

Your response

Question	Your response
<p>Q1. Do you agree with our assessment that our proposals will not affect any specific groups of persons (including persons that share protected characteristics under the EIA 2010 or NIA 1998)? Please state your reasons and provide evidence to support your view.</p>	<p>Confidential? – N</p> <p>We agree with this assessment insofar as no specific groups are any more disadvantaged than they are already by current PRS regulation.</p>
<p>Q2. Do you agree with our assessment of the potential impact of our proposal on the Welsh language? Do you think our proposal could be formulated or revised to ensure, or increase, positive effects, or reduce/eliminate any negative effects, on opportunities to use the Welsh language and treating the Welsh language no less favourably than English?</p>	<p>Confidential? – N</p> <p>No comments</p>
<p>Q3. Do you have any comments about our proposed definitions in articles 3 to 8 of Part 1 of the draft PRS Order for key service concepts that are used throughout the Order?</p>	<p>Confidential? – N</p> <p>On our reading, the definitions in the PRS Order appears to omit a large category of PRS service; namely subscription or one-off payment services which do not fall into the categories set out in article 8. It is unclear whether or not this was intentional, the consultation document does state at 4.13 an intention to regulate a narrower group of PRS, however this may create a disparity and confusion in the marketplace.</p> <p>The types of services were refer to, which are currently PSA regulated but would not be regulated under the draft Order, are paid for in the same ways as a CPRS services, but are not “provided by means of an electronic communications service” (article 3(3)(b)).</p> <p>This includes in-app purchases of access to digital content e.g. music, videos, or the provision of an app or web service itself, such as a video streaming service.</p>

	<p>This is currently captured under the Communications Act 2003, article 120(7), and therefore leaves significant confusion in the marketplace as to how these services are to be regulated.</p> <p>Furthermore, many providers will provide by PRS and CPRS services, but not necessarily at the same time or consistently, therefore an abundance of caution would suggest all PRS providers would want to register with OFCOM in any event, eliminating any envisioned reduction in administrative resource.</p>
<p>Q4. Do you have any comments about our proposed definition for PRS regulated providers and regulated activity in article 9 in Part 1 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>See answer to Q3 above.</p>
<p>Q5. Do you have any comments about our proposed approach to registration and registration exemptions in Part 2 of the draft PRS Order?</p>	<p>Confidential? –N</p> <p>No comments on the general registration requirements so long as the administration of this process is not overly onerous for when details need to be changed.</p> <p>One minor concern is the definition of ‘generally authorised person’ in paragraph (4) of article 10 of the PRS Order. This states that a single person is required to have oversight of four areas. Three areas go naturally together: risk assessments, security testing and managing OFCOM communications. These areas fall within typical legal and compliance roles. However the fourth are numbered (i) relates to finance functions and in particular the wording ‘<i>processing and payment</i>’ is problematic. In most businesses, these finance functions are deliberately kept distinct from other areas of the business, and it would be unusual to find a single person with responsibility for processing and paying invoices who also has responsibility for the other three areas, except for perhaps the CEO or MD in a very general sense. If the intention is to always have the authorised person be the CEO or MD then this should be stated, but for practical purposes it would in our view be more logical to separate the responsibility for ‘processing and payment of invoices’ away from the authorised person role, and perhaps replace with is a responsibility for ‘<u>approving the proving processing and</u></p>

	<p><i>payment'</i>, rather than actually doing the processing and payment which is what the current wording suggests.</p>
<p>Q6. Do you have any comments on our proposed requirements relating to due diligence and risk assessment in Part 4 of the draft PRS Order?</p>	<p>Confidential? –N</p> <p>With regards to article 15, we repeat here concerns that have admittedly previously been raised with the PSA in earlier consultations regarding the wording of the article. As a matter of commercial practice, PRS Providers will naturally want to enter into contracts or arrangements covering multiple territories, not just the UK, and often in advance of a full exploration of the services and operational practicalities of working in any particular market. Registration as a PRS Provider in the UK is an unreasonable step where parties are not intending to operate in the UK, or are simply exploring opportunities in a market, understanding their product/market fit, understanding the commercial. As the wording of the PRS Order currently stands, it would be contrary to the Order for the parties to undertake any form of legal relations and this is an unreasonable restriction. The wording should be amended to clarify that registration is required in advance of an arrangement '<u>to commence</u>' regulated activity, not merely '<i>in respect of</i>' which is overly broad.</p> <p>On a question of administration, with respect to article 17(4)(b) of the PRS Order, OFCOM must explain how a PRS Provider can meet this requirement after the transfer of responsibilities from the PSA to OFCOM. The PSA currently maintains an effective website and database that can be queried for previous decisions in a variety of ways, primarily via a 'Due Diligence Report'. Will this service be maintained and if not, how can a PRS provider reasonably meet this requirement?</p>
<p>Q7. Do you have any comments about our proposed approach to security testing in Part 5 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>No comments</p>
<p>Q8. Do you have any comments about our proposed approach to misleading information and/or the promotion and marketing of PRS in Part 6, Chapters 1 and 2 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>No comments</p>

<p>Q9. Do you have any comments about our proposed approach to pre-contract information and express consent for imposing certain charges in Part 6, Chapter 3 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>We are concerned with the major changes to the way consumer consent to be charged is managed for PRS under the PRS Order compared to the PSA Code. We consider this to be creating a major risk of consumer harm and damage to the wider PRS marketplace by removing controls which have been developed over several years in consultation with the industry. See our response to question 10 below for more detail.</p>
<p>Q10. Do you have any comments about our proposed approach to provision of CPRS in Part 6, Chapter 4 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p><u>Consent to Charge</u></p> <p>4.177-4.179 in the consultation document fail to provide protection from harm to consumers. By failing to specify what reasonable information constitutes evidence of consent, the lack of consistency in the way consent is to be gathered, recorded or retained will lead to wide variation in interpretation. This will result in consumer confusion and increases in complaints to providers, mobile network operators and ultimately OFCOM itself. OFCOM should take note that the industry, led by the PSA, has gone through an extensive process to identify what evidence provides good consent to charge, and it is unclear in the consultation document or at all why OFCOM would seek to remove these measures providing both certainty and protection to consumers, certainty to the industry as to what represents good practice especially in context of any investigation of enforcement of complaints by OFCOM. In the worst instance, by removing specifically the requirements for independent robust third party verification and the requirement for immutable record keeping, this leaves the market open to re-entry by unscrupulous players who may seek to fabricate evidence of consent amongst the confusion this change to requirement will inevitably bring.</p>
<p>Q11. Do you have any comments about our proposed requirements relating to vulnerable</p>	<p>Confidential? – N</p>

<p>consumers in Part 6, Chapter 5 of the draft PRS Order?</p>	<p>We are broadly supportive of the widening of the scope of duties to protect vulnerable customers, however we have concerns that the widening of the scope creates an unnecessary regulatory burden on those companies in the value chain who do not have contact with customers, such as technical service providers or creative design agencies to name two, for whom it would not be reasonable to expect full vulnerable customers policies. No evidence is proffered in the consultation as to how the widening of the scope will better protect consumers and our concern is that it will have a dampening effect in the market by discouraging market entry and competition and drastically reducing the pool of ancillary service providers. We believe the current arrangements provide more than sufficient protection, whereby such providers agree contractually with merchants, intermediary provider or MNOs to comply with those MNO and/or intermediary vulnerable customer policies and processes without needing separate policy documents of their own.</p>
<p>Q12. Do you have any comments about the proposed requirements relating to prevention of harm and offence in Part 6, Chapter 5 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>It would be welcome if OFCOM would confirm that the prohibitions here are not intended to, and would be unlikely enforced for, news and current affairs reporting of such material in line with more general broadcasting regulation.</p>
<p>Q13. Do you have any comments about our proposed approach to competition and voting services in chapter 6 of Part 6 the draft PRS Order?</p>	<p>Confidential? – N</p> <p>No comments</p>
<p>Q14. Do you have any comments about our proposed requirements in respect of certain CPRS in chapter 7 of Part 6 our draft PRS Order?</p>	<p>Confidential? – N</p> <p>No comments</p>
<p>Q15. Do you have any comments about our proposed approach to the recovery of Ofcom’s expenditure in Part 3 of the draft PRS Order?</p>	<p>Confidential? – Y / N</p> <p>As an intermediary, we are very concerned about the inability of OFCOM to give any consideration to sums recovered in fines as a way of offsetting operating costs. Historically this has been a major mitigation for the impact of the levy on network operators. By removing this mitigation we will inevitably see the significantly increased cost of the levy now</p>

	<p>being passed down through the value chain to intermediaries and merchants. This will make the United Kingdom significantly less competitive in the global DCB market, and it is critical that OFCOM does not lose sight of the fact that the marketplace is global, a fact that does not appear to have been noted in the consultation.</p>
<p>Q16. Do you have any comments about our proposed approach to additional requirements on network operators in Part 7 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>No comments.</p>
<p>Q17. Do you have any comments about our proposed requirements relating to information requirements in Part 8 of the draft PRS Order</p>	<p>Confidential? – N</p> <p>No comments.</p>
<p>Q18. Do you have any comments about our proposal to retain current PSA data retention periods for 2 years (for consumer data) and 3 years (for DDRAC data) in Part 9 of the draft PRS Order, with a preservation requirement following an investigation being opened?</p>	<p>Confidential? – N</p> <p>No comments.</p>
<p>Q19. Do you have any comments about our proposed approach to enforcement in Part 10 of the draft PRS Order?</p>	<p>Confidential? – N</p> <p>We are concerned at the removal of the enforcement process stage of Warning Letters.</p> <p>The Code, and PRS Order, sets out broad expectations for the operation of PRS on a principles basis, however does not contain specifics for how PRS providers are expected to execute those principles. This is a welcome approach, it allows the market to be flexible and welcoming, and encourages competition and good practices as opposed to box ticking and loopholing. However, this does from time to time create scenarios where a PRS provider acting in good faith may interpret requirements differently to the regulator. In these circumstances it is a vital tool for the regulator to be able to inform the PRS provider that it believes activity may be contrary to its expectations, particularly where the difference of interpretation is minor and low risk, in a relatively informal manner allowing the PRS provider to quickly change its behaviour or practice to fall in line with expectations.</p>

Removing this step has serious implications. As we are understanding the drafting of the PRS Order and the explanation in the consultation document, in the event OFCOM forms an opinion that a PRS Provider is acting contrary to the PRS Order, the only option is to start a formal investigation and publish this fact on its website. This will have the following impacts:

Damages reputation of PRS providers:

In most cases, PRS providers act in good faith and always seek to stay within the regulatory framework. Where interpretations differ, it seems grossly disproportionate to publicise this disagreement in a way that will appear to external parties as a provider being in breach. OFCOM must remember that most PRS Providers operate in a global marketplace where publicised investigations cause significant harm to external and overseas audiences who do not, and will not, understand the implications of this, interpretation the start of an investigation as a finding of breach. In other jurisdictions (and with the current PRS regime) regulators only publicise when findings of breaches have occurred.

Discourages innovation:

PRS providers will be less likely to seek to bring innovative products and approaches to the UK market where they are cognizant that a minor difference of interpretation could cause them significant reputational damage in the global marketplace.

Damages reputation of industry as a whole:

Similar to the above, where every minor concern becomes a published investigation, the UK PSR market will appear to be in a significantly poor state to external audiences, discouraging investment in the market and damaging the industry as a whole.

Increases cost of regulation:

Simply put, if every minor concern starts a full investigatory process as described in the consultation, this will be significantly costly for OFCOM, and therefore costly for the industry as, presumably, if OFCOM's costs exceed the levy the levy would be increased.

In conclusion, OFCOM should seriously consider implementing an informal route as part of its

	<p>investigation process for PRS whereby it can inform PRS Providers of a potential concern, in low risk cases, and invite a response with positive remedial action without the need for starting, and publishing, a full investigation. This will mitigate the key risks outlined above.</p>
<p>Q20. Do you agree with our provisional assessment that our proposals are justifiable, non-discriminatory, proportionate and transparent? Please provide further information</p>	<p>Confidential? – N</p> <p>We agree that the proposals are non-discriminatory and transparent.</p> <p>We do not agree that the proposals are proportionate and justifiable in particular with respect to the areas set out in our response above (which includes our reasoning) concerning:</p> <ul style="list-style-type: none"> • The changes to the requirements for consent to charge • The removal of the levy mitigation from penalty/fine income • The removal of the ‘warning letter’ stage of enforcement <p>This is notwithstanding our other comments and feedback which covers matters of a more practical or administrative nature.</p>
<p>Q21. Do you agree with our implementation period? Please state your reasons and provide evidence to support your view?</p>	<p>Confidential? – N</p> <p>Broadly we agree with the timetable, however we observe that it appears not to be clear when the final version of the PRS would be published, however with the commencement date being 1st October and an implementation period of 3 months prior, this would mean the PRS Order would be published on 1st July, coinciding with the UK holiday period. This may prove challenging and we would suggest that moving the commencement date to the 1st December may be more conducive to a smooth transition.</p>

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