

Action4 response Special conditions ONLC- a PhonepayPlus Consultation

Introduction

Action4 welcomes and thanks PhonepayPlus (PpP) for the opportunity to respond to its consultation entitled Guidance Special Conditions ONLC- A PhonepayPlus Consultation on behalf of its members.

As a membership driven trade association representing commercial businesses operating within the non-geographic telephony sector, primarily the premium rate services (PRS) 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 this document is a personal one by the author. I remember many years ago meeting Elizabeth Mc Cloud who worked for your organisation, at that time named ICSTIS, and her commenting on adult being utter filth, my response “that filth pays your wages”.

The real test as to whether regulation is effective or not, and this must be the only real test is if there is growth within the industry. This occurs when those that are charged to implement, interrupt 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. Moral judgements are simply not appropriate at any level within regulation or society. What one person considers immoral; another will feel amoral whilst a third will see as moral. A high court judge debated the word pornography for 18 hours many years ago (the outcome was that literacy merit was to be the defining line) and much has been written re the responsibility of society to gambling, pornography and prostitution.

At the end of the day we live in a democracy and moral judgements must have no place in regulation. We have many laws such as the Obscene Publications Act, the Human Rights and act and a plethora of other acts that protect decency within society. This is simply not the job of a regulator. Your consultation feels exactly that. A judgement with Craft being paid by you to back up your position. The word “indecent” has no place in a consultation re any type of service and is not in any way used in the Communication Act 2003.

Adult services as an industry are the oldest in the world and as for competition’s the fact that most TV channels run these daily, shows our nations fascination with such services.

It is a major error to distinguish any PRS by type. This happened with Multi party chat and we saw a monopolies and merger commission report that closed the industry for well over a decade. This type of service never returned and whilst we utterly agree

any type of service must be offered in a fair, reasoned and proportionate manner that protects the consumer, to make value judgements is a serious error on your part.

We do however absolutely agree with you that a consumer must be provided all information to make a decision. However as the longest standing dedicated PRS trade association, whilst we have seen many examples of one or two organisations causing harm and high levels of complaints, this does not mean the industry per se is getting it wrong.

This whole consultation feels like stealth regulation and after consistently being within the industry for 20 years we have seen this many times and also seen it go very wrong. The effectiveness of your regulation is defined by the decline in the PRS market sector.

List of questions for consultation

Question 1: Do you agree that additional responsibilities placed on network operators and Level 1 providers, to offer redress upfront and inspect consumer complaints and disputed PRS payments, are necessary to improve the post-transaction consumer journey and increase consumer confidence? Are there additional or other measures that could deliver this outcome?

If the level of complaints is true and consumer's trust of both competitions and adult services has been significantly reduced because of certain individual's practices then it is reasonable that more responsibility is placed both with the networks and the level 1 providers.

When you say offer redress up front are you suggesting that all promotions carry a message offering a refund? This is not made clear in your consultation.

It is clearly in the interest of any reputable provider of both competitions and adult services to ensure that their customers receive what they expected, as all reputable business's rely on repeat business. As we have seen in the past with virtual chat services, you can alienate regular customers by putting in too many parts to a service which actually reduces the enjoyment of the service experience.

Question 2: Do you agree with us that Special conditions are necessary for online competition and adult services? Please provide an explanation to support your response.

We are not convinced that more layers of regulation need to be put in place. What is needed is that operators comply with the code and do not seek to mislead consumers. Whilst you state that there has been an increase in complaint levels when you analyse the figures, the wider picture is that there is not such a huge increase. Other services such as DQ have higher complaint figures.

Online competition services accounted for 55%, 55% and 57% of assessed complaints in July, August and September. Adult services accounted for 22%, 19% and 14% of assessed complaints over the same period. You lump adult and competitions together. In September 14% were adult 57% online competitions. Adult complaints appear to be declining month on month. What are the other complaint areas?

If the industry were able to independently evaluate the statistics – it is likely that the vast majority of the “complaints” were in respect to one or two service providers in respect of whom PPP have already issued huge fines. There it could be argued that there lies, damn lies and then statistics, your evidence may be flawed. We request that an independent audit be allowed.

AMR PpP 2016

As already highlighted in this report, the cost of PRS remains one of the main issues for many consumers. Just under one quarter of the 3.3% of total users that had experienced a problem with a PRS stated that they “were not aware how much they were paying”, with a similar figure citing the “price I expected to pay was higher on my bill”. Just over one-fifth of users were disappointed with the content, and the same figure received “unwanted communications from the service provider”, leaving a little over one-tenth of users claiming they had not signed up to the service.

You also state in the AMR the below based on these figures why are directory enquiries not be subjected to special conditions?

The services with the highest overall percentage of dissatisfied or very dissatisfied users were directory enquiries (28%), non-broadcast competitions (28%), and dating or flirt chat (27%).

Question 3: Do you agree with our assessment of the risks posed to consumers by these services and our policy proposals as set out at pages 7 to 11 and 12 to 15? Please provide an explanation to support your response.

As stated above we question the basis of your statistics.

Within your foot notes on page 15 you mention various pieces of legislation including the Communications Act 2003 and state:

“Adult services are deemed indecent in the Communications Act 2003⁸”

Please tell us where in this Act Adult Services are defined as “indecent”? This is you as a regulatory putting words into the author of the Act and we see this as dangerous. You are making moral judgements.

“3 (4)

(h)the vulnerability of children and of others whose circumstances appear to OFCOM to put them in need of special protection;”

As a trade association we have regularly responded to you that what is vulnerability to one person is not to another, Ofcom has an overall duty of care to ensure to both the consumer and the communications industries that all involved act in a reasonable way hence why section 125 of the Communications Act defines that it is an offence to try to gain services dishonestly. It is a reality that consumers do seek redress sometimes not for wholly honest reasons yet no one has ever been prosecuted either via the Communications Act or the 1984 Telecommunications Act

“125 Dishonestly obtaining electronic communications services

(1)A person who—

(a)dishonestly obtains an electronic communications service, and

(b)does so with intent to avoid payment of a charge applicable to the provision of that service,”

You cite section 319

“319

(2)The standards objectives are—

(a)that persons under the age of eighteen are protected;

(f)that generally accepted standards are applied to the contents of television and radio services so as to provide adequate protection for members of the public from the inclusion in such services of offensive and harmful material;”

This is in relation to TV and Ofcom has very defined rules of conduct for TV as does the BCAP code and others. It is simply the case that if a Television channel or provider of content to a channel went against the codes that they would be off air or heavily fined. Although the author notes that Love Island recently allowed full sex to be shown on TV and whilst Ofcom received numerous complaints they did not penalize Channel 4. Boundaries in life are moving and what is offence to one person is not to another. We absolutely agree that Children should not see or be able to access wholly offensive content but as Mary Whitehouse often said parents must be charged with responsibility for what they let their children access.

You go on to cite Article 10 this clearly says: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority” So the very act you cite states that regulatory authorities should not impede on people’s ability to have choice.

ARTICLE 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the

disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Furthermore we cite the EU Charter Of Fundamental Rights Article 16:-

“The EU Charter of Fundamental Rights Article 16 the Freedom to Conduct Business:-

Freedom to conduct a business is about enabling individual aspirations and expression to flourish, about encouraging entrepreneurship and innovation, and about social and economic development”

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 of even date in which PhonepayPlus provide a taxonomy of risks. This Special Conditions consultation cites 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 suggests 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”. 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. “One size does not fit all”.

It should be further noted that this is a consultation regarding online competition and online adult premium rate services. Yet, the evidence in respect to Unreasonable Offence makes no distinction between the online environment and the live broadcast environment – simply that all Adult services are deemed indecent.

The risk for adult service providers is that PhonepayPlus are effectively categorizing all adult services as “indecent” irrespective of the platform over which those services are delivered. This suggests that the providers of such services will be deemed “guilty” of providing indecent content unless they are able to demonstrate otherwise.

Subjective deeming provisions are a clear form of censorship and should not be acceptable. We are worried that your proposals could be a sledge hammer to crack a nut. We accept that business must act reasonably, but overcomplicating the

operation of services may hamper, not enhance the services provided. The consumer should have an entry mechanism which goes across the industry and that is clear pricing and terms and conditions at the point of entry to the service whatever the medium it is delivered by.

Question 4: Do you consider our definition of online competitions and online adult PRS in the Special conditions notices to be clear and accurate? Please provide an explanation to support your response.

Yes, your explanations are clear. However this will lead to extra cost for the providers of these services. Our worry is that they may not solve the problems that you have highlighted and infact clearly pricing and terms and conditions at the point of entry to the service whatever the medium it is delivered by. Then positive affirmation via the consumer to continue once they are within the service .

Question 5: Do you have any views on current age verification arrangements for adult services? If so, please share them and provide an explanation to support them.

Age verification has always been a problem for the industry as a whole. Unless you have a consumer in front of you with their passport it is extremely difficult to ensure who you think you are dealing with is in fact the consumer wishing to access the service you provide.

This is a consultation on online services. The reference to “adult services” suggests that Ofcom are extending this question and the consultation to embrace adult services delivered across non-online platforms where regulation is already comprehensive and where consumer complaints are very low relative to the number of complaints generated by a limited number of, predominantly mobile, adult service providers.

Question 6: Do you think the proposals made and detailed in the Special conditions notices at pages 17 and 21 will reduce the risk of consumer harm? Please provide an explanation to support your response.

Whilst we wholly heartedly support PpP in any attempts to lessen consumer harm we are not convinced that more conditions will help the situation. What would help the consumer is for you as a regulatory to identify the small number of individuals providers of such services who are seeking to harm the consumer and work with them to tighten up their entry mechanisms, their refund structures and their ability to accept the STOP code if a mobile or an on line service when received and enforce this wish by a consumer to be removed from their service. You should be concentrating your efforts on working with those few companies that seek to cause harm and not blanketly introduce new regulation which will affect the operators who comply with the code as it is.

Question 7: Do you consider the proposed Special conditions notices to be fair and proportionate? Please provide an explanation to support your response.

For both competitions and adult services to have both pin access and double opt ins seems extreme in light of the fact you insist on clear information at the point of entry i.e. promotional material. This surely must be the key in any purchasing decision. In

any other arena where a consumer is making a purchasing decision they are told the cost at point of entry, a description of the type of service and then afforded a refund if the goods or services were not suitable as the Consumer Rights Act clearly defines.

Question 8: Can the draft Special conditions notices be improved? Please provide an explanation to support your response.

Please see above. We think in the drafted format that the special conditions are onerous on the industry and may not afford any further protection to the consumer.

Conclusion

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 put more and more layer of complication in order to operate their services. Solely due to the type of service they operate. 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 it is fed by.

What worries us is the unhelpful references in terms of the usage of the word indecent to a type of service, over the years we have seen many services cause much more harm than we are seeing here with competitions and adult services such as with the dialler services.

Throughout our response we have said we do not believe your suggested measures will work. They certainly will not work in the circumstances of the authors personal experience re competitions.

On the 29th September I was on Facebook and saw a post to find your true birth gem stone, I went onto the site and was greeted by a page that said I had won a ipad or £500 of Tesco vouchers and to click which one I would like, There were no cost warning nor text just a box very similar to the ones in hind sight that used to pop in the dialler days. I clicked on the vouchers and was told to redeem them to enter my mobile number I would be sent a redemption code. Instead I was sent "[Freemsg} U have joined Quizonia, compete to win great prizes every week until you send STOP to 66299 Help? 08004080781" If I had as all legislation in relation to the sales of goods states, the information on the promotional material in situ at the time of purchase I would never have entered my mobile number. I was charged £4.50. Simply services like this are fraud and seek to gain punitive advantage. I have contacted o2 and their response was this

Suzanne, those are third party service. You can contact the company directly on 03333137900 to speak to them about the charges. This a non-premium rate number and the call will be free for you to make from your o2 mobile.

Adam
• 5:13 PM
Ok the company I sent stop to is called Quizonia should I report them to PpP?

Yes please

Adam • 5:15 PM
Ok will do many thanks for all your help bye

Suzanne Gillies
• 5:14 PM

Suzanne Gillies

you're welcome. Please also send a text STOP to 66299

Please take this as my official complaint. If you stopped these companies operating you would not have to penalise the good guys with over onerous regulation that is killing this industry and leading to fraudsters marching through the doors.

However what you must not become as a regulator is a moral arbitrator and we notice that this and the regulatory framework Consultation was also not publicised as consultation's used to be by an e-mail to all concerned with the consultation document attached. Is this now stealth regulation?

We also note in your AMR the below paragraph:-

“Consumer perception of PRS

Since the 2014 annual market review, consumer perception of PRS has improved somewhat, driven by a more loyal user base contributing to a more stable PRS industry. In 2014-15, 10% of total PRS users claimed to use the services more, while 31% of said they used PRS as frequently as they had 12 months previous. In FY2015-16, the percentage of total PRS users that used the services more had increased to 19%, and the users that maintained consistent usage also rose to 42%. In total, 61% of total PRS users maintained or increased their usage, versus 41% the previous year. This development in itself should instil a degree of confidence in the PRS industry.”

As we have said earlier in our response, statistics can be used to prove pretty much most things. We agree that those that seek to cause harm should be penalised. You have enough scope within your code to breach the perpetrators of the harm without introducing more layers of regulation and without becoming moral arbiters.