

Action4 response Regulatory Framework Policy Paper- A PhonepayPlus Consultation

Introduction

Action4 welcomes and thanks PhonepayPlus (PpP) for the opportunity to respond to its consultation entitled Regulatory Framework Policy Paper- A PhonepayPlus Consultation 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 current regulatory framework and whether it is able to cover services such as operator billing, is that the only real test will be if there is growth within the industry. This occurs when those that are charged to implement, interpret and administer the code do so in a manner that is measured as to how they discharge these duties and the effects they have. Regulation must be fair and appropriate for those that consume Premium Rate Services and also for those that operate them.

We wish to comment on your sentence “PhonepayPlus’ primary function as a regulator is consumer protection.” ICSTIS was established as an industry regulator and whilst your Code must seek to protect the consumer your primary function must be that those that operate within the industry are compliant with your code. By doing this you will ensure protection is afforded to the consumer.

Changing how a system works without clear determination as to why and what you seek to achieve seems very much like changing for changing sake. You have not clearly defined what was ineffectual and what and why change was needed. As a trade association which has been operating for 19 years we have seen much paper regulatory change. The real change will come with the regulatory authority fully understanding the industry from all angles and supporting growth within a pragmatic and sensible regulatory environment and implementing one set of clear rules for all.

Q1: Do you agree with our view that the current Code of Practice offers sufficient flexibility to address barriers to growth in the PRS market, without reducing consumer protection?

Yes we agree that the current code should have enough flexibility to allow growth. It is the implementation of the code by PpP and its staff that is key. Consumer protection will be at its maximum when all in the industry offer their service in a fair, and clear way.

Q2: Are there barriers to growth which exist in legislation and regulation other than the PhonepayPlus Code? Please identify them along with any arguments or evidence you have as to why a change would be desirable.

For businesses to grow, they have to be confident that they understand who regulates and which rules apply. Furthermore, the rules that do apply need to be fair and proportionate having regard to an objective assessment of risk. In recent years, there has been considerable uncertainty both as to who regulates and which rules apply – indeed, regulators appear to have competed to regulate the same areas. PhonepayPlus need to be careful not to create additional uncertainty by extending their remit into areas which are already comprehensively regulated by Ofcom eg: the assessment of harm and offence in respect to broadcast content.

Q3 – Do you agree with the Taxonomy of Risk Characteristics proposed above as objective assessment criteria? Please give reasons, including for any changes or additions you would like to propose.

Our first comment is who decides what is high or low risk and how is this assessed? Another comment your organisation is 30 years old you have had 3 names. As ICSTIS you used complex language and a complex system of regulation please be minded that you appear to moving again in that direction. If the people you regulate fail to understand the terms you use they may have difficulty following the code. We campaigned to ICSTIS to use plain language (the Taxonomy of risk characteristics is not plain english). The point of being a good regulator for whatever industry is clear language and clear objectives. You seek to help the consumer. Can one of your wonderful overpaid research companies actually ask the average user of PRS what Taxonomy means? Why not use plain language and say structure? You seek to stop obtuse and obverse PRS operators but use the tone and terminology of that to confuse.

In principle we agree with the 6 categories you specify, Financial Harm, Passing Off, Uninformed Consent, Unauthorised Consent, Vulnerable Groups, and Unreasonable Offence.

However, as we have repeatedly said in consultation responses, what makes one person vulnerable at one point does not make another person vulnerable and this and unreasonable offence are subjective, not objective, and can only be interrupted on an individual personal basis. PpP must be careful they do not become moral arbiters. In regard of underage access there must be some duty of care placed on the parents, guardians or carers of the young person as to the material that child can access. We agree that no provider of any type of service should deliberately seek to promote services to what is clearly an inappropriate market space.

The concept of “Unreasonable Offence” is inherently subjective in that what represents an offence to one person will not represent an offence to another person. This consultation cannot be viewed in isolation from the parallel consultation addressing proposed Special Conditions for online competition and online adult premium rate services, where PhonepayPlus cite as part of their taxonomy of risk characteristics - more specifically as “evidence” of unreasonable offence - the fact that Adult services are deemed “indecent” in the Communications Act 2003. The Communications Act 2003 does not define Adult Services to be indecent, nor indeed is that term used in the AVMS Directive or the European Convention on Human Rights. This misleading cross referencing reflects our concern that PhonepayPlus have subjectively elevated Adult Services to an automatic High Risk status which will inevitably mean that they attract disproportionate and unreasonable levels of scrutiny

which bear no relationship to an objective assessment of risk. Ofcom are bound by the Communications Act section 3 (3) (a) to ensure that the principles under which their regulatory activities are carried out are “transparent, accountable, proportionate, consistent and targeted only at cases in which action is needed”. PhonepayPlus ought to be bound by the same principles and avoid automatically and misleadingly characterizing all Adult Services as high risk on the basis that they facilitate “indecent content”

Q4 – Do you agree with our proposed Risk Assessment Process? Please give reasons, including for any changes or additions you would like to propose.

In principle we agree with the risk Assessment process you outline but are worried that you are just trying to implement more layers of process, a service whatever it is type is either compliant with the code or in breach.

The more complex you make a system the more complex the day to day working and administration will be.

The concept of “Unreasonable Offence” ought to reflect the specific requirements imposed on Ofcom by the Communications Act sections 3(2)(e), 3(3)(a) and 4(h). PhonepayPlus should not seek to elevate all Adult Services to High Risk status without empirical evidence which clearly indicates that a given service is unequivocally acting contrary to law.

Q5 – Do you agree with the conclusions of our application of the new Risk Assessment Process to existing Special Conditions regimes, and the proposals to remove the current regimes around Consumer Credit and Remote Gambling regimes? Please give reasons, including for any changes or additions you would like to propose.

Please see our response above. Whilst we welcome you reviewing and removing the current regimes around Consumer Credit and Remote Gambling, which shows your willingness to review and adapt your process, we are concerned that service type should not be the key to saying what is high or low risk. Regulation should be based on an even playing field for all.

We note in annex B in relation to recurring donations for example you state that in your opinion there is No risk in relation to Unauthorised Consent (UC), Vulnerable Groups or Unreasonable Offence. We disagree. If a person has their phone used for a donation without their consent that is unauthorised consent. If this occurs to someone in debt this will make them vulnerable and they will be offended that money they don't have has been taken from them. Every type of service has the potential for all the criteria in your taxonomy.

Q6 – Do you agree with our proposed Exemptions process? Please give reasons, including for any changes or additions you would like to propose.

In principle we are opposed to an exemption system as all services have the potential to cause harm, and we keep saying regulation should not be based on

service type. The key is the operator of the service and if they run their services in a compliant way. The code of Practice is there to ensure that if an operator acts in an unreasonable way they will be penalised - “the polluter should pay”.

Q7 – Do you have any comments on, or suggested additions to, our list of areas where we might consider exemptions in the near future?

In principle we are opposed to an exemption system as all services have the potential to cause harm, and we keep saying regulation should not be based on service type. The key is the operator of the service and if they run their services in a compliant way. The code of Practice is there to ensure that if an operator acts in an unreasonable way they will be penalised - “the polluter should pay”.

Q8 – Would a map of the digital payments regulatory landscape, setting out the intersecting remits and scope of different regulators, be of value? Please provide the rationale behind your answer.

The key to good regulation is clarity. If a clear map assists those who need to follow regulation then we would welcome this. We welcome a regulatory arena which is clear and concise for those that operate within it. You mention that there will be more of a mix of EU and English law although the impact of this may change with Brexit.

Q9 – Would a joint working group of regulators, to consider and provide a joint response to questions of regulatory overlap, be of value?

A joint working group with a clear agenda would be a very useful way to move forward in order to produce clarity for all involved in the PRS market, indeed it could prove essential. Particularly if this involved truly working with all the trade associations involved in the industry, although we would caution against regulatory creep.

Q10 – Which regulators should we invite to take part in such a group, and why?

We agree with the list you propose and believe as the group is established other authorities or organisation may be approached for their areas of expertise. Again we would suggest that all the trade associations involved in the industry should be formal invitees.

Q11 – We would welcome any comments on the scope and approach of a joint monitoring capability.

A joint monitoring system may be a useful way forward as this will limit expenditure and also should mean that there is true information sharing in regard of any problem companies.

Conclusion

We agree with David Edmonds when he says:-

“Promoting growth and innovation is a key objective of government. Successive governments have sought to minimise or reduce regulatory burdens on business and in particular to remove or reduce barriers to investment and innovation. I strongly believe that the approach of regulators including PhonepayPlus should be no different. Ofcom’s principal duty is *“to further the interests of consumers in communications markets, where appropriate by promoting competition”*

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. By having a complex and costly system you will stifle entrepreneurial spirit and the heavy handed approach to implementation of any rules or code may end up biting the hand that feeds you.. We welcome your approach in this document to seek to set up collaborative working groups to discuss effective ways to protect the industry and the consumer and ensure clear rules. We do not welcome exemptions and division of rules and their implementation by service type. This may lead to confusion for all involved in the industry.

As we continue to say, PhonepayPlus must always strive to offer effective, proportionate and best value regulation. Most of all provide effective regulation for all involved within the industry consumer, the Level one, Level two, and all involved in the value chain.