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Ofcom's PRS Scope Review

A response from the Mobile Broadband Group – Part 1

1. The Mobile Broadband Group ("MBG", whose members are the UK mobile businesses of O2, Orange, T-Mobile, Virgin Mobile, Vodafone and 3) welcomes the opportunity to respond to Ofcom's PRS scope review. It is a review that mobile operators have been seeking for some time.
2. From the time that the idea of a review was floated by Ofcom in 2005 (and terms of reference [ToR] published in 2006) to the date of publication, the scope of the Scope Review has changed its emphasis somewhat.
3. In the ToR, Ofcom stated that "*in the light of increasing convergence in the communications sector.....the time is right for a first principles examination of the role, structure and application in this area.....Specifically Ofcom will consider.....the types of services, including new services that are subject to PRS regulation*" (and presumably by implication the types of services that are not or should not be subject to PRS regulation).
4. The ToR also stated that '*Following its analysis, Ofcom may propose some of the following*: in outline: revisions to CPRS condition, changes in the law, amendments to the PRS Code and or changes in the use of ICSTIS (now PhonepayPlus) resources
5. Ofcom has not addressed the convergence issue (it gets one mention in section 2.3)
6. Ofcom has not carried out a 'first principles examination' of the broader issues or tackled head on the fundamental question of whether the current scope of PRS regulation is right. By way of illustrating how the Scope Review has drifted from its original intent, a significant piece of research, specially commissioned for the review,

that compared the regulation of e-commerce payment mechanisms, has been left out altogether¹ and published as an afterthought.

7. Furthermore, while Ofcom does suggest some changes in PRS regulation within this consultation, it is not apparent as to whether Ofcom is also considering the other three questions – i.e. changes in the CPRS condition, changes in the law and changes in PhonepayPlus's use of resources. Is this work still to be done following the outcome of this consultation?
8. For the purposes of responding, the MBG has therefore tracked back to the original purpose of the Scope Review and for the purpose of re-emphasising the consideration of Scope has split its submission into two parts: the first part deals specifically with the scope of PRS regulation and the second part covers Ofcom's suggestions for changing the existing PRS regulations.

Part 1 – PRS Scope

9. We note (in paragraph 2.10) that Ofcom is not seeking to ascertain the legal definition of the scope of PRS but to engage in a debate about the characteristics of services, including new PRS, and their potential for causing consumer harm. However what does not appear to be being considered is the types of value added services, delivered over electronic communications networks (ECN), that should and should not be in scope of an industry funded regulatory system such as PhonepayPlus, as opposed to other consumer regulation funded out of general taxation and whether or not the law and the CPRS condition are thus fit for purpose.

Payforit

10. Ofcom is aware that the MBG has received advice that Payforit does not fall within the legal definition of PRS and so any comments made in this response are without prejudice to that position. We also believe that, from a policy point of view, there should be no requirement for it to fall within PRS regulation. Our reasoning is set out in more detail later in the paper.

Background

11. The fundamental driver for a scope review (as opposed to a general review of PRS regulation, of which there have been a few in recent years), is that the forces of convergence have undermined the fundamental logic of the PRS regulatory regime. Because market development is never linear, the scope of services falling within the purview of PhonepayPlus has accreted haphazardly rather than logically. In contrast to the wider communications regulatory regime, which has developed under the aegis of a converged regulator, PRS remains rooted in telecommunications regulation (note: that's where it is found in 'open consultations' on Ofcom's web site).

¹ Review of Scope of Premium Rate Services: Comparison Study of e-commerce payment mechanisms, A study for Ofcom by Europe Economics, April 2007

12. For example, services that have essentially developed from the cable TV/ home broadband tradition are regulated in one way and services that have developed from a telecommunications tradition in another way. To give an example, a video clip downloaded from T-Mobile's T-zone or Planet 3 and charged to the mobile account are regulated by PhonepayPlus as PRS, even though the application of the PRS regime to these services was not consulted upon before the regulation was applied.
13. A film downloaded from the BT Vision service, on the other hand, and charged to the BT account is not regulated by PhonepayPlus.
14. Meanwhile broadcasters' interactive services, accessed through a telephone line back channel (on the 'red button'), are subject to PRS regulation.
15. Ofcom's Mobile Sector Assessment² also highlights the market distortions: *Increasingly, applications for mobile phones are being sold over the internet. This effectively means that the same service can be subject to different regulation according to the way in which it is delivered. For example, a mobile ringtone or application which is delivered by text message is subject to regulation by Ofcom and PhonePayPlus, as it is classified as a phone-pay service. But a ringtone or other application which is ordered and paid for over the mobile internet (e.g. through a mobile applications store) is regulated in the same way as any other purchase through general consumer law.* Similar findings were made by Europe Economics in their review.
16. The evolution of multi-service platforms, whether fixed or mobile, has created inconsistencies in regulation. It is these inconsistencies that should be central to the PRS scope review, so that the overall regime can be modified into one in which consumers can expect consistent regulation, providers can compete on a level playing field and specialised sectoral PRS regulation can be focused only services where it can be objectively and proportionately justified over and above general consumer regulation.
17. The MBG agrees that it is helpful to use an analytical framework to work through the logic of what level of regulation should apply to what services. However there must still be a definition of what a PRS is and the proposed framework unfortunately includes criteria that are well beyond the scope of the communications industry.
18. When considering the scope of PRS regulation from a policy point of view (as opposed to a legal definition), it is presumably within Ofcom's power to consider any value added service that is charged to an ECN customer's communications account: a streamed pay per view video, a music download, the cost of an ISP's anti-virus protection, a competition vote, a traffic information service or whatever.
19. From this total population, it is then necessary to identify the circumstances (and thus services) that give rise to particular risks that would justify the additional effort and cost of maintaining specialist PRS regulation. It is here that an analytical framework

² Page 90: <http://www.ofcom.org.uk/consult/condocs/msa/msa.pdf>

has a useful role to play. Other value added services, while not totally risk free (what service is?) would be subject to generic consumer protection and, if applicable, other Ofcom measures, such as the general conditions of entitlement and access to ADR.

When the Communications Act 2003 was being drafted, the issue of separate 'charge to bill' type transactions were discussed. This review is a time to reflect more carefully than was possible at the time of the Communications Bill. The following is an extract from parliamentary debate for the applicable sections

"No. 248 would remove subsection (7)(d), which is designed to ensure that the only services being regulated are those where the charges for the content and carriage elements of the premium rate service are levied as one combined charge on the telephone bill. That is considered necessary on the basis that the customer is unable to distinguish between the two elements making up the charge and runs the risk of being unable to change the amount relating to the content of the premium rate service.

We are not trying to embrace services where a consumer uses a telephone to make a purchase with the charge appearing on a credit card or bank statement, as that is clearly outside the scope of the regulations. We also want to avoid catching purchases made over the internet through credit and other cards. However, I accept that in some future cases the charge for the premium rate service may appear on the phone bill but be identified separately from the charge for the carriage of that service. Such services would be at the margins of what might need to be regulated and I can envisage some definitional problems. I would like to reflect further on the amendment and, if the provision needs changing and the wording altered, I shall table an amendment later³.

The PRS criteria

20. So, what are the unique characteristics of the PRS that require specialised regulation? The criteria that originally led to the creation of ICSTIS in the first place are still very largely the criteria that remain relevant today. The two conditions that, when taken together, are prone to mischief are: A concatenated charging mechanism (the carriage/access takes the same form as the charge for the content⁴, and the charge is effected by terminating a communication to a number) AND a value chain where a third party service promoter has relatively easy access to the revenue sharing mechanism but does not have a direct relationship with the end customer. Experience has shown us that when these two factors come together, there is a higher likelihood of a service being presented in a misleading way and causing customers, networks and regulators difficulties.

21. The MBG acknowledges that it proved extremely difficult to target within a legal definition or concise phrase the precise services that needed to be captured and we

³ www.publications.parliament.uk/pa/cm200203/cmstand/e/st030107/am/30107s10.htm

⁴ In other words the content delivery and the content charging cannot be disaggregated

would welcome the opportunity to discuss further the appropriate legal text and the scope of the CPRS condition in due course, once Ofcom has concluded its policy position. From a policy point of view, though, it is clear that some services (e.g. on portal services and charge to bill mechanisms such as Click & Buy and Payfort) present a low risk, and should be regulated under general consumer law, like other e-commerce mechanisms, while other services, such as 3rd party reverse billed subscription services and live chat services continue to present a risk that would justify PRS regulation. The MBG strongly believes that the scope of PRS regulation should be focusing on the latter alone.

22. Services that do not meet both these criteria do not present specific risks to consumers and thus do not merit the cost of compliance with specialised PRS regulation.

The analytical framework

23. The MBG suggests that the analytical framework proposed in the review imposes a degree of subjectivity, alongside a significant risk of regulatory creep that undermines confidence in the regulator's intentions.
24. The MBG has considered the 'distinctive demand-side characteristics of PRS' suggested by Ofcom. We agree with Ofcom that not all PRS have all these characteristics. We would, however, go further and say that not all of them are 'distinctive' either. Not all PRS services are experience goods (e.g a participation TV vote) and not all experience goods are PRS. PRS are not the only types of transaction to be low value, convenient or appeal to children.
25. Transactions where there is separation between service promoter and charging mechanism are not unique to PRS; services bought using Paypal and credit cards also have these features. Another example is the Sky platform operator collecting subscriptions for non-Sky channels bundled into an offering.
26. Convenience is not a particular feature of PRS either. Oyster cards, cash, credit cards, travellers' cheques, Paypal are also convenient for the types of transactions to which they are best suited too. PRS are used for the types of services they are used for because they are convenient for that type of transaction not because they are inherently convenient in all circumstances. PRS would probably not be convenient for buying milk at the local 7 Eleven or bidding on e-bay.
27. The MBG maintains that the coming together of concatenated charging and third party suppliers with relatively easy access to the revenue sharing mechanism, are the unique, distinguishing features of PRS.
28. By way of illustration, why does a promoter running a 'parcel delivery scam'⁵ chose PRS rather than a standard rate call and credit card charging mechanism? First

⁵ I.e. where a consumer is left a message asking him to call an 09xx number to make arrangements for a parcel delivery, is kept on the line for several minutes only to receive a worthless, unsolicited biro or similar.

because it is likely to be easier to gain access to the revenue sharing network (by acquiring use of an 09xx number from a terminating provider) than it is to become an approved merchant for Visa or Mastercard. Secondly, the revenue generating opportunity occurs as soon as the customer dials the number. The charging for the service and the access use the same mechanism to effect their functions. The charging for the service and provision of the service happen simultaneously. It is not very likely (but, of course still possible) that many would agree to the credit card charge once the customer has had a chance to check out what exactly would be delivered.

29. Similarly, why would a disreputable promoter of a web-based ring-tone subscription service choose normal MT billing over Payforit? Payforit has a very prescriptive format whereby the Authorised Payment Intermediary interposes a purchase confirmation procedure that gives the customer the opportunity to check that he or she fully understands the service pricing before a charge is applied. The content billing and delivery are disaggregated and the merchant cannot trigger these to happen simultaneously.
30. By overlooking this fundamental characteristic of PRS, Ofcom's analysis does not isolate which services do and do not require supplementary regulation and consequently does not deliver a robust and logical framework to underpin the regime.
31. The PRS market after all is not alone in having issues and ,while it is always right to strive for improvement, it is not realistic or proportionate to expect perfection. The UK Cards Association records annual debit and credit card expenditure in the UK at £31.8billion⁶. APACS estimates UK credit and debit card fraud for 2008 at £609 million⁷ (0.5% of market value). This latter figure does not include other complaints and disputed charges.

Conclusion

32. The MBG argues that the scope of PRS regulation needs an overhaul. Its underpinning logic has been undermined by convergence and other market developments. As we set out earlier in this response, services have been drawn into regulation in a haphazard fashion.
33. There is no evidence that value added services sold by the ECNs themselves, be they mobile ring tones, pay per view films, printed bills, anti-virus software or whatever require specialist regulation, beyond what general consumer law and Ofcom's general conditions of entitlement require. Ofcom research⁸ revealed that 70 customers out of 824 had experienced a problem with PRS (c.7%). Of the 70, 4 had experienced a problem using a 'walled garden mobile Internet'. Of the two that complained, both had the matter satisfactorily resolved by their service provider.

⁶ http://www.theukcardsassociation.org.uk/files/apr09_commentary.pdf

⁷ http://www.apacs.org.uk/09_03_19.htm

⁸ Figure 21 and Page 36, The Consumer Experience of PRS (Ofcom research in 2007), published 14 May 2009

34. Although the research does not cover 'charge to bill' mechanisms such as BT's ClickandBuy and the mobile operators' Payforit mechanism, which allow for consumers to specifically confirm a purchase transaction, our experience is that similar low levels of complaints and lack of consumer detriment would be found, thus making it unnecessary to extend PRS regulation to these services.
35. To address any concerns about **off** portal 3rd party services, the MBG has supported the increased emphasis on due diligence now being required by PhonepayPlus, providing it still allows new players to enter the market and does not become a closed shop. Innovation in the industry is its lifeblood and it is essential that small market entrants, providing they trade responsibly, are given the opportunity to promote new ideas.
36. The MBG agrees with Ofcom that there is a requirement for continued regulation within the PRS sector. But the regulation should focus its attention on specific types of transactions where the risk of consumer harm is greatest and, by concentrating its efforts, be more successful. As we have explained in this paper, those transactions are where the promotion of the service by a third party (i.e. those further down the value chain than the originating ECN) is combined with a charging mechanism that concatenates the carriage/access to the service with the charge for the content.