

## **Action4 response The Fifteenth Edition of the Code of Practice A Phone Paid Authority Service Consultation**

### **Introduction**

Action4 welcomes and thanks the Phone Paid Authority Service for the opportunity to respond to its consultation entitled The Fifteenth Edition of the Code of Practice A Phone Paid Authority Service Consultation (PSA) on behalf of its members.

As a membership driven trade association representing commercial businesses operating within the non-geographic telephony sector, we are starkly aware that effective regulation is intrinsically linked to the good levels of industry and consumer trust and in turn a buoyant industry.

Our first comment in relation to the code is that most of whether regulation is effective or not is in the implementation of the code and those that administer this. Regulation must be fair and appropriate for those that consume services and for those that operate them.

### **List of questions for consultation**

#### **Annex A: Questions in this document**

#### **Background**

Q1 Do you agree with our proposed overall approach to the review? Please provide an explanation as to why you agree or disagree.

We agree broadly with your new approach to return to a code with some ambiguity this way it is easier to be flexible and adjust to a changing and developing industry.

You say that you have a broad approach with prescriptive outcomes however currently the code is so complex no one can clearly and easily understand it. The original ICSTIS code and regulation was more standards based. I actually have a copy of the original code and operated services under it, the basis of regulation then was a pragmatic approach. Of course we understand that the industry is now much more complex with many more players although revenues were higher under the old regime. We are with your intent to have a code which "is simpler and clearer for industry to comply with".

Q2 Is there anything else we should be considering?

We would urge you to be mindful that this industry has an ever changing playing field and that as a regulator you are industry faced but consumer facing not the other way around.

## **Market context**

Q3 Do you agree with our assessment of the market? If not, why not? Is there anything else you think we need to consider?

We largely agree with your market assessment, however, in paragraphs 56 – 58 you say that you support the consumer by providing information to the Level 2 or Service Provider. Perhaps you should also consider providing Network Provider information too as an alternative means of redress. Some of our network members say it would benefit them greatly if they handled complaints directly as it would give them a better idea and understanding of any problems with a service/s, than perhaps DDRAC allows and then they could address both potential consumer harm and also any clients who may not be acting wholly appropriately and allow them to address any issues more efficiently.

Q4 Do you have any evidence of the market to share with us that you think would support our assessment?

Over the years we have had many members who are unsure of how to interpret the code, in the past this would be resolved by a meeting or a phone call you have now moved to an e-mail compliance system which means some industry players will not want to commit to paper commercial sensitive information. Previously a more informal approach in our opinion lead to be better outcomes, also be mindful that if you over regulate you will drive operators abroad or you may encourage foreign operators who will not perhaps be so inclined to completely follow your regulation either due to misinterpretation or deliberate intent.

In paragraph 60 of the consultation document, you state that you share information and address issues early to identify potential consumer harm but this has not been some of our member's experience. Members are clear that they would value any input from PSA intelligence gathering and would always be happy to act swiftly on any intelligence in order to prevent harm early before it has a chance to escalate and become more serious. We urge PSA to move to use informal methods and work with the industry to try and stop any potential identified harm as soon as PSA is aware of an issue by contacting the relevant party and information sharing.

## **Consumer expectations and experience**

Q5 Do you agree with our assessment, based on research, of consumer behaviours, experience and expectations?

Yes we broadly agree however after over 25 years of your organisation operating a code, surely by now if the regulator and network operators were doing a good job of educating then perhaps by now you could have expected the consumer to have a bigger and better understanding of services and how to get redress or help. There is potentially a big opportunity with younger consumers to spend more via these services if they have confidence in them.

Q6 Do you have any other evidence in this area that we need to consider?

We have no further comments at this time.

## **Likely future trends**

Q7 Do you agree with our assessment of what the future holds? Please provide an explanation as to why you agree or disagree.

We broadly agree however we believe there is an opportunity for growth in the voice and older consumer market sector if the reputation of the services was improved and this was promoted, an annual award may be one way to contribute towards this happening.

Q8 Are there any market developments which we have not factored into our assessment? How do you see these influencing the phone-paid services sector and associated regulatory challenges?

We urge you to remember that you are not a consumer body and must be protecting and promoting the industry as well, at the end of the day those people who seek to harm in the main don't care about regulation. The regulation and laws in regard of many services are now so over completed as to prohibit people wanting to come into industry so to simplify regulation is a good idea

## **Assessment framework**

Q9 Do you agree with our proposed assessment framework? Please provide an explanation as to why you agree or disagree

Again we urge you to remember that you are not a consumer body and should be protecting the industry as well, we therefore welcome a pre-operational, operational, investigations and then sanction based approach. However the pre-operational process must not be over burdensome, for example for many years we have urged that the consumer should use positive affirmation to confirm that they want to continue with a service. In this way the level 1 and 2 operators would be able to prove the consumer heard cost warning/accepted the service they have connected to. The original ICSTIS code was simple to understand and use, now whilst we understand why the code has developed as it has, simply regulation is now over complicated.

Q10 Are there any factors we have not taken account which we should?

One question we do have is how you will be able to regulate fully upon those that seek to de-fraud unless you have enforceable statutory powers. At the moment your collection rates of fines show that something is not working.

## **Initial thinking**

Q11 Do you agree with our proposed initial thinking in terms of proposed changes to our regulatory strategy and approach? Please provide an explanation as to why you agree or disagree.

Going back to the original ICSTIS code there was a lighter touch regulation working with the industry informally and getting in contact with the relevant provider. PSA perhaps needs to adopt this approach again; therefore if an error in the industry via an operator/consumer is highlighted then PSA should get in contact with the provider,

this used to happen. The, network, SP or IP (level 1 or 2) could then correct the error within a set time frame.

However without statutory powers to enforce more serious sanctions for example criminal cases and then imposing jail sentences how can you stop directors setting up limited companies and then closing them to avoid fines. If you become over prescriptive you will penalise the good and just drive the deviants further underground. Just because a company is deemed to be blue chip does not always mean they act in the best interests of consumers. For example many consumers feel that companies such as Apple over charges consumers.

Our members as you can imagine, are certainly in favour of the revised guidance on better checks on those coming in to the market – a new SP/IP or level 2 currently just needs to complete an online form with their name and address and that's it. Perhaps a checklist would be a better start to the registration process. We would also welcome a more prescriptive approach and better guidance on due diligence and risk assessment so that it is possible for Level 1's to know that they have done all that is required. An improvement in the processes for consumer redress through an improved approach to call refunds is also welcomed. The level of fines is still an issue and it would appear largely always be uncollectable at the current levels. Perhaps if PSA were quicker to act on any breaches they could easily instruct a withhold of revenues before the person/company involved are paid (pending investigation) and revenues could be released later if the case is not proven just like AIT notices from the networks.

### **Potential Code 15 options**

Q12 What are your views with regards to how we can best ensure that all firms operating in the phone-paid services sector will follow, and be held to, the same standard of professionalism?

Whilst we applaud PSA trying to make a set of standards via their code that all can adhere to, in practice this will be difficult to enforce although a more informal approach where reputable companies can work together to develop clear consumer redress processes and procedures will be very helpful for all. The reality is that those who seek to set up set up services will still do so unless there is criminal redress and sanctions available to PSA however the reality of such a system may mean the lawyers get rich and the consumer is still not protected. In reality how will this work if companies are based off shore? We urge a return of true industry engagement however no statutory or self-regulatory regime will ever stop deviants.

We would be happy with more upfront checks as part of the regulation. Prescribed requirements that must be met before a service can be allocated that would be clear to all parties can only be a good thing for Network Operators as it provides a clear standard and they can be confident that they are in full compliance with the Code.

Q13 What are your views with regards to developing appropriate 'Pre-purchase standards?

Over the years it has been much debated as to how consumers can obtain redress in an easy and efficient way for all concerned and whether the network or PSA should

be the body that handles standards on getting redress. Obviously pricing information and service information is key to this process. If a consumer understands what they are purchasing then complaints should be kept to a minimum the reality is that this is complicated by the number of parties involved in the operation of many services. Anything that means a consumer cannot claim they did not know what they are purchasing is useful, in reality how will this be policed and managed by the operator of the services or PSA if their role is now to change to monitoring then this could be a huge cost in terms of regulation.

Q14 What are your views with regards to developing appropriate 'Purchase standards?

In theory this would be a welcome thing to do however the reality is that not all operators in the industry will have the technical capabilities and infrastructure to be able to this. However positive affirmation is simple and could be operated on most if not all services. It would be useful to work through this idea and have some examples of how this would operate in the various different market sectors.

Q15 What are your views with regards to developing appropriate 'Post-purchase standards?

Many operators do operate on a no quibble refund policy in reality the consumers in this industry will have the same ethos as in all others. It is just how to make sure it is easy for the consumer to contact the relevant operating party for the service involved. The consumer is not always right there are many instances where consumers will claim they have not made a call and no one in their household has in reality this is not always the case.

Q16 What are your views with regards to how we can make our investigations and enforcement procedures more effective?

Whilst we fully support sanctions for those, network operators, Level 1 and 2 operators who breach the code this process should be enforceable and realistic. Fining companies more than they earn will mean that they will close the companies and not pay fines as we see now. What should happen is a focus on earlier informal support for those who seek to work within boundaries however we have seen for example compliance advice given and then operators breached against that advice in the past. Making sure that the code is easy to understand and the point of entry obligations on all parties involved should have an effect on reducing investigations and sanctions.

Our concern would be that the whole process should not become more and more about who has got the biggest lawyer instead about whether real consumer harm has been committed. Whilst we agree that those who deliberately seek to defraud should have the book thrown at them the whole process is moving from what an ordinary operator of services can deal with and is firmly slanted to lawyers. We welcome anything that assists the process being easier and more cost effective for all. Whilst allowing real justice to be done.

We agree that all those involved in the industry must be aware of those reasonable measures to be able to operate. It is unreasonable to expect them to know every relevant law without becoming a lawyer. It is reasonable that they should have undertaken all reasonable due diligences in respect of their ability to run services.

On the whole our view is that once an issue has been identified there should be quick processes for bringing this issue in line with the Code. For example, if there is marketing that is not clear then the Service Provider should be guided on how to present clearer marketing and reviewed promptly either by the Network Operator or the PSA. Issues should then be escalated based on how well they comply with the guidance given. Persistent offenders can be brought up through Track 1 and then Track 2 accordingly. The longer that issues are left unchecked then the greater the likelihood of serious or very serious consumer harm and so early identification and prompt action are a vital part of the process.

In our response to your Code consultation on the 12<sup>th</sup> code of Practice we raised issues with our sanctions operated in particular administrative charges:-

“We would also welcome PpP re-considering its general policy towards levying administrative charges. In particular, it does not seem at all fair that parties who are successful at the Oral Hearing stage in reducing the level of fines are still liable for the totality of PpP's administrative charges. Particularly as their only recourse in those circumstances is to the Chair of the CCP, who will have made the original order regarding the administrative charges. We would recommend some independence in this part of the process.”

“Alongside of the above request, Action 4 commissioned an analysis re administrative charges. A snap of that review highlight the following points”:-

#### **“Sanctions**

- Significant fines are imposed even where compliance advice is sought, although the fines tend to be smaller
- There is an inconsistent approach to sanctions
- Fines and bans are used in conjunction with each other (not taking into account the fact that a ban is a substantial financial penalty in itself)
- Mitigation makes only a limited difference to sanction, although immediate co-operation and voluntarily refunding complainants is likely to reduce the level of the fine

#### **Conduct causing repeated concern**

- Typo-squatting
- Concealed subscription services
- Collecting personal data without consent
- Failing to ensure spending caps

#### **Aggravating features**

- Deliberate conduct
- Reckless conduct
- High cost of service
- Service of little value

Under the new code surely administration charges should only be imposed if there is a breach of the code. We have certainly noticed that substantial administrative charges are awarded even where there is a significant fine or ban imposed. It is not apparent on the face of the decisions whether or not the Panels:

- i) Apply any test when determining whether to impose administrative charges (for example a 'just and reasonable' test);
- ii) Carry out any means assessment;
- iii) Consider the proportionality of imposing administrative charges alongside the imposition of a fine or ban"

We do not feel that just financial sanctions will stop consumer harm those who deliberately seek to de-fraud will just walk away. True co-operation will reputable operators at every stage we believe is the most effective way off limiting harm and sanctions if imposed should be of a level that the operators is punished but not put out of business, they will just find another way to operate.

We welcome a restructuring of the process of your implementation of the code in this area of regulation and ask the above be considered.

Q17 What are your views with regards to how we might achieve better outcomes for consumers and uphold the reputation of the market through more effective deterrents by considering the range of sanctions available to us?

There are various options in regard of this one would be that only networks control refunds, another that all involved in the money chain can give refunds or that only PSA operate this function – however this option will lead to extra cost for the industry. We need to know what proportions of consumers do NOT receive refunds once the industry knows these statistics then a solution can be better discussed. Why and how is the current system not working? Can is is this be demonstrated by PSA with hard statistics? When you mention other regulators powers to whom do you refer and what powers do they have that you don't and are they comparable bodies to PSA in terms of their role and remit?

#### **Other general Code considerations**

Q18 What are your views on our existing funding model? Does it remain an effective model? Or do you think alternative funding models may provide a more sustainable approach going forward?

The current funding model appears to work looking at your accounts, whilst we would be happy to look at and hear alternative funding models, we must all be careful we do not throw the baby out with the bath water.

Q19 Do you consider the current categories of defined provider's capture all relevant providers involved in the provision of phone-paid services and appropriately spreads regulatory responsibility throughout the value chain? Please provide an explanation as to why you agree or disagree.

In some regard the old terminology that was used network operators, service providers and information providers seems to have covered the roles of the operators in the industry just as well as the current terminology. Mobile companies' fit in the term of networks the only real changes are aggregators and market affiliates. What must happen is a clear understanding of what entity sits within in whatever definition is used.

Q20 Do you think the current regulatory framework remains fit for purpose? Please provide an explanation as to why you agree or disagree.

Whilst we agree that special conditions and, guidance and compliance updates where designed to allow a changing industry to have rules and information on the operation of services so the code did not need to be changed regularly which is a cumbersome process. The reality is now the code and its various annexes are over complex and not easy to understand. Simplification of the overall operation of regulation within this arena and perhaps a return of how it used to operate in terms of each party in the value chain being aware of their responsibilities and obligations would be welcome. Regulation that allows for those entering into an industry to be unable clearly to follow rules needs to be reviewed and we agree that the code is not currently fit for purpose but do urge that this new 15<sup>th</sup> Code is truly fit for purpose and this will only be achieved by each stage of your newly intended process is clear and not over burdensome.

Q21 Are there any areas of potential change proposed in this document which may have an impact which you believe should be considered? If so, please let us know, including any evidence you have as to the likely impact.

A move by the regulator to prevention rather than cure has to be welcome, however the industry would need to see what this in reality means.

#### Conclusion

We widely support you revising your terms to increase market standards with better consumer outcomes but please remember you are not a consumer regulator but an industry one. When the author ran services you could call the regulator if you were setting up a service and ask for advice over the phone or have a meeting, now it seems a phone regulator will not do this you have to write in for advice, this does not allow for a fast moving, dynamic industry to be flexible and is laughable in context of your regulating the very industry you work in.

On the whole the 15<sup>th</sup> Code seems to be moving towards a more prescriptive Code that is clearer for all to follow and with the expected emphasis on prevention of consumer harm at an early stage and better redress for consumers, all of which we are in agreement with. We would welcome any support and guidance from the PSA that would, in turn, enable us to support our members in their businesses and the end users (consumers) when it comes to a clear method of service enquiries and complaint handling.

As we continue to say PSA must always strive to offer effective, proportionate and best value regulation. Most of all provide effective regulation for all involved within the industry consumer, provider, and all involved in the value chain. Ultimately effective regulation should seek to support an industry which is stable, and one with established and long-term players in it, who wish to see it grow and flourish.