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30 July 2009

Dear Jeff,

The PRS Scope Review

Please find enclosed our response to the Premium Rate Services ("PRS") Scope Review (the "Consultation"). Our response covers section 1-5 of the Consultation, section 6 of the Consultation focuses primarily on proposals for the regulation of Premium Rate Services rather than scope; we will therefore submit our comments on section 6 separate to our comments on the scope review.

Ofcom will be aware Hutchison 3G UK Ltd ("3UK") first requested that Ofcom look at the scope of Premium Rate Regulation in 2005, and in a letter dated 23 September 2005, Ofcom's then Chief Policy Partner stated Ofcom's intention to undertake the Scope Review during 2006. It is a matter of deep regret that almost four years have elapsed since the Scope Review was proposed. In that time convergence and consolidation in the communications market have meant that more Communications Providers are now supplying and charging content to their customer's bills, but it remains the case that only in the instance of Mobile Communications Providers does Ofcom regulate such services as Premium Rate. In effect Ofcom has perpetuated a two tier regulatory framework despite having a duty under the Telecoms Directive to regulate on a technology neutral basis.

3UK has repeatedly been assured that the Scope Review would, in due course, consider this key issue; and we are therefore baffled that the Consultation makes no reference to the application or disapplication of Premium Rate regulation to fixed line Communications Providers who supply content and charge it to the bills of their customers.



Nevertheless 3UK submits its response in the expectation that this issue will be dealt with in some detail when Ofcom publishes its response to the consultation.

We would welcome the opportunity to discuss our response at your earliest convenience, and in the meantime please do not hesitate to contact me if you require any clarification on any of the points raised in our response.

Yours sincerely,

Julie Minns
Head of Regulatory & Public Policy

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Hutchison 3G UK Limited (“3UK”)

Response to

The PRS Scope Review

July 2009

Background

1. 3UK was the UK’s first 3G network offering national coverage for calls and texts, and has over 90% population coverage for 3G services. As we consolidate our radio access network with T-Mobile we expect to reach 98% UK population coverage for 3G by the end of 2009. 3UK has over 4 million mobile and mobile broadband customers in the UK. Mobile broadband usage on 3UK’s network has grown rapidly and handset traffic has shown a similarly distinctive upward trend. Since September 2007, 3UK has seen an increase in data traffic across its network from 600GB per day to 32TB per day.
2. 3UK was awarded a licence by the UK government in 2000 as part of a process which was explicitly aimed at stimulating competition in the mobile sector. 3UK has been at the forefront in developing innovative mobile products and services. We have embraced products such as Skype and Instant Messenger (IM) seeing them as complimentary to our services rather than competing with them. We have brought value to the market, simplified pricing and led the market in delivering mobile broadband; in short 3UK has improved choice and value for the consumer and has provided a valuable insight into how the market is developing.
3. 3UK is driving forward the expansion of mobile broadband infrastructure and growth in the range of mobile internet options available to consumers, and has been at the forefront of many key sector developments. It is 3UK’s focus on data and internet services that informs our concern about the application of Premium Rate Regulation (PRS) to internet based content services charged directly to the customer’s communications account. This type of service is markedly different to tradition PRS which relied on charges being generated by a call or text to/from a number, and where pricing was determined by a multiple of minutes or texts thereby giving rise to concerns about pricing transparency.



Rationale for Premium Rate Regulation

4. Oftel summarised the rationale for PRS regulation in its 1999 consultation:
"Ever since PRS were introduced in the UK, 13 years or so ago, they have been subject to certain safeguards. Why? Firstly, is the relationship between the telephone company and the customer. It is the telephone company's customer who is responsible for payment of bills regardless of whoever makes the calls on their telephone. The result can be inadequate control over the types of calls which can be made using the customer's telephone and inadequate control over the costs or charges that the customer may incur. Secondly PRS can be accessed very easily. Anyone can pick up a phone and call PRS unless the owner of that telephone service has actively barred access".¹
3UK believes this rationale remains relevant and should continue to form the basis for the justification of additional regulation to this subset of retail transactions; and we welcome the acknowledgement on page 2 of the Consultation that PRS regulation is required to protect against "fraudulent or unauthorised use"²
5. It is therefore conceivable that the PRS regime should acknowledge that there may be a requirement for a difference of approach when the device (and account) are individual and personal. That is, where the device is not shared and open to charges being levied to the account without the knowledge of the account holder. Not only is a mobile phone a personal device, but each handset has the functionality that enables the customer to lock the device. It is therefore arguable that the risk of unauthorised use on a mobile is mitigated.
6. However 3UK believes that it must still be acknowledged – and the consultation fails to address this point – that there remains uniqueness about the charging mechanic utilised by traditional or 'old' PRS as Ofcom term it. 'Old' PRS requires that an event/action has to occur over and above an instruction to charge the account, there has to be either a call to a number or a text to a number that triggers a charge that is applied to the account. This is a different charging mechanism to other retail transactions where the purchase charge is applied directly via an immediate instruction to debit or charge the account for that amount.
7. The secondary event/action associated with 'old' PRS can result in a lack of clarity about the charge that will be applied as it may depend on the number of minutes spent on the

¹ Oftel & ICSTIS Joint Consultation Paper on the Regulation of Premium Rate Services
August 1999

² 2.1 of The Consultation



call or the number of texts sent or received. The lack of pricing clarity arising from the secondary event/action does therefore require an additional tier of regulation over and above that which may be afforded to the consumer from general consumer law.

8. Therefore whilst the individual and personal nature of a mobile account may mean that mobile services do not meet the 'unauthorised use test' the uniqueness of the payment mechanic still qualifies 09 and reverse billed SMS for additional regulatory treatment. In both instances the mechanic relies on the use of a number and it is the call or text to the number that triggers the charge rather than a direct instruction to 'buy' or 'purchase' as is the case with other retail transactions.
9. 3UK therefore recommends that Ofcom base the definition of PRS as charges that are triggered by chargeable communication to or from a number that result in a charge over and above the standard rate for a call or a text.
10. Section 2.6 of the Consultation suggests that direct to account services share some of the characteristics of PRS. 3UK does not believe the PRS characteristics defined in the Consultation are unique. Indeed other than the charge appearing on a communications bill, these services share the same characteristics of numerous retail transactions and these are happily afforded protection under general consumer law. It is therefore incumbent on the regulator to demonstrate what is unique about PRS rather than rely on demonstrating that there are characteristics that could give rise to consumer harm.
11. The difficulty with justifying the application of the regulation solely on it being a charge to the bill, is that it will not be future proof. It is increasingly likely that communications providers will seek to enable customers to apply a range of purchases to their account. For example a cable provider may choose to charge the cost of a set top box to the account, or a mobile provider may wish to enable their customers to pay for handset insurance by a monthly premium charged directly to their account. Neither of these charges can realistically be said to be similar to triggering a charge to the account by dialling a number or sending a text, but would presumably fall within the scope of a PRS as the charge would appear on the Communications Bill.
12. For these reasons 3UK believes the scope of PRS must be based solely on the unique aspects that a PRS may contain. Namely the use of a chargeable communication to or from a number that forms the purchase of the service.



13. It remains the case that even the Premium Rate Regulator views the use of a chargeable communication to or from a number as a key determinant of what is and is not a PRS charge. For example PhonepayPlus still regards mobile PRS as requiring the use of a number. In its quarterly return PhonePayPlus ask mobile operators to return outpayment and revenue figures for on portal services accessed and charged for on shortcodes. However in six years of operation 3UK has never charged its customers for own portal content via a shortcode, the charge is applied directly to the bill without the customer needing to make a call or send a text.

Two Tier Premium Rate Regulation

14. As evidenced in our letter to Ofcom 14 March 2008³ fixed line providers who apply charges for content services directly to their customers' accounts are not currently requested to submit quarterly returns to PhonepayPlus, nor are these on demand content services subject to the PhonepayPlus code of practice. Yet the consumer experience is identical. The customer browses within the provider's portal, selects an item for purchase and presses 'buy'. The content is accessed on the communication provider's platform and a charge is applied directly to the account.
15. It is notable that Ofcom fails to include the development in the provision of portal/internet content services charged to the bills of fixed line providers in the list of changes in the communications market since 1999. 3UK views convergence and the development in the delivery of portal/internet services that are charged to the bill of fixed communications providers as being highly relevant to the debate on the scope of PRS. Furthermore 3UK notes that despite the widespread availability of fixed provider own portal content services the consultation does not give any examples of this type of service and therefore fails to assess whether these services have characteristics that might define them as PRS under Ofcom's own suggested approach.
16. Given the requirement placed upon the UK Government to ensure that "*national regulatory authorities take the utmost account of the desirability of making regulation technologically neutral, that is to say that it neither imposes nor discriminates in favour of the use of a particular type of technology*"⁴ Ofcom must ensure that either all communications providers are captured by the Premium Rate Regulatory Framework equally.

³ See Annexe 1

⁴ Directive 2002/21/EC of the European Parliament and of the Council



17. Given the obligations placed on Ofcom by the Directive and given the absence from consideration of fixed line portal/internet services charged direct to the bill of the Communications Provider, 3UK is concerned that Ofcom's final statement following the Consultation may be open to legal challenge.

Consumer harm

18. The difficulty in trying to define PRS by characteristics of consumer harm, is that consumer harm can differ depending on the platform, as suggested above the risk of unauthorised use is potentially less on a personal device than it is on a shared device, yet Ofcom must regulate both platforms on the same basis.
19. There must therefore be a common definition that brings all relevant services into the scope of the regulation. This definition cannot be based on types of harm or perceived risks, as these are not defining characteristics but rather consequences that can arise from the use of such services. Once a common definition that meets the criteria for technological neutrality is established, and the legislation articulates that definition, then Ofcom can use a framework to determine the levels of regulation that should be applied.
20. Section 3.24 of the Consultation reports a "strong increase in the number of complaints related to mobile". However as Ofcom will be aware PhonepayPlus has reported a decrease in complaints related to mobile over the past twelve months with a reduction of 57% between June 2008 and May 2009. 3UK would therefore caution against considering complaint levels as a relevant factor in determining the scope of premium rate regulation, as this level is subject to fluctuation – and as Ofcom will be aware, PhonepayPlus acknowledged that the increase in mobile related complaints in 2007/08 was in fact due to a change in the methodology for recording complaints. *"In February 2008 we revised our methodology for recording complaints to capture in a more complete way all concerns relating phone-paid services; this resulted in an increase in the number of contacts to PhonepayPlus being recorded as complaints and is the sole factor for the dramatic increase".*⁵
21. 3UK welcomes the recognition in the consultation document that the risk of disconnection due to the inability of a customer to pay a large bill is less in today's communications market. However, 3UK would like to understand the research that supports the view in 3.27(b) that pre-pay customers are "typically less aware as to how much they spend on a

⁵ PhonepayPlus quarterly report 2008/2009 Q2



PRS". 3UK's prepay customers have access to account information via my3 on their handset and are able to see their spend on an equal basis to contract customers.

22. 3UK is concerned too by the suggestion in 3.27(f) of the consultation that age verification for non adult mobile services might be appropriate to protect minors from a range of harm. As suggested above Ofcom has a duty to regulate on a technology neutral basis and we trust that any protections proposed for under 18 mobile users would apply equally across other platforms where content is charged to the communications provider bill.
23. 3UK notes that Ofcom include 070 prefixes in the list of number ranges carrying PRS. However Ofcom's own numbering plan precludes the use of 070 for PRS. Therefore whilst PRS may be found to be illegally operating on 070 it is misleading to describe this as a PRS number range. Customers should not be misled as to which number ranges are PRS as these were until recently confined to mobile shortcodes and 09. It is Ofcom itself who has recently increased the number of ranges which are deemed to carry PRS by bringing 0871 and 070 within PhonepayPlus's code of practice. Therefore any attempt to improve pricing transparency must first examine how the numbering plan can support consumer understanding of what is and is not PRS.

The analytical framework

24. The consultation suggests that the first relevant feature of PRS is that they are experience good. However PRS is one of many experience goods, and in the same way the consumer cannot ascertain the quality a loaf of bread bought from the bakery before purchase, so too the consumer may not understand the quality of the PRS, but this only establishes that the consumer should have protection in both transactions not that the PRS requires an additional layer of regulatory protection.
25. Secondly Ofcom suggests that the purchase may be made on an impulse and that the customer may not always scrutinise the service. Again however, the same applies to a number of impulse transactions of a low value. A coin machine dispensing charms is not necessarily subject to detailed consumer scrutiny; nevertheless no one is suggesting a code of practice for the regulation of coin machines is required. The characteristic of an 'impulse buy' does not justify the application of additional consumer protection to PRS.
26. Thirdly Ofcom suggests that the complex supply chain means the producer does not set the price (resulting in a lack of pricing transparency) and that because of the chain's complexity the consumer may not easily understand who is responsible for redress. Again however this applies in other sectors, the newsagent who sells a Twix decides the price



not Mars as the producer. Secondly if a consumer buys a Dyson from John Lewis which has an offer of a free toy Dyson associated with it, but the toy which is despatched subsequent to the purchase does not arrive, does the consumer know which party is responsible for redress? Again the issues of retail price setting and consumer redress are not unique to PRS and as such are insufficient reasons to apply additional consumer protection regulation to PRS.

27. The difficulty with trying to define what falls within the scope of PRS based on the harm that can arise inevitably leads to comparisons with other retail transactions and fails to establish what it is that is unique about the PRS mechanism that means it requires additional regulation over and above general consumer law. Whilst we recognise that the current consultation is not attempting to examine the existing legal definition it is at least worth noting that the definition is based on the mechanism rather than characteristics, and characteristics are instead used to inform the application of the regulation via the PRS condition. 3UK believes this is a logical approach and sees no reason why Ofcom cannot replicate the approach that has formed the basis for the regulatory framework for 22 years.
28. Section 4.24 of the consultation details the characteristics of a PRS supply chain and 3UK notes Ofcom's acknowledgement that pricing transparency is not an issue for mobile shortcode PRS. Assuming Ofcom's analytical framework is designed not only to define what services are within scope but to determine what degree of regulation should apply, 3UK would conclude that on this basis Ofcom would deem mobile PRS as potentially requiring a lower degree of regulatory scrutiny. Yet as Ofcom asserts the majority of complaints to PhonepayPlus relate to mobile services, so it cannot be the case that a lack of pricing transparency is a key issue in determining whether a content service should fall within the scope of PRS. Again 3UK would urge Ofcom to reconsider the use of the analytical framework as the means to define the scope of PRS and rather revert to a definition based on the mechanism.
29. Section 4.29 of the consultation asserts that a characteristic that causes concern is that the "total charges for the services will only become apparent after the event". 3UK agrees that this is the case for 'old' PRS where the charge is associated with a number (09 or a shortcode) and where the charge is a multiple of the communication to or from the number (a per minute call or reverse billed SMS). However it is not the case for 'new' PRS where the price is displayed on screen and the charge for that price made directly to the communications bill. 3UK agrees, as previously suggested, that PRS associated with a



number should be caught within the scope of PRS and believes this characteristic supports a definition based on the mechanism.

30. 3UK does not understand the relevance of the characteristic 'low expenditure per transaction'. The same issues are associated with other retail transactions, and this demonstrates again the problems that arise in trying to define the scope of PRS by its characteristics. There is nothing unique about PRS in this regard and therefore no evidence on this basis of it requiring any additional regulation over and above that provided to the consumer purchasing a can of premium brand coca cola at 60p when they could get a non premium brand for 50p but they don't consider it worthwhile to 'shop around'.
31. Similarly 3UK does not understand the relevance of impulse purchasing associated with PRS. Millions of cash transactions occur every day in the UK, and yet there is no call for these transactions to require additional levels of verification. Similarly Oyster and other similar payment mechanisms require no additional verification. These contactless payments are likely to grow in popularity and 3UK would suggest that rather than seek to define the scope of PRS based on it being an impulse purchase requiring no authentication; Ofcom should instead seek to bring PRS within the remit of whatever consumer protection Government and other regulators deem necessary for other payment mechanisms which have the same 'impulse purchase' characteristic as PRS..
32. The final demand side characteristics which Ofcom suggest gives rise to consumer harm and therefore requires that services displaying these characteristics should fall within the scope of the PRS regulatory framework, are those that are 'inappropriate or offensive content' and those 'appeal to children'. Ofcom will be aware through its responsibilities for advertising regulation and through its work on the implementation of the Audio Visual Media Services Directive that both these issues are already the subject of other regulation – and also law – 3UK does not therefore agree that these characteristics form sufficient justification for PRS to be subjected to additional regulation.
33. The consultation identifies pricing transparency as a key issue to be addressed through the PRS regulatory framework and therefore services displaying these characteristics should be brought within the scope of the framework. As suggested above the problem with defining what's in scope based on characteristics is that you will always draw in non communications services. 3UK would strongly urge Ofcom to base the definition on the mechanism (that there is a chargeable communication to or from a number which also



forms the charge) and then use characteristics to define the degree of regulation that should apply to the service displaying that characteristic.

34. 3UK believes that solutions for pricing transparency should not be discussed in a policy consultation on 'scope' but rather dealt with under the 12th code.
35. 3UK agrees that there needs to be adequate redress for consumers who experience harm. However this redress does not have to be provided through a single body. Currently consumers have a variety of bodies to which they can turn for redress across a range of sectors, and then can go to Trading Standards, the small claims court, or multiple ombudsmen schemes. Information is centrally available from Consumer Direct and to 3UK's knowledge Government is not overtly concerned that having multiple channels results in consumers not being able to gain effective redress.
36. Where regulation is insufficient or ineffective, there is always a potential for consumer harm, but some regulation can come from the industry in some cases and does not always need enforced regulation. By allowing regulatory enforcement to target the areas that have high potential for harm and by being swifter in recognising trends and technological changes, regulation can be made more effective. At present, the regulation still refers to technology that has been around since 1995 using language derived from its formation in 1988.
37. 3UK believes that were the scope of PRS defined by a chargeable communication to/from a number, as detailed above, then those services – which are the ones which Ofcom identifies as giving rise to harm – would remain within the scope of the Code of Practice and redress would be obtained via the designated regulatory body. Other communications services that are charged direct to the service provider's bill would become the responsibility of either other authorities or could be dealt with via self-regulation.

Application of the analytical framework

38. 3UK notes that the consultation fails to consider the application of the framework to fixed operators own portal services. This is despite 3UK raising with Ofcom in 2005 the inconsistency in the application of PRS regulation to mobile and fixed operators. In the four years since 3UK raised this issue Ofcom has failed to direct PhonepayPlus to apply their code of practice to the portal services of fixed providers, despite the consumer experience being identical. This is further described in our letter to Ofcom dated 14 March 2008 in annexe 2.



39. The consultation does consider the application of the framework to a mobile providers own portal service. However, sections 5.4 - 5.6 refer to a Terminating Communications Provider (TCP), despite there being no TCP in the case of the mobile providers on portal service. The customer uses the portal to browse and select a service opts to buy and the charge is applied direct to the customers communications account. This is identical to the transaction performed by a fixed ISP customer who chooses to pay for a catch up TV programme and charges the payment to their communications account. No numbers are dialled or texted, no call or text has to 'terminate' in order to form the charge; it is therefore markedly different from 'old' PRS and markedly different from those services which the authors of the Communications Act deemed to require PRS regulation. Indeed the Minister said during the debate on the Communications Act:

"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 later⁶.

40. 3UK does not believe direct to bill services are Premium Rate Services, they do not use numbers to effect payment from the customer, they do not require the customer to perform a specific action (call or text) to instruct both access and payment, rather the customer issues an instruction for their account to be debited directly, it is in every respect identical to a normal payment service.

⁶ www.publications.parliament.uk/pa/cm200203/cmstand/e/st030107/am/30107s10.htm



41. The final part of section five considers how consumers might be protected from harm and what regulatory mechanisms should afford this protection. 3UK is somewhat perplexed by the inclusion of this within a scope document. The scope of regulation should not be influenced by the nature of the regulatory regime; rather it should be informed by an analysis of the nature of the proposed regulated entity. Introducing a discussion on the type of regulatory framework before the scope of the regulation is decided clouds the theoretical policy discussion. Similarly discussion on what the regulation should and should not require – as discussed in section six – brings into discussion types of harm or types of service which could influence views as to what a PRS should be.

Conclusion

42. 3UK is disappointed that the scope review that was first promised in 2005 is not a policy examination of the definition of PRS but rather a discussion about consumer harm, the type of regulation that should apply and the regulatory tools that underpin compliance.
43. 3UK recognises the value in an analytical framework in defining the levels of regulation that should apply, but does not believe it is helpful in defining what is and is not a PRS.
44. 3UK recommends that Ofcom consider a definition derived from the unique nature of PRS. Namely that the instruction to take payment or make a charge requires the consumer to make a call or send a text, and that this call or text then forms the charge. It stands apart from other retail transactions where the instruction to make a charge results in funds being debited directly without the need for the consumer to undertake an additional activity. The definition of PRS should therefore be confined to services where the charge is the communication to a number, and should exclude transactions that are debited from an account regardless of whether that is a credit card, bank or communications account.



Annexe 1

Letter from Kip Meek to 3 (23/9/05)



Annexe 2

Letter from 3 to Peter Phillips (14/3/08)