing the same or similar services. As such, the proposals set out in the proposed Measure should have a neutral effect on those companies with regard to competition."*
31. By contrast the Proposed Measure states, at clause 43, that *"a compliance notice may require the person to comply with only one of the standards, or to comply with different standards at different time, in different circumstances (whether at the same time or different times) or in different areas."*
32. The MBG agrees that there will be a need for some degree of flexibility. For example, it will be useful to have the flexibility to phase in Standards, as a 'big bang' approach is likely to be much more costly and disruptive.
33. However, the degree of flexibility given by the Proposed Measure is very disconcerting. The assertion in the Explanatory Notes that the Proposed Measure will have a neutral effect on competition is far too simplistic and appears to be more of an aspiration than a factual statement based on analytical assessment. For one thing, in a sector as diverse and dynamic as telecommunications, it is not always obvious which particular playing field one is trying to level. Market definitions can be very elusive.
34. The Proposed Measure draws the net of potential services in scope extremely wide. It is therefore absolutely essential that the Welsh Ministers, in drawing up Regulations for Standards and that the WLC in issuing Compliance Notices, take appropriate advice on competition matters. Our strong suggestion is that Ofcom has the legislative power and necessary competence to give the relevant advice.

35. The absence of such an assessment could have profound effects on the development of telecommunications and related services in Wales.

Scope – in particular the rules for shops

36. The section on shops is not clear. Schedule 8 (page 119, line 14) brings within scope those organisations that are ‘providing the public with related services’. However, in part 7 of the Interpretation section (page 121), there is an exclusion which states that ‘related services do not include services provided in shops...’

37. A ‘shop’ is defined (on Page 116) as ‘any premises where the sale of goods is the principal trade’.

38. It is very unclear whether ‘goods’ in this context includes ‘services’ or whether ‘goods’ and ‘services’ are meant to be different. Mobile operators and the independent retailers sell both airtime contracts and mobile devices in shops. The first could be said to be a ‘service’ the latter a ‘good’.

39. It should be made clear that the provision (is this the same as sale?) of both goods and services in shops are out of scope. This will be particularly important, one would imagine, for companies that sell both telecommunications goods and services and other products under one roof (such as supermarkets).

40. Furthermore, to be consistent, the same exclusion should apply to on-line sales too. Otherwise, the Proposed Measure falls at the first hurdle in its stated aim of being competition neutral in the private sector.

Jurisdiction

41. The MBG is also very unclear on how jurisdiction works in the Proposed Measure, when ‘telecommunications and related services’ can be provided to customers in Wales from anywhere in the world.

42. Section 94 of the Government of Wales Act states that an Assembly Measure *‘neither applies otherwise than in relation to Wales nor confers, imposes, modifies or removes functions exercisable other than in Wales.’*

43. What does ‘in relation to Wales’ mean in the context of telecommunications services? And what does ‘nor impose functions exercisable other than in Wales’ mean? Mobile operators have the additional complexity that its customers are not static. They provide services to customers from outside Wales roaming into Wales and vice versa.

44. The MBG believes that the jurisdiction must be much more narrowly and clearly focused on serving Welsh customers with telecommunications and related services in Wales. This is all, in any event, that the Government of Wales Act allows.

Schedule 9

45. Schedule 9 sets out a comprehensive list of activities in relation to which service delivery standards must be specified. We understand that Welsh Ministers must provide an impact assessment prior to proposing Regulations. However, if such an impact assessment indicated that it would not be justified to regulate in respect of one or more of these activities, the Proposed Measure affords no leeway to exclude such an activity from the Service Delivery Standards.
46. The MBG suggests that the word 'must' be substituted with the word 'may' so that the title of the schedule reads: "*activities in relation to which service delivery standards may be specified.*"

Appeals to the Tribunal

47. The MBG believes all stakeholders, particularly the WAG, want a measure that establishes a process for developing Standards and Compliance Notices that are reasonable and proportionate. It will be in all our interests that this is done properly at the outset, with transparent and rigorous cost benefit analysis.
48. Nevertheless, the LCO requires that no duties can be imposed "*unless there is a means for that person to challenge those duties, as they apply to that person, on grounds of reasonableness and proportionality*".
49. However, the Proposed Measure only allows for, in clause 91 (2), the person to appeal against a determination of the WLC and, in 91(3), against 'the enforcement action' of the WLC. This does not appear to be entirely consistent with the LCO or in the best interests of the WLC and other stakeholders. As well as being able to appeal against a determination of non-compliance or an enforcement action, the person should also be able to appeal against the Compliance Notice itself. This is what, in our view, the LCO requires and what would deliver an easier process for the WLC in many instances.
50. The MBG further believes that a period of 28 days in which to make an appeal is very unreasonable. This is about the time allowed for a road traffic offence. The matter at hand could be financially very material and the points at issue could be legally and economically complex. The person should be given at least 30 days to give notice of any intention to appeal and given at least a further 90 days in which to lodge the appeal.
51. A final point on the Tribunal is that, because this topic forms a key element of government policy, it must demonstrably be acting independently of the WAG. At Schedule 11, Part 2, section 9 (2), the Proposed Measure should specifically mention

that one of the principles to be followed in drawing up the appointment Regulations is that the Tribunal must be independent of government (and, clearly, the WLC).

Impact assessment for Proposed Measure

52. The MBG understands that the WAG has not published a detailed Impact Assessment for the Proposed Measure because, of itself, it does not require telecommunications service providers to do anything. Nor have mobile operators made a full assessment of the costs of meeting the Service Delivery Standards set out in Schedule 9. Initial assessments, though, confirm that they will be material.
53. The complexity of adapting call centres (some of which are based outside the UK), billing systems and web-sites is several orders of magnitude greater than adaptations that former public utilities or public bodies have apparently had to make (the Explanatory Notes mentions installing translation machines in council chambers). Initial calculations based on schedule 9 suggest that the annual running costs for mobile operators will exceed £200k per annum by a considerable margin.
54. We would expect the Welsh Ministers and WLC to look into these aspects in more detail in relation to the Regulations for Standards at the appropriate time. Nevertheless, we felt it important to point out that the comparisons presented in the Explanatory Notes are somewhat misleading.
55. We also noted with some alarm the statement in the Explanatory Notes that for *“services such as help lines and call centres, it may be easier to locate Welsh language provision in Wales”*. It is totally unrealistic and damaging to Wales to create an expectation that an organisation in the global telecommunications market has to be physically established in Wales in order to serve the Welsh market. This cannot be in the interests of Welsh consumers.
56. It is also important to distinguish the telecommunications sector from public sector bodies and former publicly-owned utilities. With the notable exception of BT, providers of telecommunications services are and have always been privately-owned businesses subject to the usual commercial pressures. They should not be treated akin to ex-public utilities.

Operational and Policy Standards for public bodies

57. In addition to Service Delivery Standards, virtually all public bodies will be required to comply with Operational and Policy Standards. Such Standards, may cover, for example in clause 28, how a policy decision *‘has positive effects on opportunities for other persons to use the Welsh language’*.

58. There are around 135 categories/bodies listed in Schedule 6. We are concerned that all these bodies will interpret their obligations under clauses 28 and 29 differently, including making stipulations on their suppliers.
59. For all the reasons mentioned in this paper around consistency, proportionality, level playing field for competitors etc., the WLC is the only person, through the Compliance Notice process, that should have the authority to impose Welsh language provisions on commercial organisations that fall into Schedule 8 categories. The Measure and any relevant Regulations must specify this.
60. This is the only way to keep Regulations for corporate and individual consumer customers consistent and to ensure that a rigorous process for setting Standards is followed on all occasions.

Compliance Notices for telecommunications services and related providers entering the Welsh market

61. Public telecommunications operator licences in the UK were abolished under the new European framework for telecommunications in 2003. Since then, providers have operated under 'general conditions of entitlement'. Ofcom sets the general conditions and any company that is prepared to work within these rules can operate public electronic communications services without the need to apply for a licence. It merely has to notify Ofcom of its existence.
62. The system of Compliance Notices being issued by the WLC, being personal to an individual organisation, is slightly different to both of these systems. Presumably the WLC would only wish to serve Compliance Notices to those providers serving customers in Wales (even though, under the Proposed Measure, in theory, the WLC can issue one to a provider of any system existing '*wholly or partly in the United Kingdom or elsewhere*')
63. The MBG more or less understands the intended process for setting Regulations and issuing Compliance Notices when the WLC carries out this exercise for the first time. It is not clear, however, how the WLC will deal with subsequent market entrants or on what basis it would be judged that a provider has entered the Welsh market for the first time and would thus be liable for a Compliance Notice.
64. In order to maintain a level playing field, where Regulations cover a group of persons to which a new actor entering the Welsh market belongs, the WLC should, within three months of becoming aware of that person starting to provide services to customers in Wales, enter into consultation with that person with a view to issuing a Compliance Notice in a timely fashion.

Conclusion

65. The MBG understands the basic structure of the Proposed Measure and is confident that it can form the basis for successful, relevant and effective legislation. Nevertheless, the Proposed Measure contains provisions that have the potential to have a very material impact on commercial organisations providing services to customers in Wales. We would urge, therefore, the Committee to give close consideration to the matters raised in this submission and to propose changes to the Proposed Measure, along the lines we have suggested, to improve it and thus maintain the confidence of those investing in the Welsh economy both now and in the future.