Vodafone response to Phone-paid Services Authority's draft Code of Practice (fifteenth edition)

1. Vodafone Ltd ("Vodafone") welcomes the opportunity to respond to Phone-paid Services Authority's ("PSA") consultation on its draft 15th Code of Practice. Vodafone has always advocated proportionate and balanced regulation designed to build trust in and assist the growth of the Phone-paid Services Market.

2. With that principle in mind Vodafone has considered the proposed Code of Practice in detail and we thank the PSA Executive for its open and constructive bilateral discussions which have provided clarification in a number of areas. Our response focuses on those points where we consider amendments are needed and should also be read in conjunction with the Mobile UK submission as Vodafone is a signatory thereof.

3. Vodafone has already responded to Ofcom's parallel consultation seeking to provide approval to the new edition of the Code. Vodafone agreed that Ofcom was only able to offer provisional approval to the Code at that stage and we highlighted concerns which prevented full approval of the code provisions from being "proportionate to what they are intended to achieve" under the Communications Act 121(2)f; specifically:

    a. Regulatory approach.
    The current wording appears to include services that should be out of scope.

    b. Due diligence.
    We are satisfied that PSA's intention is to only require Due Diligence Risk and Control to be conducted on directly contracted parties, but one reading of the current drafting suggests wider Network Operator responsibilities. Were this to be the case the Code fails its proportionality test.

    c. Customer Care.
    The Code must be clearer on who has primary responsibility. The contract for Premium SMS, Charge to Bill, Voice shortcodes and Premium (long dial) Voice services is between the customer and the service provider. The service provider must explicitly be given primary responsibility for customer care. This does not change current processes or reduce Vodafone's responsibilities, but rather ensures that the provider of the Premium Rate Service is incentivised to invest in suitable customer service levels. This is a wholly proportionate approach.

    If the expectation is for this responsibility to be assumed wholly or primarily by the Network Operator through the adoption of Ofcom's definition of a complaint then the provision would, in the context of Vodafone's current low complaint volumes to PSA, be entirely disproportionate.

    d. Renewal of subscription services.
    These measures disadvantage Vodafone and other Network Operators in comparison to other forms of payment which do not have such strict regulation.

    e. Transitional arrangements.
    Vodafone is discussing concerns in this area with PSA.

4. Vodafone believes that relatively minor changes can be made by PSA to satisfy these requirements and a number have been clarified with PSA, highlighting why Ofcom approval should

have taken place after the completion of the PSA consultation.

Regulatory approach

5. PSA has emphasised that the new code is required as the market has changed in the last decade and the PSA acknowledges their work and that of industry has driven down consumer complaints to the lowest level for a decade. PSA believes that the proposed CoP will deliver regulation to consolidate this change in complaint levels.

6. However, PSA must provide a proportionate level of regulation and Vodafone has concerns that in two instances the regulatory approach as drafted is not proportionate.

7. PSA has powers to regulated *Controlled Premium Rate Services* as set out in the Communications Act 2003. The CPRS definition was always intended to provide consumers protection where there is third party involvement in the provision of a service and a clear differentiation between the underlying connectivity to enable access and the provision of the content itself. This has since been encapsulated in the FCA's payment services regulations.

8. Draft text in 6.2.12 and 7.5.1 may be read to suggest that own-portal value-added services are being inadvertently caught in the Code. As such services fall outside the CPRS definition this should not be the case.

9. Vodafone understands from its discussions with PSA that the inclusion of own-portal services is not intended. Confirmation of this understanding is appreciated and perhaps a direct reference in the code to the CPRS condition may be provided to prevent future misunderstandings.

10. The introduction of new controls on long term subscriptions Vodafone also considers to be disproportionate and to potentially undermine attempts to secure long-term growth in this market. One of the objectives of the PSA is to maintain a healthy competitive environment. An overly zealous regulatory landscape creates an intolerable risk assessment of the Phone-paid Services market for reputable merchants and the conclusion that it is simply too difficult to operate within the UK regime. Similar market impacts were seen when regulation was extended to 0871 services with a number of companies and merchants either not entering the market or simply quietly withdrawing. PSA proposals risk a similar outcome.

11. It is reasonable to alert customers to an ongoing subscription once a year via a mechanism separate to the monthly spend reminder but it is disproportionate to make them create a new consent to buy when other equivalent payment mechanics do not. This additional action undermines the requirement that the PSA must deliver a "level playing field" in regulatory terms. The PSA risks disproportionately regulating subscription service in comparison to other micro-payment mechanics thereby entirely devaluing the last remaining USP of mobile transactions namely, the ubiquity of availability to mobile users.

12. This is not theoretical. In recent years action taken by both the MNOs and PSA has drastically changed the shape of the independent third-party aggregator marketplace and it has seen a massive increase in the presence of the major digital brands' App Stores. In the market these OTT brands account for an ever-increasing share of customer spend. Yet the ability of merchants to use the aggregators' payment platforms in the Mobile Charge to Bill services does not exist in the two biggest Apps stores in the UK. Over-regulation simply exacerbates the ability of Charge to Bill to compete.

13. Vodafone calls on PSA to align with the auto-prolongation rules being introduced into Ofcom's General Conditions from December 2021. This does not require express consumer consent for

rolling 30 day contracts after the expiry of a fixed commitment term, providing the customer can terminate at any time without paying an early termination charge.

14. Vodafone has seen no evidence for PSA to diverge from this approach, particularly as the monthly communications spend Ofcom seeks to regulate is considerably higher than those of individual PRS subscription services.

Due Diligence

15. The consultation document is clear in paragraph 351 that Vodafone would only be responsible for "*those elements which are within their control and for which we would expect them to undertake effective due diligence and have in place effective ongoing risk assessment and control processes*". It is our understanding following email exchanges with PSA that this means those companies with whom Vodafone has a direct contractual relationship. Rather than being liable for potential breaches by any member of the value chain including those over which it has no direct influence as inadvertently suggested in 3.9.11 of the code and Annex 2.

16. Vodafone requests that the necessary clarification is provided.

Customer Care

17. The PSA has introduced a new definition of a complaint (D.2.17) seeking to align it to Ofcom definitions. However the issue is that clauses 3.4.4 and 3.4.5 do not clarify that the primary responsibility for customer care is created by the contract between the customer and merchant when the customer buys the service from the merchant. The result of the current drafting could focus customer care on the Network Operator rather the merchant thereby resulting in the merchant abdicating itself from its customer service obligations.

18. Vodafone asks that PSA makes it clear that it is the merchant who has primary responsibility for customer care, which will allow industry to continue the recent significant improvements in complaint handling.

Renewal of subscription services

19. As set out above Vodafone maintains that the requirement for a 12 month automatic re-authentication of all subscriptions (3.3.11) will make carrier billing in this area prohibitively non-competitive against other micro-payment mechanics. The PSA should not introduce provisions which disadvantage the competitiveness of the PRS industry with extra regulation without quantifiable evidence of consumer harm. Vodafone notes that there are no similar requirements for any other payment mechanics; Ofcom's implementation of the European Electronic Communications Code allows for a rolling 30-day contract after the completion of a minimum contractual period and that the FCA remedies for the insurance industry focus on allowing customers to exit an auto renewal to avoid a 'loyalty penalty' – by way of contrast there is no increase in price to the recurring PRS subscription.

Transitional arrangements

20. Following discussions with PSA it is Vodafone's understanding that adjudications started under the 14th Code will be concluded under the processes introduced by the new Code of Practice, but that any findings or imposed sanctions will follow the Code applicable at the time of the breach. Vodafone does not object to such a procedural transition, provided that compliance consider takes account of the rules and guidance relevant at the time of any breach.

21. Vodafone has identified a number of concerns in relation to the operational application of the new code which could be improved to provide greater certainty to industry and improved outcomes.

Best Practice, Guidance and Compliance Advice

22. PSA has long held the position that Best Practice (3.2 & D2.8) & Guidance (D2.36, 2.2.1, 2.4.4) and Compliance Advice (not defined in the code) is non-binding and that guidance given or contained in a PSA document is open for challenge and can be overruled by the Code Adjudication Panel. In the 15th Code of Practice following guidance is seen to be merely a mitigating factor (5.8.1) and (5.7.3).

23. If a network or merchant has followed PSA best practice, guidance or compliance advice fully, Vodafone believes this should not be mitigating factor to any ruling made by the Code Adjudication Panel, but rather is a deciding factor as to whether a case should be brought before the Code Adjudication Panel in the first place. Vodafone would expect Ofcom in similar circumstances to consider its guidance when determining whether to open a case and then to proceed if there was a divergence from that best practice or guidance. It is the extent of this divergence which determines that level of mitigation.

24. If PSA is unable to stand behind its advice it should either withdraw all forms of compliance advice and written guidance and rely solely on the code or the compliance advice and guidance issued by "Skilled Persons" within the PSA needs to be given formal status within the 15th Code of Practice.

Changes to regulation

25. Vodafone does not agree that it is acceptable for PSA to make 'minor clarifications' to the code as proposed in paragraph 6.4.5 without prior consultation. If such a clarification is sufficiently important to be deemed to be beneficial or necessary it should be consulted upon accordingly or relevant guidance provided in conjunction with industry to ensure even the best intended changes have no unintended consequences.

Registration

26. PSA takes no responsibility for validating the information within its registration system. This is a missed opportunity and a glaring weakness to the detailed due diligence risk and control requirements being placed upon industry. It is not acceptable for the regulator to have potentially inaccurate information, whether input by design or human error and to expect industry to use that as the cornerstone of its due diligence. Vodafone calls upon PSA to carry out the same level of verification on its registered entities as it expects at every other level of the value chain to avoid undermining its own safeguards.

27. Vodafone recommends that PSA considers creating an api lookup into the Companies House database that stops a business from registering a name different to that recorded in Companies House. (A foreign registered company would have to indicate that its responsible for its correct format of its name).

28. The new code potentially places numerous participants within the value chain in immediate breach of the code if it insists that all names currently held in systems align to those held in the PSA Registration scheme. The requirement to use the Name As Registered may differ slightly from MNO to MNO simply due to data entry practices as they are input by different L1s. The PSA

needs to better understand the system requirements and associated costs for this requirement in order to introduce an extended implementation period and to make a lookup api available to check DDRC information automatically in order to avoid typographical variations.

29. The registration process should also require the merchant or intermediary provider to register every web entity / brand they create and the time periods when they are actively acquiring customers. This record must also record the last date customers of that service were billed in order to provide an indication of genuine live services.

Thematic review

30. The supervisory proposal to introduce "thematic" reviews is a disproportionate requirement without the introduction of checks and balances similar to the limitations set out in s.137 of the Communications Act 2003 which sets the boundaries of Ofcom's information gathering powers. We call on PSA to align its code in this regard and to make a transparent framework available of the triggers that will lead to a thematic review. Currently, whether intended or not, there is a presumption of 'access all areas' including MNO systems and platforms that have no direct involvement in PRS which is inappropriate.

31. We have a related concern that the "skilled persons" carrying out such reviews must be competent in their field to return an accurate report however the PSA reserves the right to appoint their favoured party. Members of the value chain should be able to agree with PSA "skilled persons" from a published list of qualified providers and to an agreed set of PRS related boundaries.

32. To be clear there are aspects of Vodafone's network activity which are highly sensitive. Vodafone will not provide access to unqualified representatives or those lacking the necessary security clearance.

33. The output of these reviews should have clear boundaries on the information that can be collected and the time for which it can be held prior to any request being made.

Conclusion

34. Vodafone has worked hard to move fraud prevention into an automated era, improve the customer experience by delivering better lookup tools and make customer care training more accessible and more relevant. The result of this is that customer complaints into the PSA are at their lowest levels ever. For regulation to be fair we believe it should be proportionate and effective. Given the lack of complaints we feel the proposals for subscriptions, thematic reviews and de facto extension of DDRC responsibilities are disproportionate while the proposed data capture required of the MNOs will not be effective because of the discrepancies in how merchant or service identities are captured and verified.

35. To be present in a market the participants must be able to make a return on investment. However, if that return is made too difficult to achieve or the cost of becoming compliant is too high and there are alternative markets then the PSA risks removing the incentive to participate in the mobile payments market.

36. Vodafone urges the PSA to amend the proposed 15th code taking the concerns raised above to deliver a market with the opportunity to grow and flourish alongside the other competitive micro-payment mechanics.