

DentonWildeSapte...



Ofcom PRS Scope Review Consultation

A briefing note produced by Denton Wilde Sapte LLP
for MEF Members

July 2009



OFCOM CONSULTATION ON THE FUTURE REGULATION OF PREMIUM RATE SERVICES ("SCOPE REVIEW")

INTRODUCTION

Ofcom has published a consultation document in its PRS Scope Review which is designed to look at the existing regulation of premium rate services and set out, if at all, that regulation should adapt to current trends and market developments (http://www.ofcom.org.uk/consult/condocs/prs_scope/prsscope.pdf). The Review has been some time coming: Ofcom originally produced its terms of reference for the Review in December 2006. Responses to the consultation are due by 24 July 2009.

Under the Communications Act 2003 (sections 120-124), Ofcom has overall responsibility for the regulation, provision, content, promotion and marketing of premium rate services. The definition of premium rate services for this purpose is determined by a special notice (the **PRS Condition**) which is limited in application only to those types of services which, in Ofcom's opinion, give rise to particular consumer harm – this is referred to as "controlled PRS". Ofcom accepts that the current definitions used may not be sufficient to capture the full range of services which should be subject to the PRS regulatory regime and has invited comments from stakeholders as to how it might be amended to better reflect any relevant market changes.

In practice, Ofcom has deferred day to day regulation of PRS to PhonepayPlus (**PpP**), which it undertakes through enforcement of the PpP Code of Practice (**Code**). The Communications Act gives Ofcom the power to approve the Code and any modifications to it. PpP is in the process of starting its own consultation on a new Code (12th edition) and has already published a paper outlining the likely direction of that new Code (see <http://www.phonepayplus.org.uk/upload/Code12-GreenPaper-FINALv2-June2009.pdf>). Since a number of proposals in the Scope Review would necessitate changes to the Code (see below), Ofcom intends to consult directly with PpP in the approval process for that new Code.

ANALYTICAL FRAMEWORK FOR PRS AND APPLICATION TO PARTICULAR SERVICES

The Scope Review looks in some detail at how PRS have evolved over time and its impact on consumers. In this way, Ofcom intends to set out why it believes regulation for PRS is appropriate and necessary and how it justifies modifications to the existing regulatory framework going forward.

This relevant analysis includes an appraisal of the distinctive characteristics of PRS as compared with other communications services. Ofcom points in particular to the following:

- PRS are experience goods, the quality of which consumers can only ascertain at the point of consumption;
- consumers pay for PRS via a fixed or mobile provider, but the service itself is most often provided by a third party (ie Service Provider (SP)/Information Provider (IP)), also it can be difficult to identify the true costs involved until the consumer receives their phone bill (and those on pay-as-you-go contracts may never be fully aware of the charges);
- PRS tends to be an impulse purchase; and

-
- certain PRS may (if not properly monitored) include inappropriate content and some services are designed specifically to appeal to vulnerable parts of society, eg children.

Based on these characteristics, Ofcom concludes that without effective regulation of PRS there is the scope for considerable consumer harm. This harm will be exacerbated where there is limited pricing information available. Further ineffective regulation may provide incentives to SPs and IPs to take advantage of unsuspecting consumers.

Ofcom believes that existing regulation has provided benefits to consumers (and suppliers). It cites in particular the pricing information requirements in the PpP Code, the new prior permissions regime introduced by PpP in January 2009 which certain providers have to conform to, and the 30 day rule which enables the terminating communications provider (ie the person whom the consumer pays for the PRS) to withhold payment to SPs in the event of any issues with the PRS in question. Nevertheless, Ofcom considers that there is scope for adjusting the existing framework to take account of the following market developments:

- the huge increase in take-up of PRS in recent years, spurred by increased mobile ownership and usage (especially amongst children);
- the fact that 64% of mobile users are now pay-as-you-go customers who are typically less aware how much they spend on a PRS (for the reasons already set out above);
- an overall decrease in transparency of PRS tariffs; and
- a number of new PRS number ranges which cannot be barred by consumers.

Together the main characteristics of a PRS service and the potential for consumer harm in the provision of those services as a consequence of recent market developments are referred to by Ofcom as its "**Analytical Framework**". Chapter 5 of the Scope Review document seeks to apply that Framework to a number of 'old' and 'new' PRS services and, more specifically, to test whether the Framework is appropriate to those new services as they emerge (the specific examples used by Ofcom include the purchase of games through Payforit¹, purchasing ringtones via reverse billed SMS and the 08000 mumdad service which allows children to call family members in times of emergency). No further justification has been given as to why these particular PRS services were chosen as the benchmark for Ofcom's analysis.

To test levels of consumer harm, Ofcom looks closely at complaints figures published by PpP for each of the example services. It highlights particular concern with subscription services in general which appear to account for a high proportion (over 50%) of all complaints received by PpP. This information is, however, somewhat out of date, given that it fails to account for the impact of PpP's new Prior Permission regime which was introduced in January 2009 and which has, on PpP's own analysis already led to a significant decrease in complaints (See <http://www.phonepayplus.org.uk/output/news/PHONEPAYPLUS-MOBILE-REVIEW-ONE-YEAR-ON.aspx>)

¹ Payforit is a cross-operator WAP billing scheme created by the UK mobile networks by which PRS by which service providers can use an accredited intermediary to process payment from consumers.

Ofcom has also commissioned consumer research into the use of PRS and reported issues with those services. The main area for complaint revealed by that research is as to consumers being charged more for accessing services than expected.

SELF REGULATION

In determining how to exercise its statutory functions, Ofcom is under a duty to consider whether self-regulatory initiatives can meet any concerns it may have as to the protection of consumers – in other words, can the PRS industry undertake its own initiatives to deal with the issues identified in the Scope review.

The conclusion reached by Ofcom is no. In reaching this conclusion it points to the complicated supply chain involved in providing PRS and the likely conflict of interests between the different suppliers acting across that chain. In sum, it does not accept that all suppliers concerned have a collective interest in solving the problem of consumer harm citing concerns that not all parties will take a self-regulatory scheme equally seriously. However, it does believe that steps can be taken to empower those in the industry to act more responsibly (see below).

PROPOSALS FOR SPECIFIC ACTIONS TO IMPROVE THE CURRENT REGULATORY FRAMEWORK

On the basis of its analysis, Ofcom believes that whilst the existing regulatory regime works well, there are three main areas where specific action is needed. In each area it has proposed potential solutions to remedy the concerns identified:

Lack of price transparency

This is, on Ofcom's analysis, the "major problem" facing the PRS market. It believes purchasers of these services are not receiving enough information about the costs of a PRS service, whilst others are not using PRS services because of concerns about being overcharged. The Scope Review sets out two proposed solutions, focussing on PRS services where the consumer has to dial a premium-rate phone number:

- (a) Requiring pre-call announcements (PCAs) in the form of a recorded message indicating pricing information for a PRS service: Ofcom had previously consulted on making this mandatory in respect of 070 and 0870 numbers, but decided not to do so on account of concerns as to the impact on service reliability. It now wants to consult again on introducing such a requirement, this time across all PRS numbers.
- (b) Requiring all advertisements to include the BT price and the maximum price which will be charged by their network provider for the call: Ofcom considers this may be a more practical means of achieving price transparency (it has rejected any requirement that the information provided includes all variations in charges given limitations of space in any advert).

Facilitating effective consumer redress

Ofcom accepts that the PpP complaints process provides an important means of redress for consumers, but argues that a minority of users would know what to do if they had a problem with PRS and that steps need to be taken to facilitate more direct redress against the SP/IP concerned. It therefore suggests that:

-
- (a) PpP should expand its current 'number checker' service which is a database setting out the names and contact details for the service provider of a particular service – at present this covers only 85% of all PRS numbers and Ofcom believes the cost of expanding the service to capture all numbers (£0.6million) would be justified on account of the benefits accruing to consumers as a result.
 - (b) Thought should be given to making it a requirement that all SP/IPs adopt formal complaints procedures to deal with customer complaints (to a certain minimum standard): this is already imposed by Ofcom on mobile network and fixed line operators through their licence conditions and Ofcom wants PpP to consider including appropriate provisions in its new Code of Practice.

Empowering suppliers to act responsibly

As set out above, Ofcom believes that even with the existing regulations in place (through the PpP Code of Practice), those in the industry need to be given more opportunity to improve the overall standard of behaviour of other participants. In particular, it wants to enable participants at each level of the supply chain to be able to carry out the necessary due diligence on those with whom they partner for the provision of PRS services. Specifically, this would apply as to Termination Communications Providers in relation to Service Providers and to Service Providers as regards Information Providers.

A range of options have been considered to meet these aims, but the Scope Review mentions two alternative proposals:

- (a) PpP be mandated to introduce a centralised registration scheme that would collect and make accessible information on SPs and IPs for suppliers to use in deciding whether to enter into negotiations with particular commercial partners; or
- (b) The introduction of a "reputational database" which would effectively be a more comprehensive version of the current database run by PpP which includes details of all adjudications as to alleged Code breaches.

Ofcom is undecided precisely who would be subject to either of these options and what information either would contain.

Ofcom has also looked at the availability of call barring facilities in the PRS industry. At present, most if not all communication providers offer this function to their customers. However, those facilities are not generally available in respect of outgoing calls and SMS messages to mobile shortcodes (particularly reverse billed messages). Ofcom therefore proposes that it will look more closely at which call barring facilities are presently available and the costs/benefits of providing for a mandatory system of call barring across all services.

Alex Haffner
Senior Associate
Denton Wilde Sapte LLP
9 July 2009

alex.haffner@dentonwildesapte.com

About Denton Wilde Sapte LLP

Denton Wilde Sapte is an international law firm and its leading Technology, Media & Telecoms practice comprises over 20 partners and more than 40 other lawyers internationally. The practice enjoys an excellent reputation in the traditional media sector and also places a strong emphasis on digital media and areas growing out of convergence such as new media, online and mobile content services. We advise on major transactions in Europe, the Middle East, Africa and beyond, working with prestigious clients from across the entertainment value chain. For more information, please visit: www.dentonwildesapte.com.

About Mobile Entertainment Forum (MEF)

MEF exists to represent the interests of its global membership across the mobile entertainment value chain. Our goals are to build awareness, create business development opportunities and facilitate the development of commercial guidelines and best practices to promote a healthy and profitable industry.

With global headquarters in London, a Hollywood-based Americas secretariat, an Asian chapter in Hong Kong and the newly expanded EMEA branch, MEF's network of members represents a veritable "Who's Who" of mobile entertainment businesses and entrepreneurs. For more information and a full list of members please visit: www.m-e-f.org.