

CABLE&WIRELESS RESPONSE TO PHONEPAYPLUS' 12TH CODE DISCUSSION PAPER

21.07.09

Cable&Wireless

INTRODUCTION

Cable&Wireless is one of the world's leading international communications companies. The Worldwide business unit (formerly Europe, Asia & US) provides enterprise and carrier solutions to the largest users of telecoms services across the UK, US, continental Europe and Asia, and wholesale broadband services in the UK. With experience of delivering connectivity to 153 countries – and an intention to be the first customer-defined communications services business – the focus is on delivering customers a service experience that is second to none. Cable&Wireless has also recently acquired THUS, a leading provider of Internet, data and Telecoms services throughout the UK and with a major presence in the SME market. The comments contained in the response are representative of both companies.

Both Cable&Wireless and THUS are active participants in the termination of PRS. Together we continue to support PhonepayPlus' regulatory work and we welcome the opportunity to be able to help shape thinking at this early stage of work for the 12th Code of Practice.

We are concerned that this initial work on the 12th Code is being conducted before Ofcom has completed their PRS Scope Review. We appreciate that the Scope Review has been long overdue (Thus and Cable&Wireless originally met with Ofcom as part of a 'scoping study' in the summer of 2006), but we would expect the timing between Ofcom and PhonepayPlus to be better orchestrated. Obviously Ofcom and PhonepayPlus need to work closely, but this timing is unfortunate. We are concerned that there is a risk that the 12th Code becomes nothing more than a document of transition with the requirement for yet another edition or heavy revisions shortly after publication because of potential outcomes of the Ofcom Scope Review. We urge PhonepayPlus to be mindful of Ofcom's extended work in this area and not to appear to anticipate the outcome of Ofcom's PRS Scope Review.

Much of the discussion paper appears to focus on PhonepayPlus' ability to enforce regulation and to apply sanctions. This is disappointing as the impression is of a pure enforcement agency rather than a regulator seeking to prevent issues from occurring. This contrasts starkly with the approach taken to assist Service Providers in relation to 0871 regulation.

Cable&Wireless calls on PhonepayPlus to take a more hands on role in proactive regulation. The registration scheme offers the ideal opportunity for the regulator to act as gate keeper and to whittle out companies and individuals who have a track record of persistent breaches or scam operations. PhonepayPlus already has the powers to bar individuals from operating in the PRS market. By utilising a registration scheme as a gateway to services PhonepayPlus are merely moving their regulation from a reactive to proactive position. It is not a barrier to entry as a company proving that they are a fit and proper person should be a low hurdle for the majority of individuals and companies. It also ensures PhonepayPlus knows their customers and provides the ability for the current uncertain funding mechanism to be replaced by an annual payment levied against Service and Information Providers. The benefit in terms of consumer protection is immense as it prevents scamsters from operating at source rather than relying on numerous third parties to carry out regulation on the industry's behalf.

We reject the the Indepen report finding (part of the Ofcom Scope Review) that such an approach will not lead to a reduction in the number of breaches as PhonepayPlus must follow due process rather than be able to take commercial contracting decisions. Due process is exactly what is needed to prevent scams from reappearing. A reliance on commercial contracting decisions only results in more dubious services, rejected from the larger networks, resurfacing with those Networks where the commercial opportunity outweighs the potential risk of the service. It is not the case that these service are sold to the Terminating Network Operator as being dubious, rather that the service is hidden within a package of legitimate traffic. For smaller operators dependent on PRS traffic, commercial decisions focussed on the legitimate traffic are unlikely to reject anything where the purpose of the service is slightly unclear. It is only the regulator that can impartially identify these services and ensure that they are prevented from being reborn with alternative providers. Nor do we agree that PhonepayPlus is any less able to form an opinion on behaviour than Terminating Network Operators. Indeed PhonepayPlus is the only party that has a complete picture of behaviour across multiple networks and so is in a unique position to understand when a service is just a newly packaged form of scam.

We urge PhonepayPlus to take a more detailed and fundamental look at the role of PRS regulation (as we expected Ofcom to do in the PRS Scope Review) rather than simply look to issue a streamlined version of the 11th Code of Practice.

QUESTIONS

1. DO YOU AGREE WITH OUR BROAD ASSESSMENT OF THE RANGE OF HARMS THAT MAY IMPACT UPON CONSUMERS? IF NOT, WHY NOT?

The range of harms as set out appears to encompass the full range of detriments that consumers of PRS may encounter. Cable&Wireless agrees that it is important to link potential consumer harms to the Outcomes PhonepayPlus hopes to achieve through its regulation. However we would remind PhonepayPlus that they must seek to meet these objectives in a proportionate manner. Cable&Wireless is concerned that some of the proposals would not pass a proportionality test and we provide more detail below.

2. DO YOU AGREE WITH OUR ASSESSMENT AND DEFINITION OF OUTCOMES AND SUPPORTING THEMES? IF NOT, WHY NOT?

Cable&Wireless broadly agrees with the assessment and definition of outcomes and their supporting themes. We do have some concerns that in comparison to the Outcomes the themes are far more prescriptive. Whilst this is not in itself an issue it may require PhonepayPlus to find a way of amending these themes should the law change and additional categories become necessary. It would be inefficient for example to have to re-issue the entire Code. By taking a more principle driven approach PhonepayPlus must be mindful to offer industry education and practical examples of interpretation with which to support these Outcomes. If this advice is not effective there is a concern that PhonepayPlus may find it difficult to successfully adjudicate against those companies

which operate in the grey fringes of any regulation until a body of adjudication precedent is fully established.

Cable&Wireless has some minor comments in relation to a couple of the Outcomes:

Appropriateness: We note that some of the bullets listed under this outcome could be considered breaches of law and perhaps fit within the “legality” outcome (e.g. racial hatred).

Privacy: To assist in streamlining regulation Cable&Wireless would favour an outcome which can be directly linked to the provisions of the Privacy and Electronic Communications (EC Directive) Regulations 2003. Cable&Wireless has commented on the potential for confused PRS regulation caused by the number of different agencies essentially covering the same area in response Ofcom’s PRS Scope Review. This would be an ideal opportunity to align the PhonepayPlus Code with existing regulation.

Cable&Wireless would query what is meant where PhonepayPlus allows providers of phone-paid services to contact consumers where the “consumer has previously purchased from them”. Colleagues at Cable&Wireless on occasion are required to monitor the pricing announcements and content of services. It is our experience that such activity can result several months later in the receipt of text messages advertising ‘similar’ services (albeit often from different Service Providers). Cable&Wireless seeks clarification as to whether simply dialling a PRS number and hanging up before any service is received should be regarded by Service Providers as a ‘previous purchase’. We also query whether PhonepayPlus should consider making reference to other existing rules for contacting customers such as the Telephone Preference Service.

Redress: Cable&Wireless would like to see for the avoidance of doubt the insertion of ‘timely’ in the Outcome in relation to the payment of refunds. The revised Outcome would read: “That consumers are able to seek appropriate redress from the providers of phone-paid services in a straight-forward and timely way, and that any refunds to which a consumer is entitled are also provided in a straight-forward and timely way”. Ofcom research quoted in the Scope Review has shown that consumers do not always seek redress due to the small amounts of money involved and there is a risk that some Service Providers may seek to prolong the payment of redress in the hope that the consumer will cease to chase their complaint. Where difficulty is encountered in obtaining a refund and PhonepayPlus has already received a fine payment PhonepayPlus should administer refunds direct to consumers from the funds received.

3. CAN YOU IDENTIFY ANY OUTCOMES FOR CONSUMERS THAT YOU CONSIDER WE MAY HAVE OVERLOOKED?

We do not have any further outcomes to suggest.

4. DO YOU AGREE WITH OUR OUTCOME AND SUPPORTING THEMES ABOUT COMPLAINTS HANDLING? DO YOU HAVE ANY OTHER SUGGESTIONS?

The proposals to ensure Service Providers and Information Providers have robust complaint handling procedures appear to offer a robust set of requirements for complaint handling. As

PhonepayPlus recognises there is a need for these requirements to be flexible enough not to be overly burdensome on the smaller Service Providers in the market.

5. DO YOU AGREE THAT PHONEPAYPLUS IS RIGHT TO SUGGEST THAT IT SHOULD BE ABLE TO REVOKE PERMISSION OF CONSENT WHERE IT IS PROVEN THAT CONDITIONS HAVE BEEN BREACHED AND WHERE SUCH AN ACTION WOULD BE JUSTIFIED AND PROPORTIONATE? IF NOT, WHY NOT?

Cable&Wireless agrees that the ability of PhonepayPlus, as the regulator of PRS, to revoke permission of consent is a fundamental tool required to effectively regulate PRS. A Prior Permission regime which did not allow for this would be toothless and would leave PhonepayPlus at the mercy of any company which sought permission for one type of service only to immediately switch it to another. We fully support PhonepayPlus' ability to revoke prior permission in instances where it is proven that the conditions of the permission have been breached or have not been met.

6. DO YOU AGREE THAT PHONEPAYPLUS IS RIGHT TO CONSIDER ALLOWING PARTIES ALONG THE VALUE-CHAIN TO APPLY FOR PRIOR PERMISSION WHEN IN A CONTRACTUAL RELATIONSHIP TO PROVIDE A SERVICE?

Cable&Wireless supports the extension of prior permission requirements to the Information Provider community. This is no different to requiring a Service Provider to seek prior permission for services whilst they are in a contractual relationship with a Network Operator. In order to maintain a consistent regulatory regime there should be no difference when applying these requirements downstream parties.

7. DO YOU AGREE THAT PHONEPAYPLUS IS RIGHT TO SUGGEST THAT AN APPLICANTS PREVIOUS BREACH RECORD IS A FACTOR THAT IT IS ENTITLED TO CONSIDER AS PART OF A CONSIDERATION OF AN APPLICATION FOR PERMISSION OR CONSENT? IF NOT, WHY NOT?

Yes, PhonepayPlus should consider an applicant's previous breach history before granting permission or consent for a service. The PRS industry has been blighted by less scrupulous companies being able to replicate 'scams' in slightly different guises across numerous networks, similarly certain Service Providers have repeatedly been adjudicated against for similar offences. Any measure which prevents these parties from being able to continuously run services in breach of the Code has Cable&Wireless' full support.

8. DO YOU AGREE WITH OUR ASSESSMENT THAT ALL PARTICIPANTS IN THE VALUE CHAIN FOR DELIVERY OF PHONE-PAID SERVICES HAVE RESPONSIBILITIES FOR COMPLIANCE? IF NOT, WHY NOT?

Cable&Wireless believes that the value chain provided by PhonepayPlus is oversimplified and doesn't address the weaknesses inherent in the 11th Code of Practice. Only a network, Service Provider and Information Provider are recognised. There is no mention of the wholesale model involving resellers or the complicated broadcasting chain. These are also not addressed in the assessment of the value chain.

Cable&Wireless agrees that all parties do have some responsibility for compliance, but that this responsibility is directly correlated against the consumer harm involved. OCPs have a responsibility through General Condition 14 to inform their customers of the cost of PRS calls from their network, Terminating Network Operators have a responsibility in the 11th Code of Practice to conduct due diligence on the Service Providers they contract with, but it is the Service Provider and Information Providers which previous breaches have shown are the areas which require targeted regulation. PRS is the *raison d'être* for these companies and breach evidence clearly shows that it is this end of the value chain where consumer harm most commonly takes place.

The involvement of Cable&Wireless in this value chain is as a mere conduit for the services which are being operated. Cable&Wireless can in no way be held responsible for the actions of its customers' customer and rejects the idea that it should have to prove its due diligence procedures in every case of an Service or Information Provider breach. The majority of the information available to the Terminating Network Operator is also a part of the registration scheme requirements. One would not expect to hold PhonepayPlus culpable of negligence for not preventing a breach of its Code, yet it holds the same information as the Terminating Network Operator and will have issued a registration number and potentially even prior permission or compliance advice.

We do recognise that there may be instances of rogue networks operating in concert with Service Providers, but these should be identifiable from weak applications to be a network in the first instance and could easily be prevented from obtaining network status by PhonepayPlus during the registration process. We agree that Networks should carry out due diligence on their customers, who in turn should carry out due diligence on their customers and so on down the chain. However any potential penalty must be for failing to carry out due diligence and can not be in any way linked to the extent of the end party's breach.

9. SUCH A CHANGE IN APPROACH MAY HAVE DIFFERENT IMPACTS ON DIFFERENT PROVIDERS IN THE VALUE-CHAIN. WHAT ARE THESE IMPACTS LIKELY TO CONSIST OF AND WHAT BUSINESS OR CONSUMER BENEFITS DO YOU THINK WILL ARISE?

Cable&Wireless does not believe this to be an efficient use of PhonepayPlus' resources unless there have been systematic and repeated failings by particular parties further up the value chain. Where such problems exist with a particular TCP PhonepayPlus will quickly become aware of a spate of issues. It is at this point that the Network should be approached. To apply a blanket approach across all companies in the value chain, where there is no evidence of those companies causing consumer harm is entirely disproportionate and an intrusive and expensive means of regulation. PhonepayPlus must target its limited resources to the point at which harm occurs.

10. DO YOU AGREE WITH OUR ANALYSIS OF THE OUTCOME OF ASSESSMENT AND CONTROL? IF NOT, WHY NOT?

Cable&Wireless fully supports the application of enforcement supporting PhonepayPlus' Outcomes against Information Providers where they own the content and promotion of a service. We agree that this should apply to a party irrespective of whether a company's main business is as a Service Provider or TCP.

We do not agree that anything less than flagrant and systematic disregard of due diligence by a TCP should be given material consideration in the investigation of Information Provider breaches. We note that the information held by Network Operators is almost identical to that gathered by PhonepayPlus as part of the registration period. PhonepayPlus should be responsible for both assessment and control through the implementation of an effective registration scheme. We cover this in more detail below, but if PhonepayPlus acted as a gatekeeper through an effective registration process it would then be incumbent upon the TCP to ensure that this registration was held. A far more efficient process than the current double collection of information.

11. WHAT THOUGHTS DO YOU HAVE ON OUR SUGGESTED APPROACH TO A REGISTRATION SCHEME?

Concerns have been raised at the NTS Focus Group about the procedural suitability of PhonepayPlus conducting this consultation whilst Ofcom's supposedly root and branch Scope Review of PRS was underway. Cable&Wireless understands that this document is intended to be 'green' in its thinking and dealing with the early stages of preparation for a draft 12th Code; however we are concerned about the impression this section of the document gives that the decision to proceed with a registration scheme and a reputational database is already a done deal. It is Cable&Wireless' opinion that the current proposals have not explored adequately the possibilities offered by such a database and we would have liked to see more consideration given to a robust and future proof solution. Instead the current proposal appears to be a cheap, cobbled together solution that will not provide any clearly definable benefit.

From the document it appears that the registration database will be no more than a dumb bucket collecting input fed directly into it from Service Providers. PhonepayPlus will then use this information to link to breach information and to attempt to link associated companies and individuals. This approach may be pragmatic and cost efficient but the limitations are glaring. At worst PhonepayPlus will be left with a database full of linked bogus companies that provides little or no useful assistance to those Network Operators attempting to use it for due diligence purposes.

Cable&Wireless would like to see consideration of a fully functional database that would not only hold the registration details of all parties in the PRS chain, but which could also be used as a basis to restructure the current levy along the lines of an annual registration fee applied principally on individual Service Providers and Information Providers. The database would ensure that PhonepayPlus had undeniable proof that the parties in question had valid bank accounts and were who they claimed to be. It would also make any links between companies transparent.

It is clear from all of the research conducted by Ofcom and the experience of Cable&Wireless within the PRS market that the root of consumer harm within the market can be found primarily with the minority of companies that choose to deliberately (or sometimes negligently) misadvertise their services. It is here that regulation needs to be applied to curb such abuses. To do that PhonepayPlus needs to regulate and not to rely on Terminating Network Operators to do the regulation on their behalf. The registration database is a prime example. It offers the perfect gateway at which to refuse registration for anyone that fails to prove their identity, that they have the customer service procedures in place or that they have a track record of breaches. The Irish PRS industry is currently governed in such a manner by Regtel. Companies do not get to operate in the market until they have had their services and promotions approved by the regulator. This is the model PhonepayPlus should be adopting. It should be down to the Service / Information Provider to prove to the regulator that they are a 'fit person' in order to gain registration. Terminating Network Operators are then obliged to only contract with those entities which have been fully approved and there will therefore be no need for cross-value chain accountability an investigation by PhonepayPlus.

At present Terminating Network Operators are bearing the administrative burden of regulation rather than PhonepayPlus. They collect the revenues, enforce directions in terms of disconnection, suspension and revenue withholds and are expected to police the suitability of companies within the value chain – all of which is entirely disproportionate to the direct consumer harm that can be attributed to the actions of the Terminating Network Operator. We urge PhonepayPlus to apply regulation to those areas of the value chain where it is required and not where it is most convenient.

PhonepayPlus should be adopting a registration process which serves as a filtering process and not solely an unvalidated duplication of effort. It seems unthinkable that a Terminating Network Operator could potentially be found in breach of conducting adequate due diligence and therefore guilty of negligence for holding exactly the same information as the PhonepayPlus. It is hard in such instances to see how a charge of negligence can be the sole remit of the Terminating Network Operator and not also implicate the regulator.

12. WHAT OTHER SUGGESTIONS DO YOU HAVE FOR HOW WE COULD CREATE GREATER INCENTIVES FOR PROVIDERS TO CO-OPERATE WITH PHONEPAYPLUS IN THE EVENT OF INVESTIGATIONS?

This section of the document is curious in that it discusses the need for parties to be 'quick' in demonstrating that they can demonstrate that they have satisfied due diligence and risk assessment obligations, but it is entirely devoid of any discussion on incentive to co-operate. Cable&Wireless maintains a good relationship with PhonepayPlus and is keen to continue to provide all the help it can to eradicate unscrupulous practices from the PRS market, but our incentive is to maintain the health of the PRS market and to protect our customers, not to seek regulatory incentives.

PhonepayPlus needs to concentrate its actions on actual instances of consumer harm, rather than use valuable resource ascertaining whether parties not directly involved in the instance of consumer harm have followed compliance to the nth degree. There is a danger that the result could be juxtaposition between PhonepayPlus' desire to streamline the Code of Practice in order to end the

practice of applying every possible breach to an adjudication and what appears to be a case of applying fewer, but wider, breaches to as many parties as possible. Cable&Wireless is of the opinion that any investigation of the value chain beyond the specific instance of consumer harm needs to be entirely proportionate to the harm caused.

We are aware of recent examples where clear links may be drawn between parties acting in concert, but this needs to be a proportionate response rather than a general practice. We are not reassured by PhonepayPlus' reassurance that they will not automatically carry out such investigations every time a breach is 'alleged'. We know that PhonepayPlus will pursue an investigation of a breach on the basis of a single complaint, so the bar for such detailed investigations needs to be much higher than even a single breach (let alone allegation) and should only be initiated where there is clear evidence that the consumer harm is the result of a particular company's actions.

Furthermore, if PhonepayPlus run a registration scheme as we set out in answer to question 11, whereby PhonepayPlus take responsibility for the "due diligence" of the registrants, there will be no need to require networks to hand over documentation in a timely manner, as PhonepayPlus would already have that information themselves.

The number checker information could also form part of the registration process.

13. DO YOU AGREE WITH OUR PROPOSED APPROACH TO REFORMING THE INFORMAL PROCEDURE? IF NOT, WHY NOT?

Cable&Wireless is supportive of PhonepayPlus' plans to rename the Informal Procedure as a "Notification Procedure" and to widen its scope. We support any measure that prevents consumer harm without the need to initiate formal proceedings.

14. DO YOU AGREE WITH OUR PROPOSAL THAT OUR ARRANGEMENTS FOR STANDARD AND EMERGENCY PROCEDURES SHOULD BE RETAINED? IF NOT, WHY NOT?

Cable&Wireless agrees that the current arrangements for standard and emergency procedures appear to be working and that they should be retained in their current format.

15. DO YOU AGREE WITH OUR APPROACH AND WHAT REGULATORY IMPACTS, COSTS AND BENEFITS DO YOU FORESEE?

Cable&Wireless believes that the ability for PhonepayPlus to be able to adjudicate against more than a single party for any breach may have some benefits, but only where it is proportionate and appropriate to do so. We caution PhonepayPlus from adopting a carpet bombing approach in the hope of being able to enforce a breach somewhere along the value chain. A more targeted approach to remove repeat offenders from the market would be much more desirable.

16. WHAT WOULD BE THE COSTS AND BUSINESS IMPACTS ASSOCIATED WITH SUCH PROPOSALS? WHAT CONSUMER BENEFITS DO YOU THINK WOULD ACCRUE?

Cable&Wireless supports the additions to the Code where it states that refunds should be available to all consumers and not just those that have complained to PhonepayPlus. We also wholeheartedly support the consumer view that refunds should be available directly from PhonepayPlus where they have issues obtaining the money. This is particularly the case where PhonepayPlus has already received payments for any associated fines. In such an instance consumer redress must be given precedence over fine revenue generation.

17. WHAT THOUGHTS DO YOU HAVE ABOUT IMPROVING PHONEPAYPLUS' EFFECTIVENESS OF FINE COLLECTION AND DO YOU HAVE ANY SPECIFIC PROPOSALS FOR HOW WE COULD BETTER SECURE FINE COLLECTION THROUGH CHANGES TO THE CODE?

PhonepayPlus will not improve its fine collection until PhonepayPlus is fully cognisant of all Service Providers and Information Providers operating within the market. This could be achieved through the registration scheme if implemented effectively. Whilst PhonepayPlus remains reliant on intermediaries there can be no guarantee that fine collection will improve. Indeed where PhonepayPlus levies its maximum available fine on companies running blatant scams (such as the recent 070 issues) it is likely that this money will never be recovered. Indeed Cable&Wireless predicts reduced collection rates where this sanction is imposed. In such cases the best PhonepayPlus can hope for is to drive such individuals and companies from the market permanently.

18. DO YOU AGREE WITH PHONEPAYPLUS' PROPOSALS FOR NEW TERMS IN RESPECT OF THE CURRENT TERMS "SERVICE PROVIDER" AND "INFORMATION PROVIDER?" IF NOT, CAN YOU SUGGEST ALTERNATIVE TERMS?

Cable&Wireless is ambivalent to the terms used in identifying parties in the value chain. The key thing for PhonepayPlus to recognise is that many of these parties are interchangeable. Action should be taken against the party responsible for consumer harm irrespective of where they are commercially or technically in the PRS value chain.