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Miss Kelly German
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Three's response to the Phone-paid Services Authority's consultation on "Proposals to enhance the effectiveness of sanctions imposed by PSA Tribunals on non-compliant providers"

Dear Miss German,

This is Three's (Hutchison 3G UK Ltd) response to the Phone-paid Services Authority (PSA) consultation on the effectiveness of sanctions on non-compliant providers.

Three is the UK's challenger mobile network. Since we launched in 2003 we have focused on ensuring that our customers are able to make the most of their devices through market-leading propositions such as 4G at-no-extra-cost and Feel at Home, which allows Three customers to call, text and use their data allowances abroad in 60 destinations at-no-extra-cost. As a result, Three is the largest carrier of mobile data, with our network carrying 36% of all the UK's mobile data¹.

The PSA has a vital role to play in ensuring that consumers are able to have confidence in phone-paid and premium rate services, and are able to use them safely and securely. As such, it is important that the PSA have the ability to regulate, and ultimately to fine non-compliant service providers. We therefore welcome the opportunity to respond on the PSA's proposals to ensure these fines are more effective.

This is critical not just to consumer protection, but also for the success of the phone-paid services marketplace. Three therefore supports the PSA's proposal to increase the Tribunal's flexibility in setting fines. However, it is important that the PSA go further. The recent increase in the industry levy, to fill the gap left by non-collection of non-compliant providers' fines, demonstrates the need to consider not just the level of fines issued but also the ability of the PSA to ensure these are recouped, and that fines are levied in a way that encourages greater compliance.

¹ Enders Analysis, December 2016

It is Three's view that fines would be more effective if also levied at an aggregator level. This will ensure that those responsible for bringing services on board for customers are incentivised to give those services the proper scrutiny needed before making them available for consumers.

Our responses to the PSA's specific questions can be found below:

Question 1 – Do you agree with the proposals to provide the CAP with a revised process for imposing fine sanctions, as set out within the attached Supporting Procedures?

The Tribunal's fining powers are an essential mechanism to both deter malpractice from providers, and ensure that regulation is effective in protecting consumers.

Three welcomes the PSA's proposals for greater flexibility, set out under paragraph 2.3. The PSA is right to note that having the ability to make "effective, reasonable and proportionate" fines is essential. It is also proportionate that the Tribunal should have scope to consider the full revenue raised by a particular service when determining a fine. This will give the Tribunal the flexibility needed to set fines that are effective, and encourage greater responsibility from providers for malpractice, even when it might only affect a minority of their customers.

However we would welcome additional clarity about whether fines will take into consideration the revenue of a service provider, who may have multiple services running across multiple aggregators, rather than a particular non-compliant service alone.

Three has previously set out its view that the PSA should consider not just the level of fines, but also against whom a fine should be levied in order to enable the greatest compliance and protection for consumers. As stated above, we would urge the PSA to consider levying fines against aggregators of services, as well as providers.

Aggregators are ultimately responsible for the services they facilitate for providers. They are in the best position to interact with a provider to determine whether or not a service is compliant and to support providers in making their services compliant - and to be ultimately responsible where a provider does fall short. Fining the aggregator would be the most effective deterrent, as it would be targeted at the companies best placed to prevent consumer harm in the first place.

Question 2 – Do you agree with the proposal to replace revenue bands with a description of relevant revenue, as set out within the Supporting Procedures?

The PSA is right to note that the current structure of revenue banding places artificial limitations on the fines the Tribunal can levy in a particular case. This means that the fines levied might not be proportionate given the specifics of a case, its duration and number of customers impacted.

Three therefore supports the PSA's proposals under paragraphs 2.11-2.12, to allow greater flexibility around the determination of fines, by moving to a description of relevant revenue. We agree with the PSA's comments set out in paragraph 2.14 that this will help the Tribunal assess the factors in the case at hand, rather than being restricted by precedent and banding.

There will need to be greater consideration around how PSA is able to recover these fines. As the PSA has noted previously, serial infringers often run services on a temporary basis, with a light footprint of recoverable assets making collection of fines (regardless of their level) difficult or impossible in a great many instances. This led to an increase in the operator levy in order to fill the shortfall. While increasing the flexibility around fine levels is welcome, it will be of little deterrence in cases where a provider evades a fine altogether.

This needs to be addressed in parallel with the PSA's consideration of Tribunal fining structures. As noted above, Three believes that levying fines against an aggregator will enhance the PSA's ability to collect fines. This will ensure that fines are genuinely effective in enabling more compliant and cost effective regulation.

Question 3 – Do you agree with the proposal to amend the wording of descriptors and introduce supporting interpretive factors, as set out within the attached Supporting Procedures?

As noted above, we welcome the PSA proposals in paragraph 2.17 to revise the guidelines to allow higher penalties in appropriate cases. This includes the Tribunal being able to consider 'supporting interpretive factors'. The PSA is right to note that precedent places too great a restriction on the fines the Tribunal can levy in a particular instance. Giving the Tribunal the ability to determine a fine level based on a case's specific merits will ensure fines are both more effective and proportionate.

Three also supports the PSA's proposed changes to the case impact descriptors and the clarity these will give the CAP in setting these fines.

Question 4 – Do you agree with the proposals to revise the process by which the Tribunal arrives at the appropriate sanctions for a case, as set out in the Supporting Procedures?

Three welcomes changes set out in paragraph 2.29 of its consultation. The PSA proposals will help make explicit the Tribunal's consideration of a wider range of factors in determining the level of proportionate and effective fines.

However, Three would additionally ask that the CAP be given greater flexibility to fine up to the maximum per breach within a case, rather than to a maximum in an overall case. The status quo is too restrictive, and means there are cases where a service might not be fined in proportion to the number of breaches or the scale of impact on customers.

Question 5 – Do you agree with the proposal for commencement of the new decision making process set out in the Supporting Procedures?

As set out in our response, Three broadly supports the PSA's proposed changes. The PSA is right to note in paragraphs 2.33-36 that the proposed changes would not be unfair or result in prejudice, and that the measures set out in 2.34-2.36 to give providers adequate notice of change are proportionate.

Three agrees that the proposals do not represent new powers, only enhanced scope to use existing powers more effectively. Therefore, we agree that these changes do not need to be given a significant lead in time.

Question 6 – Do you agree with our assessment of the potential impacts both on the Phone-Paid Services Authority and providers? Do you have any further information or evidence which would inform our views?

Three agrees with the PSA's assessment of the likely impact of its proposals, in particular with regard to efficiency savings. These proposals are then a welcome step in the right direction.

However, with regard to the PSAs assessment of the enhanced deterrence and consumer protection resulting from these proposals, it is Three's view that there is a need for a more fundamental rethink of the PSA's approach. Doing so will ensure this greater flexibility is used to deliver the greatest benefits in consumer protection, and reduced cost of regulation.

While fines are an effective deterrent; they need to be levied in the right places to incentivise good behaviour. However, the aggregator's responsibility for bringing a new service on board is not reflected in the levying of fines (on L1s) and levy charges (operators). Three urges the PSA to take a new approach in this regard, one where aggregators are better incentivised to prevent not just redress consumer harm, as well as facilitating the better recovery of fines.

If got right, this could be an opportunity to properly align the costs of regulation with responsibility of those able to approve services - the aggregators – enabling a better, healthier market for phone-paid services, with more efficient regulation and most importantly less consumer harm.

I hope this response is useful. If you should have any questions please do not hesitate to get in touch on Simon.Miller@Three.co.uk.



Simon Miller
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